

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **049972/2025**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 24 March 2026

DR WOUTER BASSON

Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

First Respondent

JUDGE B.H MBHA

Second Respondent

DR L.N MAKWAKWA

Third Respondent

PROF D.A HELLENBERG

Fourth Respondent

PROF N.I TSABEDZE

Fifth Respondent

MR T.S.M MKHONTO

Sixth Respondent

JUDGMENT

DE VOS AJ

Introduction

- [1] The applicant (“Dr. Basson”) seeks to interdict the first respondent (“Health Council”) from proceeding with disciplinary proceedings.
- [2] Dr. Basson seeks the interdict based on unreasonable delay. The conduct giving rise to the disciplinary proceedings occurred more than forty years ago; the complaints against Dr. Basson were laid twenty years ago, and twenty-five years have lapsed since their filing. As a result of this delay, Dr. Basson claims his right to a fair process will be infringed.¹
- [3] The Health Council opposes the relief and intends to persist in the disciplinary proceedings. Centrally, they contend that there is no trial-related prejudice that is to be suffered by Dr. Basson.

Parties

- [4] Dr. Basson is a cardiologist practising in the Western Cape. He is 74 years old. He obtained an M.B.Ch.B. degree at the University of Pretoria and thereafter a Master’s degree in Physiological Chemistry. Two years later, he qualified as a Specialist Physician. He served in the South African Defence Force from 1980 to 1995. After his career with the South African Defence Force, he practised as a cardiologist in Pretoria and thereafter in Cape Town.

¹ Dr Basson also claims that his right to a fair and just administration action (section 33 of the Constitution); right to freedom of trade, occupation and profession (section 22 of the Constitution) and right to privacy and liberty (section 12 and 14 of the Constitution) will be infringed if the proceedings are not interdicted.

- [5] The Health Council is the *custos morum* of the medical profession and also the guardian of the public interest insofar as members of the public are affected by the conduct of members of the profession.
- [6] The second to sixth respondents are the Professional Conduct Committee, with Judge Mbha as Chairperson. No relief is sought against them.

Context

- [7] During 2000 and 2001, complaints were filed against Dr. Basson with the Health Council relating to alleged unprofessional conduct. The complaints relate to Dr. Basson's involvement in the SANDF during the 1980s, in his capacity as a soldier, as a project officer, and with the Surgeon General as the project leader.
- [8] In 2007, the Health Council commenced disciplinary proceedings against Dr. Basson. The proceedings culminated in this Court's 2019 order recusing the committee on grounds of perceived bias. The members recused themselves, and the Health Council gave notice in 2025 of its intention to institute, *de novo*, disciplinary proceedings against Dr. Basson based on the same factual allegations of unprofessional conduct during the 1980s.
- [9] It is the second disciplinary proceedings against Dr. Basson, which he seeks to interdict.

Test to be considered

- [10] Dr. Basson requests the Court to halt the Medical Council's proceedings against him permanently. Relief of such nature requires a Court to intervene in existing proceedings, and in this case, to do so permanently.

- [11] Courts have been reluctant to intervene in pending professional conduct inquiries. Such relief is not easily granted;² it is radical, both philosophically and socio-politically.³ A permanent stay is seldom granted in the absence of extraordinary circumstances or significant prejudice.⁴
- [12] However, the starting point is that trials should be commenced and completed without unreasonable delay. There are several reasons for this principle. In *Sanderson*, the Constitutional Court held that the criminal justice system aims to punish only those persons whose guilt has been established in a fair trial. Before a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. The profound difficulty is that an accused person, despite being presumptively innocent, is subject to various forms of prejudice and penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system.⁵
- [13] The right to have a matter finalised without unreasonable delay protects not only an accused person or a person facing disciplinary proceedings, but also the public, which has a legitimate interest in matters commencing and concluding reasonably and expeditiously.⁶
- [14] When this right is threatened to be breached, an accused person can seek a stay of the proceedings against them on the grounds of an unreasonable delay.

² *Rodrigues v NDPP* [2021] 3 All SA 775 (SCA)

³ *Sanderson* para 38

⁴ *McCarthy v Additional Magistrate Johannesburg* [2000] 4 All SA 561 (A)

⁵ *Sanderson* para 23

⁶ *Sanderson* para 37

[15] In considering whether to grant a stay, certain factors or requirements have crystallised. The requirements for a permanent stay of prosecution, as crafted in the criminal law context, have been accepted and adopted for a stay of civil proceedings. These are that a Court must consider the length of the delay; the reasons assigned to justify the delay; the aggrieved person's assertion of a right to a speedy trial; prejudice of the aggrieved person, and the nature of the alleged offence must be taken into account. These are not a checklist⁷ but must be applied holistically.

[16] Courts will intervene in existing proceedings if the person faces grave injustice if the proceedings are not halted. In the labour context, Courts have asked whether a failure to intervene would lead to grave injustice.⁸ Particularly so when its intervention is sought to halt such proceedings permanently. In the criminal law context, Courts ask whether the delay has resulted in irreparable trial-related prejudice.⁹

[17] The Court considers, first the nature of the alleged offence.

Nature of the alleged offence

[18] There are four charges against Dr. Basson. They are set out in detail in the Health Council's charge sheet. Mr. Cilliers, on behalf of Dr. Basson, drew the Court's attention to specific aspects of Dr. Basson's evidence at his criminal trial, in the context of considering the seriousness of the crimes.

⁷ Bothma v Els and Others (CCT 21/09) [2009] ZACC 27; 2010 (2) SA 622 (CC) ; 2010 (1) SACR 184 (CC) ; 2010 (1) BCLR 1 (CC) (8 October 2009) ("Bothma") at paras 37 and 38

⁸ Booysen v Minister of Safety and Security (2011) 32 ILJ 112 (LAC) at para 36

⁹ Bothma

[19] In the early 2000s Dr. Basson faced 67 charges. Dr. Basson was acquitted on all charges in 2005. Extracts of Dr. Basson's evidence at his criminal trial were presented to the Court. The Health Council presented the affidavit of Prof. Miles, who will serve as its expert witness in the disciplinary proceedings. The Court therefore considers the charge sheet, as well as the aspects of Dr. Basson's evidence during his criminal trial and the response thereto from Prof. Miles.

"Charge 1

During or about the period 1986 to 1988 and 1992 as Project Officer at Delta G, he coordinated the production of the following drugs and tear-gases on a major scale:

(a) Methaqualone —

Also known as Mandrax is a sedative drug. The usual effects include the relaxation, euphoria and drowsiness, also reducing the heart rate and respiration. Larger doses can cause depression, a lack of muscular coordination and slurred speech. An overdose can cause delirium, convulsions, hypertonia, hyperreflexia, vomiting and renal insufficiency, coma and death through cardiac or respiratory arrest.

(b) MDMA — methylenedioxy-N-methylamphetamine) —

Also known as Ecstasy and referred to in the criminal trial as "Baxil". It is semi-synthetic entactogen of the phenethylamine family considered a recreational drug. The effects are subjective feelings of openness, empathy, energy, euphoria and well-being. Common side effects are jaw clenching and elevated pulse. Short-term health threats include hypertension, dehydration and hyperthermia.

(c) BZ - (3 Quinuclidinyl Benzilate)

Is an incapacitating agent. Approximately 30 minutes after exposure to BZ aerosol, symptoms appear such as disorientation with visual and auditory hallucinations. The symptoms peak in 4 and fall to 8 hours, and may take up to 4 days to pass. Other symptoms can include dilated pupils, dry mouth and increased body temperature. The action of BZ on the central and peripheral

nervous systems resembles that of Atropine. Like Atropine, BZ binds 2 muscarinic acetylcholine receptors.

(d) CS — (ortho-chlorobenzylidene malononitrile) —

Is a teargas which cause the eyes to sting and water. CS is rapidly hydrolysed in water

(e) CR (dibenz (BF) — 1,4 oxazepine) -

Is also an eye irritant (tear gas), more potent but less toxic than CR is hydrolysed only to a negligible extent in water solutions.

[20] In relation to the first charge, Dr Basson's evidence, at the criminal trial, was that these substances were created to conduct crowd control:

"you want to break the cohesion of the crowd. You want to deal with the purposefulness with which this crowd assembles.... You want to deal with that cohesion and the way you do that is to change people's psyches, on the one hand, with the incapacitating agents... so that they will not want to or not be able to act aggressively nor be able to think coherently as with BZ, or as in the case with CR where they become so sick that they become nauseous and go home because of the visceral nausea and the burning and the discomfort, he does want to anymore, he wants to go home and lie down and die."

[21] Mr. Cilliers submitted that the intention was not to harm or kill people; the opposite was the intention. The submission was that, if there was a violent crowd, one could disperse them with force or attempt to develop a substance to neutralise aggression.

[22] Prof. Miles responds to Charge 1 as follows:

"Dr. Basson unethically exerted 'functional control' over Delta G so that it could become a 'first level, the covert level, chemical and biological warfare research unit,' an 'instrument of war'. Mortars intended to disperse these toxic chemicals were the primary weapon that Dr. Basson caused to be manufactured and deployed. Dr. Basson administratively oversaw the selection, procurement, access to, and research and development programs for large scale weaponizing of chemical materials.

Dr. Basson secured large amounts of toxins for full scale weapons production. More than four tons of the hallucinogen BZ was purchased (25 million doses)....

Hundreds of thousands of Methaqualone and Mandrax tablets were purchased. Nine tons of Cannabis was purchased. Cocaine and MDMA (also referred to as Baxil or Ecstasy) were purchased for use in weapons. Seventeen tons of new generation tear gasses (CS and CR) were produced.”

[23] Prof. Miles states that whilst Mandrax is essentially a sedative drug, the overdose causes dis-coordination, muscle spasms, seizures, cardiac arrest, and respiratory arrest. Dr Basson signed for approximately 200 000 such tablets and also personally worked on the pyrotechnical test, which is a test that involves taking the drug and turning it into a gas that would disperse a weapon fired by a mortar.

[24] With regards to ecstasy, this is a street drug that induces euphoria and harmonia. The overdose causes high blood pressure, dehydration and hyperthermia.

[25] Lastly, with regards to BZ, the United States Military entirely abandoned BZ in 1976 because of its danger to people on the ground, a fact of which Dr Basson was well aware.

[26] The next charge:

“Charge 2

(i) During the 1980's as Project Officer of Project Coast and on the direct instruction of the Chief of the South African Defence Force you were involved to weaponise thousands of 120 mm mortars and teargas; and/or

(ii) During the 1980's you had some of the 120 mm mortars filled with CR, referred to in charge 1, which mortars were supplied by the South African Defence Force to one Savimbi in Angola for use.”

[27] Dr Basson's evidence in the criminal trial was that the research in this regard had already been done, and his work involved replicating existing substances, and that the purpose of the substances was that the people “do not want to throw rocks at

each other anymore". The submission was made again that there was no evidence of harm resulting from the conduct that forms the basis of this charge.

[28] An extract of Prof. Miles's affidavit in relation to this charge:

"In designing and manufacturing of mortars with CR gas, Dr. Basson unethically risked injuring the health of civilians and non-combatants from the gas and possibly, depending on design, from shrapnel. There is no reliable indication to predict the pulmonary reserve of adults and children who are affected by these active products in field deployments."

[29] The next charge:

"Charge 3

During or about 1983 — 1989 you on 2 to 4 occasions provided disorientation substances for over the boarder kidnapping ("grab") exercises, where the substances were used to tranquilise the person to be kidnapped.

[30] Dr. Basson's testimony at his criminal trial was that the intention was to use the drug after a person had been held down so that they "can safely be brought back to Pretoria". The evidence, essentially, is that the drug was used in cross-border "grab" operations to prevent the person from being able to defend themselves. The intention, as expressed by Dr. Basson, was to prevent them from harming themselves and to be able to execute the "grab" operation without harm to the patient or target.

[31] Prof. Miles' response to this charge is:

"During or about 1983-1988, Dr. Basson unethically used his medical expertise to propose and supply compounds for non-therapeutic purposes to be used in a hazardous manner for the purpose of abetting kidnapping. Some of the substances that Dr. Basson discussed in relation to testimony on the matter of abetting kidnapping can cause lethal or permanently disabling conditions. Special operations field conditions would not be expected to have allowed for effective management of the major hazards of these compounds, if they were supplied for such operations.

Phencyclidine was also well known to cause convulsions, muscle damage, extreme agitation, death and suicide in some patients.”

[32] The last charge:

“Charge 4

During 1982 to 1989 you made available cyanide capsules to operational officers commanding for distribution to members of specialised units for suicidal usage.”

[33] Dr Basson’s evidence at his criminal trial was that this was being used in very specialised operations and provided an alternative to operatives in the event of capture. Dr. Basson’s evidence was that he only made these substances available.

[34] Prof. Miles’ affidavit responds to this charge:

“Dr. Basson held the incorrect opinion that cyanide salt ingestion is painless and lethal within seconds. (Mammal work shows that convulsions, vigorous gasping, and/or respiratory distress are common and that the time to death is minutes, not seconds).”

[35] In general, and in relation to all four charges, Dr. Basson pressed the court to consider that these charges are being made without any evidence of harm, in the particular context of South Africa’s history, and in the absence of a doctor-patient relationship.

[36] Furthermore, in considering the seriousness of the charges, Dr. Basson highlighted the events at the first disciplinary hearing. After the cross-examination of Prof Benatar (the Health Council’s first expert witness), counsel for the Health Council requested a postponement to obtain a further expert witness. In justifying the postponement, counsel informed the Committee that the effect of Prof Benatar’s concessions was such that Dr Basson’s witness needed only to testify that he agreed with Prof Benatar, and Dr Basson would be acquitted. Before this Court, Dr Basson asserts that the seriousness of the crimes with which he is

charged must be considered in light of the Health Council's own expert, who essentially conceded Dr Basson's case.

[37] The Court has considered these submissions. It weighs with the Court that the facts which serve as the foundation for these charges were the factual basis for the 67 criminal charges preferred against Dr. Basson. The acts that form the basis for the charges before the Health Council were sufficiently serious for the NPA to consider them grounds for criminal charges.

[38] The Court also considers that Bam J has already held that -

“This court is not burdened with either the merits of the matter or any evidence pertaining to a possible sentence. It is however important to remark that the offences the applicant was convicted of **are of a very serious nature and the sentences to be imposed may have devastating consequences.**”¹⁰
(emphasis added)

[39] The charges Dr. Basson faces are, essentially, the creation and distribution of massive amounts of dangerous substances, which were intended to be used by, amongst others, the military, against people who would include, unarmed civilians. This is a serious charge.

[40] Leaving aside Prof. Miles' evidence as to the impact of the substances, Dr. Basson's own evidence at his criminal trial was that the effect of these substances was such that a person would want to go home and lie down and die. Dr Basson's counsel explained that the evidence didn't mean they would die, just that the substances would induce a feeling as if they were dying. Accepting that interpretation of Dr. Basson's evidence, the creation of a substance that makes people feel like dying evinces a sufficiently serious charge.

¹⁰ Basson v Hugo and Others (3113/15) [2015] ZAGPPHC 5 (23 January 2015) para 4

[41] The accepted intention of the cyanide capsules was that they would induce death. Again, leaving aside Prof. Miles' response to this, on the common cause facts, the capsules were intended to cause death. This is a serious charge.

[42] The Court concludes that the charges are serious.

[43] The Court must weigh this finding appropriately. The Constitutional Court in *Sanderson* overturned the High Court decision for its failure to consider the nature of the offence in a permanent stay. The Court held that "without placing the specific nature of the offence in the scales, the balancing exercise is itself unbalanced."¹¹

[44] The Court held that a salient feature of the High Court's judgment in the present matter is that it gave insufficient weight to the nature of the offence, as highlighted in the above decisions.¹² The Court held:

"Society demands a degree of repose for its members. People should be able to get on with their lives, with the ability to redeem the misconduct of their early years. To prosecute someone for shop-lifting more than a decade after the event could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a reasonable doubt. Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay.

The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us "Molato ga o bole" (Setswana) or "ical'aliboli" (isiZulu) – there are some crimes that do not go away.¹³

¹¹ Bothma para 38

¹² Bothma para 62

¹³ Bothma para 77

- [45] Whilst not a sole determining factor, the finding that the charges which Dr Basson faces are serious, tips the scales against granting a permanent stay.
- [46] One last issue must be considered under this heading.
- [47] Mr. Cilliers argued at the hearing that the Court must consider the application through the lens of section 18(2) of the Criminal Procedure Act. The section provides that prosecution is barred after 20 years, save in certain exceptional circumstances. These exceptional circumstances are serious crimes – those for which historically the death penalty could be imposed, and in our democratic era, those serious crimes that have been specifically identified by Parliament.
- [48] The argument was that, as a starting premise, the Court should consider that the Health Council, akin to the state in criminal matters under section 18, is too late to prosecute these crimes due to the delay.
- [49] Mr. Joubert, for the Health Council, stated that the section provides that the delay is to be calculated from the time the person is charged, not from the time the crime was allegedly committed. On this reading of the section, the delay, counted from the charge, is minimal – less than a year.
- [50] The Court accepts Mr. Joubert's clear interpretive point on behalf of the Health Council. However, even if the approach could be adopted from the criminal procedure context to the present one, the Court finds the crimes Dr Basson is charged with sufficiently serious to fall within the category of crimes for which prescription would be inappropriate.

The length of the delay and the reasons assigned to justify the delay

- [51] The applicant divides the delay into four time periods. First, the delay between the conduct and the complaint: 1980 to 2000. Second, the period from 2000 to 2007

was the time between the complaint being laid and the commencement of the first inquiry. Third, between 2007 and March 2019, was the period between the commencement of the first inquiry and the order from this Court that members of the Committee must recuse themselves. Fourth, from March 2019 to November 2024, which is the period from the recusal order to the notice of the present inquiry.

[52] The Court considers each of these.

1980 - 2000

[53] The Court accepts that the period between the alleged incidents in the 1980s and the laying of the complaint in 2000 is a lengthy delay.

[54] The judgment in *Rodrigues v NDPP*¹⁴ provides assistance in this regard. In 2018, Mr. Rodrigues was charged with, amongst others, the murder of Mr. Timol. Mr. Timol was murdered in 1971. It was only after the reopened inquest into Mr Timol's murder in 2017 that Mr Rodrigues, who was by then 79 years old, was charged.

[55] Mr. Rodrigues approached the High Court seeking a permanent stay of prosecution. Mr. Rodrigues pointed out, in support of seeking a permanent stay of the criminal proceedings, that the delay between Mr. Timol's murder and the charge was a 47-year delay.

[56] The High Court dismissed the stay of proceedings. Of assistance to this Court is the manner in which the High Court dealt with the period from 1971 to 1994:

“[42] The relevance of this period and the 1994 cut-off date is that the approximately 23 years it spanned, covered the pre-democratic era. It was a time when a minority government was in power and one that was, in law, responsible for a system of arrest and detention without trial and under whose watch some of the most serious and systemic violations of human rights took place. The

¹⁴ *Rodrigues v National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159; [2019] 3 All SA 962 (GJ); 2019 (2) SACR 251 (GJ) (3 June 2019)

Applicant was in the employ of that government and in particular, in its security machinery. It hardly could have been expected from that government that the will to investigate such crimes as the murder of Mr Timol would have emerged and persisted, resulting in a proper investigation and charges being proffered.

[43] On the contrary, the 2017 Inquest found a cover up that was engineered, and of which, the Applicant was a part of and in respect of which he committed perjury. The conclusion of the TRC in this regard - that the First Inquest failed to properly hold the police accountable, thereby contributing to a culture of impunity - is also relevant in this context.

[44] It can therefore hardly be open to the Applicant to suggest that the 23 years from 1971 to 1994 could be characterised as constituting a delay when, objectively speaking, all of the legal and factual considerations to which I have referred, would have militated against any action on the part of the authorities by way of an investigation or a prosecution. The Applicant had elected to make himself a part of that system, had participated in its oppressive machinery, and allegedly sought to cover up his wrong-doing. Surely he cannot now be seen to reap a benefit from such a state of affairs and locating part of the culpability in the delay over those 23 years to that system. To allow him to do so would seriously offend notions of fair play and the interests of victims that have become a central feature of our criminal justice system.

[45] Accordingly, whilst this period does chronologically fall into the timeline of 47 years, it should not, for the reasons given, be reckoned as constituting part of the delay.”

[57] The Supreme Court of Appeal affirmed this finding by the High Court and held that “the said period, which was a pre-democratic era, should not be taken into account in the determination of the delay.”¹⁵

[58] This Court similarly concludes that this period, a pre-democratic era, should not be taken into account in determining the delay.

[59] The Court notes that, even outside the context in which *Rodrigues* and the present matter are considered, our courts have held that a forty-year delay is, in itself, insufficient to stay proceedings. In *Bothma v Els*, there was a 47-year delay

¹⁵ *Rodrigues v NDPP SCA* para 21

between the conduct complained of and the date on which proceedings were instituted.

- [60] There is a seven-year gap between the end of our pre-democratic period from 1994 to 2000, which is not covered by the Rodrigues judgment. The court notes that Dr. Basson was only charged in 1999, and shortly thereafter a complaint was laid with the Medical Council.

2000 and 2007

- [61] The Health Council explains that between 2000 and 2003, Dr Basson was criminally charged and acquitted, and the acquittal was finally confirmed by the Constitutional Court in 2005. Between 2005 and October 2007, the parties exchanged several pieces of correspondence in relation to the matter; made arrangements for a pre-inquiry meeting and held two pre-inquiry meetings. In addition, the charge sheet was served, both the initial and the finalised charge sheet, which then served as the Charge sheet before the Committee.

- [62] The Court is satisfied that this delay is justifiably explained.

2007 - 2019

- [63] The first inquiry by the Health Council commenced on 19 November 2007, and Dr. Basson pleaded to the charges brought against him. On 24 November 2008, Dr. Basson requested a postponement of the inquiry to allow him to bring an application for a permanent stay. In May 2010, Bertelsman J dismissed the first application for a permanent stay.

- [64] After several challenges, including the parties' availability, the inquiry resumed on 26 September 2011. On 18 December 2013, Dr Basson was found guilty, and

sentencing proceedings were scheduled for 20 February 2014; however, they were eventually resumed on 19 January 2015 due to counsel's unavailability.

[65] On 19 January 2015, Dr Basson requested Professors JFN Hugo and RE Mhlanga to disclose whether they were members of SAMA or RUDASA. SAMA and RUDASA were organisations that canvassed for Dr. Basson's removal. The request was refused, and Dr. Basson approached the urgent court to halt the proceedings.

[66] On 19 January 2015, Baqwa J granted an interim order interdicting the Committee from proceeding with the inquiry pending the finalisation of the urgent application. On 23 January 2015, Bam J directed that Dr Basson be granted the right to institute the application for the recusal of Professors Hugo and Mhlanga, if so inclined, within 10 days. Pursuant to Bam J's order, on 12 March 2015, Dr Basson made his application to the Committee for the recusal of Professors Hugo and Mhlanga, which application was refused on 13 March 2015.

[67] Dr Basson then approached this Court to set aside the refusal of Professors Hugo and Mhlanga to recuse themselves. Dr. Basson was successful in the recusal application before Potterill J. The Health Council appealed the recusal judgment to the Supreme Court of Appeal and the Constitutional Court. That round of litigation concluded with the Constitutional Court dismissing the appeal for leave on 5 February 2020.

[68] This delay is fully justified, and the reasons proffered are sound.

2020 – 2024

[69] The Health Council contends that during this period, the parties' representees engaged in several rounds of correspondence. This included Dr Basson's request

for funding for his defence from the Department of Defence and other administrative matters.

[70] There was also an informal meeting towards the end of September 2020. The key issue, according to the Health Council, contributing to the delay was the “recurring theme” in correspondence from Dr Basson’s representatives that they were awaiting confirmation from the state attorney on whether the defence would receive medical cover.

[71] During 2022, given the challenges of constituting a Committee, chaired by a retired Judge and by registered persons who would not be perceived as biased, the Health Council once again deliberated on whether the professional conduct inquiry into Dr. Basson’s conduct should proceed. On 22 November 2022, the Board of the Health Council resolved to proceed. The parties’ representatives continued to engage in correspondence throughout 2023, and on 4 July 2023, a hearing was held for the purposes of Professors Hugo and Mhlanga to recuse themselves in accordance with the order of Potterill J.

[72] The Health Council then appointed new members of the present Professional Conduct Committee who comprise the second to sixth respondents cited in these proceedings. Thereafter, on 14 August 2024, Dr Basson was formally charged.

[73] The Court weighs the Constitutional Court’s words in *Sanderson* quoted with approval in *Bothma* that a “person’s time has a profound value, and it should not become the plaything of the state”¹⁶ and “it would be profoundly troublesome if people approaching their eight decade of life could suddenly, and without the most

¹⁶ Bothma para 36

weighty justification, find themselves confronted with charges relating to events that had taken place forty years before.”¹⁷

[74] However, the Health Council has, albeit with unexplained periods of inaction, sought to prosecute Dr. Basson since 2007. The period from 2007 to date has been marked by significant litigation between the parties related to the present disciplinary proceedings. It has not been nineteen years of delay, it has been nineteen years of continuous – though not constant – prosecution of the complaints by the Health Council.

[75] The case law on delay usually rests on facts in which there has been a long delay resulting from a lengthy period of complete inaction from the date of the conduct complained of to the date of prosecution, at which point a complaint about delay arises.

[76] Those are not the facts before this Court.

[77] Here, the Court is faced with a continuous prosecution, with multiple delays caused by litigation and events arising within the context of ongoing proceedings, albeit over a lengthy period. That is different to a delay marked by inaction.

[78] The period between the conduct and the proceedings is lengthy. Assuming this is the relevant period to be considered, and not just the period between the charge and the proceedings, the Court weighs that much of this period was pre-democratic or involved the parties engaging in the proceedings, which resulted in several interlocutories.

[79] Whilst much time has passed since the complaints were initially laid against Dr. Basson, during the past twenty-five years, the Health Council has been engaged

¹⁷ Bothma para 42

in consistent attempts to proceed against Dr. Basson. The proceedings against Dr. Basson were not resolved speedily, much of this due to litigation he initiated, in which he was successful.

[80] It would be inappropriate for the Court to weigh only the length of time that Dr. Basson has faced these proceedings, without considering the reasons, which the Court finds are sufficient to justify the period between the conduct complained of and the proceedings.

[81] The Court concludes that whilst there is a long period between the complaints and/or the charges, these do not show an unreasonable delay in commencing or seeking to conclude the proceedings.

Trial-related prejudice

[82] The proceedings against Dr. Basson will involve the leading of expert witnesses. The parties will use the evidence led at Dr. Basson's criminal trial as the factual foundation for the proceedings. It is on this basis, the leading of witnesses based on accepted facts, that the Health Council ran Dr. Basson's first disciplinary proceeding.

[83] The Health Council will again lead the evidence of Prof. Miles, who testified during the first set of disciplinary proceedings. Dr. Basson previously led the evidence of Gen. Knobel as his expert and wished to do so again in the second round of proceedings. However, Gen. Knobel passed away in 2021.

[84] Dr. Basson has pleaded that experts in this field of medical ethics are very rare. He further pleads that the history of the first inquiry shows the evidence of the experts is crucial and decisive for the adjudication and consideration of his conduct within the context of the military. Dr. Basson points out that it took the Health

Council a year to find another expert during the first proceedings and that it could source such an expert only from the US.

- [85] Dr. Basson pleads that his representatives were not successful in identifying and/or obtaining the services of any other expert in this field, apart from Gen. Knobel. Dr. Basson pleaded that he is of the view that it will be impossible to find a substitute as an expert witness with the necessary experience and expertise relating to this specialised field.
- [86] The Health Council responded that Dr. Basson's claim that no other expert can be found is an exaggeration. Whilst the Health Council admits that the pro forma complainant relies on 12 different international protocols, codes of ethics, conventions, and similar documents in order to prove the case against the applicant. To claim that expertise in this regard is extremely limited is an over-exaggeration.
- [87] In addition, the Health Council cites Dr. Gross from Israel, a known expert, who would be appropriate.
- [88] The Health Council criticises Dr. Basson for not setting out the attempts made to find such an expert, and for his position lacking convincing reasoning. No information is provided as to the research done to find a similar expert, for instance, Professor Miles or even Dr. Gross from Israel, to testify.
- [89] In reply, Dr. Basson pleaded that there are no other experts and that Dr. Gross had previously declined to testify for Dr. Basson. Dr. Basson pleaded that the dilemma of medical professional conduct in a military environment is very complex, and he has no knowledge of any expert who can assist in presenting his case as an expert. Dr. Basson presents a qualified position: that he has no knowledge of any expert in South Africa who can assist him.

- [90] There is a dispute of fact as to whether or not Dr. Basson will be able to find another expert. The Court must apply Plascon-Evans. The respondent's version that there are other experts is to be preferred on Plascon-Evans. Seen from a different angle, Dr. Basson has to prove irreparable trial-related prejudice, in the face of the Health Council's answering affidavit, he has failed to meet this onus.
- [91] However, even if the Court were wrong in this regard; even if the Court were to accept that Dr. Basson has indicated, in reply, that Dr. Gross is not available or that Plascon-Evans should not apply, certain submissions were made at the hearing of this matter. At the hearing, the submission was that Dr. Gross's concern was physically attending a hearing in South Africa, and that the option of his giving evidence online had not been investigated. At the hearing, it appeared that whether Dr. Gross could testify online had not been explored. Nor was it explored whether, if placed in funds, Dr. Basson could find an international expert.
- [92] The Court is not persuaded that Dr. Basson will not be able to find an expert. However, the Court considers the legal position if it were wrong in this factual finding.
- [93] Assuming Dr. Basson cannot find any other expert, he asserts that without Gen. Knobel, he will lack an expert to advise him on how to counter or address Prof. Miles' evidence. He will also be without an expert to defend him against Prof. Miles' evidence. The Committee will also be unable to question Gen. Knobel or assess his demeanour as a witness. This is the trial-related prejudice Dr. Basson claims—if he cannot find another expert.
- [94] The Health Council has, to counter potential prejudice, offered that Gen. Knobel's expert evidence, led at the first proceedings, could be accepted into evidence in

the second proceedings. This included evidence-in-chief, cross-examination, and re-examination.

[95] Dr. Basson in response requested that the Health Council concede the correctness of Gen. Knobel's evidence. The Health Council did not concede the correctness of Gen. Knobel's evidence.

[96] Dr. Basson's position is that this offer will not assist him because the Committee will be confronted with the "viva voce evidence of Miles on the one hand and only a transcript of evidence by Knobel during previous proceedings with the specific indication that the credibility or reliability of the evidence of Knobel is not admitted or stands to be disputed."

[97] Even assuming that Dr. Basson cannot source another witness and that some trial-related prejudice remains, even after Gen. Knobel's evidence is admitted, this is insufficient under the Constitutional Court's reasoning and precedent. The presence of trial-related prejudice is insufficient; the standard Dr. Basson must meet is irreparable prejudice. There is nothing in the facts that has shown that the prejudice, assuming it has been proven, is irreparable.

[98] The Court draws on the Constitutional Court's decision in *Bothma v Els*. Mr. Els indicated that, due to the lapse of time, he was unable to give his legal representatives full instructions because he could not find documentary evidence or records of his precise whereabouts during the alleged periods, particularly in March 1968. He explained that his brother and sister-in-law, who could have testified as to the time periods of the renovations on the farmhouse, had both passed away. The same applied to his domestic worker, who could have testified as to whether or not the young Mrs. Bothma had stayed with him in the farmhouse. In addition, he no longer had the records relating to his ownership of various motor

vehicles at that time.¹⁸ Counsel for Mrs. Bothma conceded that some amount of prejudice would be caused by the delay in bringing the prosecution after forty years.¹⁹

[99] However, the Court held that the controlling principle for ensuring fairness at trial is the presumption of innocence. Mr. Els had failed to establish that the prejudice that he would suffer would be irreparable, and the stay of prosecution should be set aside.²⁰ The Court asked whether, in a broader sense, Mr. Els' right to a fair trial would be irreparably violated as a consequence of the extreme belatedness of the prosecution.

[100] The Court concluded, despite the concession that there would be some trial-related prejudice, in the context where Mr. Els faced imprisonment, that he had failed to show that his rights had been irreparably violated:

"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained."²¹

¹⁸ Bothma para 17

¹⁹ Bothma para 24

²⁰ Bothma para 24

²¹ Bothma para 68

[101] The Court notes that in *Bothma* the absent witnesses were factual witnesses. In this case, there is no issue with the factual foundation, as it remained sealed in Dr. Basson's criminal trial transcript, unaffected by the passage of time. Even that prejudice – being the absence of factual witnesses – was not enough for the Constitutional Court to conclude that the prejudice was irreparable.

[102] Here, the potential absent witness, Gen. Knobel, was to testify regarding the interpretation of legal documents to determine the ethical standard. The Constitutional Court in *Bothma* was willing to permit proceedings to continue in the absence of factual witnesses on the reasoning that prejudice was not irreparable and was to be properly determined during the proceedings.

[103] The Constitutional Court's reasoning applies with more force to a case where the facts are determined and the potentially absent witness was to give evidence on what is not a factual position, but rather a legal conclusion to be drawn. If the prejudice in *Bothma*, where factual witnesses were absent is not irreparable, then *moreso* on the facts of this case, Dr. Basson's prejudice (assumed to be proven), is not irreparable.

[104] In *Naidoo v National Director Public Prosecutions*²², the Cape High Court refused to grant a stay, holding that trial-related prejudice is not easy to establish and that it—

“borders on the impossible for this Court [a court other than the trial court] to determine the impact of the loss of a witness, or the effect of the lapse of time on the reliability of the recall of events by witnesses. . . . The State faces the same prejudice and the extent of the prejudice can only be properly measured by the trial court hearing all the relevant evidence.”

²² [2003] 4 All SA 380 (C) quoted with approval in *Bothma* para 72

[105] The Health Council contends that this is an issue for the Committee to decide. It is for the members to decide on the totality of the veracity of the evidence of General Knobel.

[106] The submission is supported by the Constitutional Court judgment in *Bothma*. In *Bothma*, the Court accepted that Mr. Els would suffer some trial prejudice. However, the Court held that it is up to the trial court to ensure that Mr. Els has a fair trial and “it would be ill-advised at this stage to rehearse scenarios”.

[107] Similarly, in *Sanderson*, the Constitutional Court held that barring proceedings, without an “opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching.”²³ The Court at this stage, cannot ascertain the real effect of the delay on the outcome of the case.

[108] The Court notes the nature of the determination to be made by the Health Council. The facts have been distilled. They are common cause. Dr. Basson’s transcript at his criminal trial is the factual foundation on which the Committee must decide whether he breached his duties. This will ultimately remain an interpretive issue for the Committee to decide, based on the ethical standard to be gleaned from the international codes of conduct and protocols relied upon. It is a conclusion to be drawn by the Committee based on established facts. It is, at this stage, unclear how much weight the Committee needs to or will attach to an expert’s view on documents the Committee itself will ultimately interpret.

[109] For these reasons, the Court concludes that Dr. Basson has failed to show trial-related prejudice, on a factual level, and even if such prejudice was to be shown,

²³ *Sanderson v Attorney-General, Eastern Cape* (CCT10/97) [1997] ZACC 18; 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC) (2 December 1997) (“*Sanderson*”) para 38

it is not of such a nature to grant a stay of the proceedings nor is it appropriate to do so at this stage.

[110] It further weighs with the Court that the other factors to be considered, such as the length of the delay, the reasons for the delay and the seriousness of the charges, all weigh against the granting of a stay. The Court notes, specifically, the Constitutional Court's approach in *Sanderson* in which it overturned the High Court for failing to place sufficient emphasis on the seriousness of the charges.

[111] For all these reasons, even assuming that there was trial-related prejudice proven on the facts, they do not rise to irreparable prejudice and are to be weighed together with the other factors which all weigh against the granting of the stay.

Costs

[112] Dr Basson is litigating to assert his right to a fair process. He attracts the protection of the *Biowatch* principle and is not to be mulcted in costs, even if unsuccessful.

[113] Order:

- (i) The application is dismissed.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

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Date of judgment:	24 March 2026