IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 11/05/2005

CASE NO: 19375/2004

DELETE \NHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

SIGNATURE

In the matter between:

DR ROBERT NUTT **APPLICANT**

and

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

THE CHAIRPERSON OF THE MEDICAL AND DENTAL PROFESSIONAL BOARD **SECOND RESPONDENT**

JUDGMENT

BOSIELO, J

[1] **INTRODUCTION**

1.1 The applicant is a specialist ophthalmologist, duly registered with the first respondent as a registrar in Ophthalmology in terms of the provisions of the Health Professions Act, 56 of 1974 (the Act). He is currently employed at Chris Hani Baragwanath

Hospital in Soweto, Gauteng. At all material times prior to his registration as a specialist ophthalmologist, the applicant was registered with first respondent as a general practitioner.

1.2 The first respondent is THE HEALTH PROFESSIONS COUNCIL (the Council), a statutory body endowed with full legal capacity in terms of section 2(1) of the Act. In terms of section 3 (c) one of the main objectives of the council is to determine strategic policy and make decisions in terms thereof with regard to the professional boards and the registered professions, for matters such as finance ... ethics and professional conduct, disciplinary procedure ... interprofessional matters and maintenance of professional competence.

1.3 The second respondent is the Chairperson of the Medical and Dental Professions Board which was established by the Minister of Health, on the recommendations of the COUNCIL in terms of section 15 (1) of the Act.

1.4 The objects of the BOARD are set out in section 15 A and 15 B of the Act and include, inter alia-

1.4.1 Controlling and exercising authority in respect of all matters affecting the training of persons and the manner of the exercise of the practices pursued in connection

with any profession falling within the ambit of the professional board (section 15 A (c));

1.4.2 Maintaining and enhancing the dignity of the profession and the intergrity of the persons practising the profession (section 15 A(g) and

1.4.3 guidance of the profession(section 15 A (h).

1.5 In essence, the Board is the guardian of the prestige, status, dignity, professional standards and intergrity of the Medical and Dental professions, the so-called *custos morum.* It supervises and controls the ethical and professional standards of these professions and of importance, protects the public against unprofessional conduct by registered practitioners.

[2] **BACKGROUND**

2.1 During 1993 to 1995 the applicant practised as a general practitioner in partnership with one Dr Vivek Saviji Solanki (Solanki) and one Dr D. Mihailovic (Mihailovic) at Carstenshof Clinic, Midrand; Arwyp Medical Centre, Kempton Park and at Flora Clinic in Roodepoort. This partnership was conducted under the name and style of Emergimed. However it appears

that each partner had his own practice number. It is common cause that the applicant rendered professional services under his own practice number, mainly at Flora Clinic Roodepoort. It is furthermore not in dispute that during or about 1994, Dr Mihailovic ceased to be a partner due to ill-health. Nothing more will be said about him in these proceedings.

2.2 As a result of a number of complaints lodged by a medical aid scheme, viz Bankmed to the Medical Association of South Africa, a formal complaint was lodged against the applicant and Dr Solanki. A professional conduct inquiry (the inquiry) was held on 3 November 2000. It is common cause that although the applicant was served with the notice of the inquiry, he failed to attend or to send a representative. Dr Solanki, who was present at the inquiry pleaded not guilty to all the charges and tendered an exculpatory explanation. He expressly disavowed any complicity in any dealings which occurred at Flora Clinic, save to admit that he at times, acted as a *locum* for the applicant. The members of the Professional Conduct Committee recommended to the first respondent that Dr Solanki be found not guilty. Suffice to state that first respondent, acting in terms of Regulation 15(1)(a) confirmed the recommendations of the Professional Conduct Committee and absolved Dr Solanki of any wrongdoing.

2.3 Acting in terms of Regulation 10(1)(1), the professional Conduct Committee proceeded with the inquiry in the absence of the applicant. The pro forma complainant, Mr C. Hinds of Hofmeyr, Herbstein & Gihevala Inc. proceeded to lead the evidence of Mrs Y. van Gijsen (Van Gijsen) a department head at Bankmed. After hearing the uncontested evidence of Mrs van Gijsen, the Professional Conduct Committee *resolved* to recommend to the first respondent that the applicant be found guilty of unprofessional conduct and that a fine of R 5000-00 be imposed on him (Regulation 10(4). In terms of Regulation 10(5)(g)(i), a record of the proceedings was prepared and submitted to the first respondent for its consideration at its meeting, of September 2001. *However* before the meeting of the Board of September 2001, the applicant submitted written representations which seriously impugned the propriety of the disciplinary enquiry. In addition to the written representations, the applicant requested an opportunity to address the first respondent through his legal representative before the said representations were considered. Suffice to state that the first respondent declined this request. Instead the first respondent "resolved that in the light thereof that you were not given an opportunity by the relevant Professional Conduct Committee to

be heard and in the light of the representations by your legal representations:

a) the proposed finding and penalty by the Professional Conduct Committee be not confirmed;

b) the matter concerning yourself be referred back for hearing by a new Committee of Professional Conduct Committee."

2.4 It is common cause that as a result of the dissatisfaction expressed by the applicant about the resolution to refer the matter for a hearing *de novo* before a new committee, the first respondent sought legal opinion. Suffice to state that the first respondent was advised that it could not refer the matter for the inquiry to start *de novo* but that it had to remit the case to the Professional Conduct Committee which originally made the recommendations for further consideration and report, as it would be acting *ultra vires* the enabling legislation i.e. Regulation of 15(1). In order to facilitate this, the first respondent was advised to rescind its resolution of September 2001 in terms of Regulations 55. Acting on the advice from its legal representatives and during September 2003, first respondent rescinded its resolution of September 2001 and resolved afresh "that the previous resolution of the Board of September 2001 pertaining to Dr Nutt be rescinded and that the

matter be referred to the same Professional Conduct Committee which previously presided over the matter."

2.5 As the applicant felt aggrieved by the resolution of the Board of September 2003 to refer the case to the Professional Conduct Committee, the applicant launched these proceedings wherein he seeks, in terms of his amended Notice of Motion, an order:

> *"Declaring that the resolution adopted by the Medical and Dental Board during September 2003 rescinding the Board's own decision of September 2001 to refer the matter for hearing by a new professional conduct committee and referring the matter back to the same professional conduct committee* ***ultra vires*** *and of no force and effect in so far as it is intended to be a re-hearing or continuation of the proceedings by the professional conduct committee held on 3 November 2000."*

2.6 It should therefore be patently clear that the crisp issues to be decided are firstly whether first respondent had acted in terms of Regulation 15 (1) and refused to confirm the recommendation of the Professional Conduct Committee, and if it did, whether such conduct amounts to absolving or acquitting the applicant of any misbehaviour, and secondly whether such conduct precluded the first respondent from resolving afresh to

remit the matter to the Professional Conduct Committee for further consideration and report i.e whether it can be said that the first respondent was *functus officio*.

[3] **RELEVANT STATUTORY PROVISIONS**

3.1 Regulation 15 (1) of the Regulations Relating to the Conduct of Inquiries held in terms of Section 41 of Act provides that

"The Council may vary, confirm or refuse to confirm the recommendation of the disciplinary committee, or may refer the case to the disciplinary committee for further consideration and report. "

3.2 On the other hand, Regulation 55 of the General Regulation's and Rules promulgated in terms of the Health Professions Act, no 56 of 1974 provides that

"55 (1) *A motion to rescind a resolution passed at a previous meeting shall be considered only if the notice thereof was given in terms of regulation* 29. *Such motion shall be passed if a majority of the votes recorded are in favour of it.*

(2) A motion to rescind a resolution passed during a meeting of a professional board may, notwithstanding, above provision, be

consIdered durIng me same meeting of me professional board , *provided that written notice is given during the same meeting that the matter be considered Such motion shall be passed only if two-thirds of the votes recorded are in favour of it. "*

[4] **LEGAL ISSUES**

4.1 I find it necessary to state at the outset that both counsel were *ad idem* that it is clear from the language employed by Regulation 15 (1) that the various alternatives provided therein are disjunctive and not conjunctive. Both counsel were further agreed as a logical consequence that the Board could opt for only one of the four alternatives but could not combine anyone of them with the other. Based on this, Mr de Waal SC for the applicant submitted that it was impermissible for the first respondent to refuse to confirm the recommendation and at the same time, to refer the matter back to the Professional Conduct Committee for further consideration and report. Although he conceded, correctly in my view, that first respondent was ordinarily authorised to refer the matter to the Professional Conduct Committee for further consideration and report, Mr de Waal submitted that consideration and report, within the context

of the regulation, did not mean reopening the case for further evidence. He relied for this submission on the dictionary meaning of the word "consider" as found in various dictionaries. For purposes of this judgment I will accept that the everyday ordinary meaning of consider is *inter alia* "debate and decide on" "cogitate on", "contemplate", "deliberate", "think over", "weigh", " examine the merits", "take into account" etc. Mr de Waal argued that, in the absence of any ambiguity, I am bound to give the phrase \\ further consideration and report" its literal and ordinary meaning. He submitted, with zeal, that if the legislator had intended a re-hearing amounting to the tendering of further evidence, and submissions, it would have said so expressly.

4.2 On the other hand, Ms Hassim for the respondents submitted, that it is patently clear from a perusal of Regulation 55 that the first respondent was perfectly entitled to rescind its earlier resolution of September 2001. She argued further that having rescinded that resolution, first applicant did not, contrary, to what Mr de Waal submitted, refuse to confirm the recommendation of the Professional Conduct Committee as envisaged by Regulation 15(1). She submitted that what first respondent did is that without refusing to confirm the recommendations, it decided within its powers to refer the

matter to the Professional Conduct Committeee particularly as the major complaint of the applicant was that he had been denied the right to be heard. She argued that the fact that the resolution of September 2003 does not expressly or clearly state the purpose for which the matter was remitted, is not fatal as it should be clear that the Board could only refer the matter back to the disciplinary committee for further consideration and report to the Board (Regulation 15(1). She developed her argument further to be that, as the applicant had requested for an opportunity to be heard before a final decision was taken, it follows logically that the Board was entitled to remit the matter to the disciplinary committee for the purpose of affording the applicant the right to lead whatever evidence he wished which should then be considered by the committee before it could make recommendations to the Board. She contended, quite persuasively that this was the only practical way through which the committee could comply with the fundamental rules of natural justice coupled with the legitimate expectation which the applicant had to be heard before any adverse findings could be case against him.

4.3 As against the above-stated submission, Mr de Waal argued that the Board was incompetent to resolve to refer the matter to the disciplinary committee, as after having refused to confirm the

initial recommendations, the Board was *functus officio*. In my view a careful perusal of the resolution of September 2003 shows clearly that after the initial objection to the resolution of September 2001, and taking account of the basis of the objection advanced, it cannot be said that the Board refused to confirm the recommendation of the disciplinary committee. In my view it appears to be linguistically correct to say that, faced with the applicant's representations and counsel's advice! the Board decided or opted instead to remit the matter to the disciplinary committee without expressly deciding whether to confirm, vary or refuse to confirm the recommendations of the disciplinary committee. It is only coincidental that its decision had the ultimate effect of not confirming the recommendations. In any event, such a result was both logical and inevitable.

4.4 Concerning the submissions by Mr de Waal that the Board having taken a resolution in September 2001 was *functus officio* and thereby implying that it was incompetent to rescind that resolution, I find these submissions, with respect to be misconceived and plainly fallacious. Needless to state that Regulation 55 is very clear. It expressly empowers and authorises the Board, once the proper procedure is followed, to rescind its own resolution. As Mr de Waal did not contend that proper procedures were not followed, I find his submissions on

this point, with respect, to be devoid of any substance. I have found support for my finding in Carlson Investments Share Block v Commissioner, SARS 2001(3) SA 210 (WLD) at p224 J where the learned Navsa J (as he then was) aptly stated:

> "At 376 Baxter proceeds to deal with the position where 'Variation or revocation is expressly authorised': The introductory sentence is of importance:
>
> > *"In order to cater for the many situations which a change of decision is not only necessary for flexibility but is also in the interests of justice, public authorities are often expressly empowered to reconsider their decisions. "*

In further amplification of my finding, I found the following dictum in Carlson's case (supra) at p 240 A to be both apposite and illuminating:

> *"Since all the administrative principles debated in this judgment have as their end fair administrative procedures that will lead to lawful and just administrative decisions, I am constrained to pose the question: How, against the totality of the circumstances of this case, can the respondent be said to have acted improperly or unfairly?"*

For obvious reasons, I find myself in respectful agreement with the above-quoted dicta. I also found it difficult to refrain from asking the vexed question:

How against the developments in casu can it be said that the first respondent acted unfairly, improperly or even capriciously in remitting the case to the Professional Conduct Committee more so that Regulation 15(1) *makes express provision for such a course?*

[5] In my view, stripped of unnecessary niceties, the crisp question which pertinently merits serious consideration is whether the Professional Conduct Committee could re-open the case, hear further evidence and make new recommendations to the Board based on the new evidence and possibly further submissions as contended for by Ms Hassim. The submission by Mr de Waal is that the Professional Conduct Committee was confined by the Regulation 15(1) to merely, if not mechanically reconsidering what was already before them and reporting thereon only. He submitted that to interpret this phrase to include the hearing of further evidence and submissions would amount to unduly straining the clear language of the regulation. On the other hand, Ms Hassim argued that the primary reason why the Board decided to remit the matter to the Professional Conduct Committee is because, it agreed with the applicant that contrary to the rules of natural justice, he had been denied the right to be heard before a decision which affected him

that, in an attempt to cure the defect, the case be re-opened and the applicant be afforded an opportunity to be heard and to make further submissions before any new recommendations or a report could be made to the Board. She argued, quite strenuously, that the meaning or construction contended for by Mr de Waal would lead to a patent absurdity, which could never have been contemplated by the Legislature.

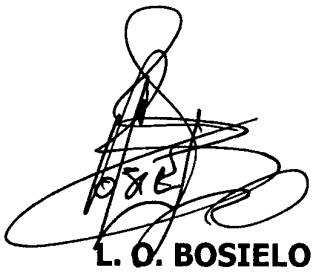
[6] I feel constrained to state that Ms Hassim's submissions are to me, more cogent and persuasive. After a careful consideration of the papers, it is clear to me that contrary to the submissions made by Mr de Waal, the Board never resolved to refuse to confirm the recommendations of the Professional Conduct Committee. What the Board did, is that having realized that the Professional Conduct Committee acted wrongly in proceeding with the inquiry against the applicant in his absence (even though regulation 10(1)(1) makes provision for such a step), it elected, without deciding on the merits of the case, to remit the case to the same Professional Conduct Committee ostensibly for further consideration and report. In my view, any argument that such a procedure amounted to an acquittal is clearly misconceived. Having acted in terms of Regulation 15(1), it now remains open to the Professional Conduct Committee to reconsider the case and to make a report to the Board. How the Committee could reconsider its previous decision properly without

hearing further evidence, and new submissions based on the new evidence escapes my logic and understanding. In my view, to attempt to reconsider its previous decision without hearing further evidence and/or submissions would be akin to merely paying lip service to what was envisaged by the enabling legislation. Being an ordinary mortal with no prophetic foresight, as the Professional Conduct Committee has not acted on the resolution of November 2003, I cannot pre-empt what they are going to do or how it is going to deal with this case. Suffice to state that the decision to refer the matter back to the Professional Conduct Committee for further consideration and report falls squarely within the powers of the first respondent in terms of Regulation 15 (1). Furthermore, the Board was competent to rescind its earlier resolution in terms of Regulation 55. It therefore cannot be said that first respondent in acting, as it did, acted ***ulrta vires*** the powers entrusted to it by the regulations. It follows logically that the resolution of first respondent of September 2003 is perfectly legal.

[7] Furthermore, as Mr de Waal correctly pointed out, the applicant does not seek a review and the setting aside of the proceedings before the Professional Conduct Committee. Consequently I do not deem it necessary for me to express any view on the nature and appropriateness of those proceedings. The same holds true of the question whether the applicant can justifiably expect to receive a fair hearing if the matter was to be further considered by the same

Professional Conduct Committee which had made the previous recommendations against him. In any event, this is what Regulation 15 (1) provides for expressly. I find it necessary to state that it is the same applicant who objected vociferously when the Board initially resolved to refer his matter to a new committee. Furthermore, by a letter dated 29 November 2000, the applicant personally requested first respondent to afford him a re-hearing of this matter. In the interests of fairness and justice, the first respondent acceded to the applicant's request. Speaking for myself, I find it ironic if not cynical of that the applicant that the should now be complaining when in a laudable attempt to dispense justice, he is afforded the opportunity to be heard. I am tempted to infer that what the applicant wants is to be absolved on all the charges on plain technicalities. Such a step would in my view, would render the entire system of the supervision, discipline and the maintenance of the dignity and standards of professionals registered with first respondent to be nugatory. It cannot be disputed that first respondent, as the *custos marum*, of the Medical and Dental professions, has awesome responsibilities to protect the vulnerable and unsuspecting members of society against unscrupulous professionals. It would be regrettable if technical defences were allowed to deflect the course of justice and deny the first respondent the right which it has in terms of the Act and the regulations, to take appropriate disciplinary steps against its errant members.

In conclusion and for the aforegoing reasons, I hereby find that the applicant has not made out a case entitling him to the relief which he seeks in terms of his Notice of Motion. In the result, the application is dismissed with costs.



L. O. BOSIELO

JUDGE OF THE HIGH COURT

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FOR THE APPLICANT: ADV. W P DE WAAL SC
INSTRUCTED BY: MESSRS DE SWART VOGEL MAHLAFONYA
FOR THE RESPONDENT: ADV. S K HASSIM
INSTRUCTED BY: MESSRS HOFMEYER HERBSTEIN GIHWALA INC
DATE OF JUDGMENT:
HEARD ON: 3RD MAY 2005