IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 3113/15

In the matter between:

WOUTER BASSON	23/1/2015 Applicant
and	
PROFESSOR J F N HUGO	First Respondent
PROFESSOR R E MHLANGA	Second Respondent
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	Third Respondent

JUDGMENT

BAM J

(Applicant represented by Adv J G Cilliers SC and Adv MMW van Zyl SC;

Respondents represented by Adv T Motau SC and Adv L Kutumela.)

1. This matter came before me on 22 January 2014 in the urgent court. Due to time constraints, I had to deal with more than 20 other urgent applications within 4 days, my judgment is not as comprehensive as I would have preferred it to be.

2. The applicant is the subject of a disciplinary enquiry conducted by a committee of third respondent. First respondent is chairman and second respondent a member of the committee. The disciplinary hearing commenced several years ago and after the applicant had been found guilty on several charges against him, the proceedings have now reached the stage of sentencing.

3. On 19 January 2015 the applicant, on an urgent basis, was granted an order interdicting the respondent from proceeding with the hearing pending the finalisation of an application to compel first and second respondents to provide applicant with information relating to first and second respondent's membership to any of the organisations that endorsed the petition suggesting, *inter alia,* very severe

penalties and other administrative action, including his striking from the roll as medical practitioner, handed in as Exhibit GG5 at the hearing on 26 November 2014, apparently pending a possible recusal application against the first and second respondents. The application is opposed by the respondents.

4. 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.

5. The main issue in this matter, the possible recusal of the first and second respondents, turns upon the principle of a fair trial provided for in the Constitution. This is however not what the application before this court is about. What the applicant actually had been seeking at this stage is information of the first and second respondent's involvement, if any, in the petition, Exhibit GG5, pending a possible application for the recusal of the first and second respondents.

6. What prompted the applicant to lodge this application was the following. In his founding affidavit the applicant alleged that one of the petitioners that endorsed the petition, Exhibit GG5, was an organisation called *South African Medical Association, ("SAMA").* The said petition, according to the applicant, *"...strongly agitated for the most serious penalty to be imposed and for my removal from the Roll of Medical Practitioners as sentence in the proceedings."* The applicant further stated that it had come to his attention that first applicant may be a member of *SAMA.* The applicant said he was unable to determine whether that was in fact the position in that *SAMA* refused to disclose information about its members. At the commencement of the proceedings on 19 January 2015 counsel appearing for the applicant raised the issue with first respondent, asking first respondent whether he was indeed a member of *SAMA.* This was admitted in open court by first respondent. Upon a further question by applicant's counsel whether first respondent was a member of any of the other organisations that signed the said petition first respondent said he had to peruse the list consisting of approximately 30 organisations. First and second respondents were then requested to do so. Subsequently however the first and second respondents ruled that the applicant was not entitled to the requested information and ruled that the matter should proceed, and ruled further that the applicant was not entitled to have the matter stood down to consider his options. The hearing proceeded after the applicant and counsel had left to lodge the interim application.

7. After the granting of the interim order, the applicant served a supplementary affidavit on the respondent' attorney. The third respondent filed an answering affidavit to which confirmatory affidavits of the first and second respondents are

attached. It is confirmed by the first respondent that he is a member of *SAMA* and another organisation, *Rural Doctors Association of South Africa, "RUDASA",* that signed *"and/or"* supported the petition, Exhibit GG5. The first respondent proceeded to explain his situation and said the following:

"I did not participate in the processes related to the compilation of any of the petitions in issue. I also did not sign any of them. The reason thereof is simple. I could not allow myself to be influenced by and/or to participate in processes relevant to the issues to be determined in the proceedings, which were occurring outside the hearing."

The first respondent did not elaborate whether he was aware of the contents of the petition before it was admitted as an exhibit.

8. The second respondent did not say anything about membership of any of the organisations involved in the signing of the petition save to confirm the statement of the first respondent who mentioned that second respondent advised him that he is not a member of any of the organisations in question, that he did not partake in any process relating to the petitions and that he did not sign the petitions.

9. It was contended by the respondents that the applicant's supplementary affidavit should not be allowed in that the applicant was in law bound to set out his case in his founding affidavit. One of the arguments was that the applicant, in his supplementary affidavit now relied on his Constitutional rights to affair trial, which was not the basis of his application as set out in his founding affidavit.

   The applicant's supplementary affidavit elaborates to some extent on the information that was before Baqwa J when he granted the initial order on an urgent basis. The respondents' contention that the supplementary affidavit should not be allowed has no merit. This is not a matter where the applicant in a replying affidavit endeavoured to strengthen his case. The applicant was in any event entitled, at all relevant times to rely on his Constitutional rights to a fair trial and to lodge this type of urgent application at any time, even during the trial. The argument that the applicant was obliged to wait until the case had been disposed of and then to exercise his remedies, on the basis that a Court should not deal with a matter piece meal is totally misplaced.

10. On behalf of the respondents it was also submitted that the application is not urgent. The applicant was furnished with a copy of the petition already on 26 November 2014 but waited until 19 January 2015 to raise his concerns. I do not intend to dwell on this issue. It suffices to say that in my view the application is indeed urgent. It involves the Constitutional rights of the applicant important information pertaining to whether he could expect to experience a fair trial. In the event of a court finding that the allegations of the applicant should be upheld, it is

clear that a continuance of the hearing will not be in the interests of justice and may cause the applicant severe and irreparable harm. This is a very serious matter. Our justice system, governed by the supreme law, our Constitution, can never allow a possible miscarriage of justice to proceed. Any litigant will therefore be entitled, if there are *prima facie* grounds to suspect that a presiding officer in any trial, or enquiry like the one in hand, may be biased or that his or her mind set could have been contaminated by any aspect outside the proceedings, to approach the court for the appropriate relieve. The argument advanced on behalf of the respondents that the applicant had other remedies and that he was obliged to follow the procedure in terms of the provisions of PAJA should, in my view, be rejected out of hand. The applicant was faced with a situation that the remedy to approach this court on an urgent basis was absolutely appropriate and justified in law. To this extent I have no hesitation to find that the first and second respondents were wrong in refusing to furnish the applicant with the relevant information in respect of their possible involvement with the organisations who signed the petition. In view of the contents of the petition and the first respondent's relation to SAMA I am satisfied that both first and second respondent were obliged to furnish a proper explanation of their possible involvement and/ or knowledge of the petition. Their refusal to do so was not justified and irregular. The applicant, therefore, had sufficient grounds meriting the application and indeed justified to approach this court on an urgent basis.

11. It is contended by third respondent that the applicant, instead of lodging this application, could have lodged the recusal application based on the admission of the first respondent. The third respondent questioned the relevancy of the information sought in respect of whether first respondent was also a member of any of the other organisations that signed the petition. In regards to second respondent it is pointed out by third respondent that applicant had no evidence linking him to any of the relevant organisations. It was further submitted by third respondent that what is fatal to the applicant's case is that he failed to make out any case that either the first or second respondents, or both, *"partook in any process related to the compilation of the petitions."*

12. Although this argument does have some merit, I could find no reason to criticise the applicant's process to investigate whether the first and second respondents were not also involved in other organisations which had supported the petition. In my view it is really relevant to establish what the possible extent of any extra curial influence on the first and second respondents, if any, could have been.

13. The criticism levelled at the way counsel for the applicant dealt with the problem by confronting the first respondent directly in open court with the issue of his possible involvement and knowledge of the petition, may, arguably, be frowned upon. However, the first respondent, in his capacity as chairman, with the aid of his legal advisor in the form of the eminent retired Honourable Judge President, Mr Justice Eloff, could have made a ruling that counsel should either raise the aspect in chambers or *in camera,* before formally recording the issue. Be that as it may, in issue came to the forth and the relevant aspects were recorded. It remains a factual situation.

14. An application or an order that the presiding officer should recuse is a very serious matter. Not only will an order in this regard materially affect the proceedings but it will surely have a devastating effect on the officer(s) in question. In matters of this nature our law requires that there should be a real apprehension of bias and not a mere suspicion in that regard.

15. Although this court is not called upon to adjudicate a recusal application, it must take into account what test is to be applied in that type of applications and whether the applicant's possible application for recusal is not frivolous and a mere waste of time. In the case of *President of the Republic of South Africa and Others v South African Football Union and Others* 1999*(7)* BCLR 725, commonly known as the SARFU case, it was emphasised that the test is objective. It was stated as follows in par[48]: *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is an open mind to persuasion by the evidence and submissions by counsel."*

16. In view the seriousness of this type of situation, I am satisfied that the applicant was entitled to the information sought from the first and second respondents and that the respondents were in the circumstances not justified to refuse same. Any person involved in trials or enquiries of this nature are fundamentally entitled to a fair trial. The contention on behalf of the respondents that the applicant had other remedies, eg. In terms of PAJA or to have waited until the conclusion of the proceedings, is without substance and does not need any discussion.

17. I have therefore arrived at the conclusion that it cannot be said that the application is frivolous, or merely part of delaying tactics, as suggested by the respondents. The applicant was justified to bring this application.

18. It has been indicated by the applicant's representatives that the first and second respondents have now furnished the required information, as referred to in paragraph 2 of the Notice of Motion. Accordingly it is not necessary to make any order in that regard.

19. What remains is the issue of a possible future application for recusal of the first and second respondents and costs.

20. The first and second respondents' ruling in refusing the applicant the opportunity to consider to bring an application for their recusal, as alluded to above, was wrong. This concerns the contents of prayer 3 of the Notice of Motion and the proposed prayer 3 in the applicant's Heads of Argument. The proposed order is clearly in conformity with the accepted facts and prayer 3 of the Notice of Motion. However, in my view an order granting the applicant the opportunity to lodge an application or the recusal of the first and second respondents within a limited time will have the required effect. This order will effectively stop the proceedings pending the lodging of the recusal application within the time specified.

21. In respect of costs, I have already indicated that I am satisfied that the applicant was justified to approach this Court on an urgent basis. Taking into consideration that the first and second respondents acted upon legal advice, I am not prepared to grant a cost order against them, more so because they were cited in their personal capacity.

ORDER:

1. The applicant is granted the right to institute the application for the recusal for the first and second respondents, if he is inclined to do so, within 10 days of this order.
2. The third respondent is ordered to pay the applicant's costs, ~~jointly and severally~~, the ~~one paying the other to be absolved~~. The costs to include the costs of 2 counsel.

[redacted]

A J BAM JUDGE OF THE HIGH COURT

23 January 2015