Twenty years an accused: An analysis of two decades of proceedings against Doctor Wouter Basson

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OPSOMMING

Twintig jaar 'n aangeklaagde: 'n ontleding van twee dekades se verrigtinge teen dokter Wouter Basson

Hierdie artikel is 'n analise van die strafregtelike- en dissiplinêre verrigtinge teen dokter Wouter Basson wat sedert 1999 aan die gang is, en wat steeds nie afgehandel is nie. Dokter Basson se militêre loopbaan sowel as sy betrokkenheid by die voormalige Suid-Afrikaanse Weermag se biologiese en chemiese wapenprogram genaamd Projek Coast, word kortliks bespreek. Die strafsake wat teen dokter Basson ingestel is word bespreek in chronologiese volgorde, so-ook die onderskeie appèlle en dokter Basson se uiteindelike ontslag. Dokter Basson se dissiplinêre verhoor by die Suid-Afrikaanse Gesondheids-beroepsraad, voortspruitend uit sy betrokkenheid by Projek Coast, word ontleed. Die fokus word geplaas op die voortvloeiende hersieningsaansoeke, die daaropvolgende appèlle en relevante regs- en etiese beginsels. Laastens word die praktiese gevolge van die jongste uitsprake in hierdie aangeleentheid aangeraak.

1 INTRODUCTION

Dr Wouter Basson likely has become one of the most notorious of medical practitioners in South Africa. That he is a controversial figure is the result of his leadership role in the biological and chemical weapons programme of the erstwhile South African Defence Force (SADF) known as Project Coast.[1] At the time Basson was involved in the manufacture of biological and/or chemical weapons for the SADF and, to a limited extent, the South African Police Service and Civil Co-operation Bureau.[2] Consequent on the termination of Basson's employment in the SADF he was criminally charged with numerous narcotics

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* The article is based on sections of the first author's LLM thesis titled "Medical professionals in armed conflict: The case of Dr Wouter Basson" (UP 2020). The thesis was prepared under the supervision of the second author.

1 Gould and Folb *Project Coast: Apartheid's chemical and biological warfare programme* (2002) 19.

2 *Idem* 18.

offences, fraud, attempted murder and murder.[3] The trial lasted over three years and resulted in Basson's acquittal on all charges.[4] The state subsequently appealed to the Supreme Court of Appeal as well as the Constitutional Court with limited success, resulting in no further prosecution being instituted against Basson.

Basson was prosecuted for his actions not only in the criminal courts of South Africa but, during 2007, the Health Professions' Council of South Africa (HPCSA) acted against Basson for allegedly transgressing the principles of medical ethics.[5] The disciplinary proceedings against Basson by the HPCSA still have not been finalised. At the time of writing, Basson continues to practice as a cardiologist in Cape Town.

The article interrogates the legal issues raised by the proceedings instituted against Doctor Wouter Basson; the ethical issues in relation to the accusations made against Basson are discussed in a subsequent article. The article further questions whether, in the end, justice had been served and whether it remains worthwhile for the HPCSA to pursue this matter any further. Below, an outline of Basson's military career and his involvement in Project Coast is presented. The focus then shifts to Basson's criminal trial as well as his disciplinary hearing before the HPCSA. The most recent review applications are outlined. The article lastly offers a few concluding remarks.

2 BASSON AND PROJECT COAST

Dr Wouter Basson joined the SADF's South African Medical Services (SAMS) in 1979 as a medical officer.[6] Basson was swiftly promoted and by 1988 he held the rank of Brigadier and headed Medical Staff Operations and later he became head of Research and Development in SAMS.[7] Interestingly, Project Coast was not the first time South Africa had produced chemical weapons. South Africa's first involvement in the production of chemical weapons was during World War II through the production of mustard gas for the Allied Forces in factories at Chloorkop in Johannesburg and Firgrove in the Cape,[8] but after the demand had been met production ceased in July 1945.[9]

In the early 1970s, the Department of Defence approached the Council for Industrial and Scientific Research (CSIR) for the purpose of investigating and monitoring chemical warfare agents on behalf of the SADF. The SADF wanted the CSIR to develop counter-intelligence equipment for the SADF's Special

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3 *Idem* 231.
4 *Idem* 240.
5 Lötter *Medical professionals in armed conflict: The case of Dr Wouter Basson* (LLM thesis UP 2019) ("Lötter thesis") 72.
6 Gould and Folb 24–25; Cock "The role of violence in current state security strategies" in Swilling (ed) *Views on South African state* (1990) 101–102; Burger and Gould *Secrets and lies: Wouter Basson and South Africa's chemical and biological warfare programme* (2002); Singh *The biological manipulation of the human species in Southern Africa by means of chemical and biological weaponry: Medicolegal implication* PhD thesis, University of Natal (2002).
7 Gould and Folb 43.
8 *Idem* 31.
9 *Ibid.*

Operations Group[10] in response to the purported threat posed by chemical and biological weapons in the hands of the Soviet Union and its allies and to wean South Africa from its dependence on the North Atlantic Treaty Organisation.[11]

Although the SADF gave the impression that there was an imminent threat of a chemical or biological attack, its soldiers were poorly equipped to apprehend such an attack as apparently there were only between 10 and 20 nuclear, biological and chemical (NBC)-suits available to members of 7 Medical Battalion at that time.[12] It was only in 1988 that senior SADF officers were commissioned to discuss the acquisition of chemical and biological weapons equipment and training procedures for certain operational divisions.[13]

Project Coast was a secretive operation and in order to keep it that way several front companies were established to conduct research on behalf of the SADF.[14] Delta G Scientific (DGS) and Roodeplaat Research Laboratories (RRL) conducted the required research and/or development of chemical and/or biological weapons on a small scale.[15] DGS mainly focused on the production of CR teargas, whereas RRL investigated chemical and biological weapons which are untraceable *post mortem*.[16] By 1995 Project Coast ended and was decommissioned on presidential orders.[17] However, Basson's involvement in Project Coast would haunt him for the rest of his career and forms the main subject matter of his criminal trial and disciplinary hearing.

3 BASSON'S CRIMINAL TRIAL

Basson was arrested in January and October 1997 for respectively narcotics and fraud-related offences.[18] There were 67 serious charges brought against Basson which included murder, attempted murder, 24 charges of fraud to the amount of R36 000 000.00, assault with the intent to do grievous bodily harm, possession of 3 158 ecstasy capsules and 38.6 grams of powdered ecstasy, dealing in methaqualone, possession of cocaine, alternatively possession of 100 000 mandrax tablets and 1 200 kilograms of methaqualone, procurement of 500 grams of Thymus peptide, Thymosin and 500 kilograms of methaqualone which allegedly he intended to purchase in Croatia in 1992.[19] These charges would have resulted in several life sentences had Basson been convicted.

The trial eventually commenced in October 1999, with Basson's defence team raising an exception to charges relating mostly to offences allegedly committed or conspired to outside the borders of South Africa. They argued that section 18 of the Riotous Assemblies Act 17 of 1956 as well as the common law fail to

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10 *Idem* 32 and 35.
11 *Idem* 36–37.
12 *Idem* 41.
13 *Idem* 109–110.
14 *Idem* 3.
15 *Idem* 8.
16 *Ibid.*
17 *Idem* 41.
18 *Idem* 231.
19 *Ibid.* See also Swart "The Wouter Basson prosecution: The closest South Africa came to Nuremburg?" 2008 *Journal of Foreign Public Law and International Law* 209–226 available at http://www.zaoerv.de/68_2008/68_2008_1_b_209_226.pdf (accessed on 15-01-2020).

make conspiracy a crime and that Basson could not be prosecuted for crimes allegedly conspired to and/or later committed outside South Africa.[20] The prosecution argued that an amnesty is not applicable in this case as the offences were not committed within the general scope of military duties.[21] The exception succeeded with the court basing its decision upon a general amnesty[22] applicable to all South African security forces members who operated in Namibia before 1989 and ruled that Basson could not be prosecuted for crimes committed outside the Republic despite their being planned here and being committed by South African citizens.[23] As a result, six of the charges were dropped.[24] Regarding the narcotics offences, Basson denied that he ever traded narcotics. All that the state was able to prove was that the ecstasy found in Basson's vehicle was from the same batch that was prepared by DGS.[25]

The prosecution appointed a forensic auditor to investigate the dealings of Basson and DGS and RRL in order to prove that Basson misappropriated SADF funds for personal and/or collegial gain and that he and his colleagues were in fact the beneficiaries of several of the front companies.[26] In denying these claims, Basson maintained that he simply used the front companies to protect his cover and to protect the SADF from dubious procurements.[27] The prosecution pressed on by raising an investigation into Basson's lavish lifestyle and extensive international travel. However, Basson persisted that these were necessary elements to conduct the business of Project Coast under the cover of an international businessman.[28] It was claimed the international associates of Basson were carefully considered and purposefully chosen in order to facilitate sanctions-busting by the South African government at that time and that the properties were purchased on their behalf and on their instructions.[29]

The focus of the trial then shifted to the murder-related charges against Basson, many of which were allegedly conspired to within the Republic but were committed outside its borders. Several CCB and SADF members were called to testify about their assassination instructions and how they disposed of the bodies.[30] The court rejected their testimony by finding that they presented a false version to implicate Basson and to save their own skins through a section 204[31] indemnity from prosecution.[32] The state persisted with charges of human rights violations such as the attempted murders of ANC members and extrajudicial killings with chemical agents. However, in order to succeed they had to prove Basson was involved *directly* in the manufacturing and exchange of weapons for

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20 *S v Basson* 2000 (1) SACR 1 (T) paras 6, 9–11.
21 Gould and Folb 232.
22 Administrator-General Government Notice 16 of 1990.
23 Gould and Folb 232.
24 *S v Basson* 2000 (1) SACR 1 (T) 17.
25 Gould and Folb 233.
26 *Ibid.* See also *S v Basson* para 16.
27 *Ibid.*
28 *Idem* 235–237. See also *S v Basson* 2000 (1) SACR 1 (T) para 15.
29 *Ibid.*
30 *Idem* 236. See also Swart 211 and *S v Basson* para 12.
31 S 204 of the Criminal Procedure Act 51 of 1977.
32 Gould and Folb 236; see also *S v Basson* 2000 (1) SACR 1 (T) paras 1985–1998.

assassination.[33] Despite testimony from operators confirming the manufacture and use of these weapons, no direct involvement or causal link could be established.[34]

Basson was further charged with possession of top-secret chemical and biological weapons documents which were found in his vehicle and his residence. The state could not refute Basson's version that he did not know to whom the documents belonged nor who had packed the trunks containing the documents.[35] On 11 April 2002, Basson was acquitted on all charges and left the court a free man.[36]

4 SUPREME COURT OF APPEAL AND CONSTITUTIONAL COURT

The state instantly brought an application for leave to appeal the acquittal on several grounds of which two are pertinent, namely, that the presiding judge ought to have recused himself from proceedings upon such application and, as a result of the refusal, to admit the bail record into evidence and hear arguments on its admissibility.[37] In its unanimous judgment the Supreme Court of Appeal (SCA) ruled that the state's application was riddled with errors and showed a flagrant disregard for the rules of that court.[38] Furthermore, that the reserved questions of law became academic and need not be adjudicated and that the state could appeal only against issues of law not of fact.[39] As a result the appeal was dismissed.[40]

Dissatisfied with the SCA judgment, the state approached the Constitutional Court (CC) for further relief. In essence the appeal in the CC dealt with three issues, namely, whether the conduct of the judge during the trial proceedings was such as to give rise to a reasonable perception of bias. Secondly, whether the trial court was wrong to exclude the evidence led in bail proceedings from the criminal trial and, thirdly, whether the state is entitled effectively to appeal against the quashing of certain charges at the outset of proceedings at that late stage and, if so, whether those charges were wrongly quashed.[41] The CC held that the High Court erred by finding that the court did not have the power to adjudicate on a conspiracy within South Africa to commit an offence beyond its borders in terms of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 and, as a result, set aside the acquittal of Basson on six charges of conspiracy to commit murder.[42] Technically, the CC judgment opened the door for the state to proceed with a prosecution afresh on those particular charges. However, because the conspiracy charges and other charges on which Basson was already acquitted were intimately intersecting the state was ever mindful of a possible *autrefois acquit* defence and declined to prosecute further.[43]

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33 Gould and Folb 240.
34 *Ibid.* See also *S v Basson* para 2018.
35 *Idem* 238.
36 *Idem* 240.
37 *S v Basson* 2002 JOL 9680 (T) 19–21.
38 *S v Basson* 2003 3 All SA 51 (SCA) para 118.
39 *Ibid.*
40 *Idem* para 119.
41 *S v Basson* 2005 (12) BCLR 1192 (CC) para 1.
42 *Idem* para 265.
43 Swart 212.

What is glaringly absent is the lack of reference to international law and customary international law in the initial indictment. Had the provisions of these legal systems been included Basson would have had a more gruelling task to convince the courts of his innocence.[44] It is common cause that the armed conflict in Namibia between the SADF and liberation movements is regarded as a non-international armed conflict and therefore Common Article 3 is applicable. Its application means that Basson is in violation of the Geneva Conventions.[45] There are opinions arguing that Basson's offences were committed to further the interests of government policy and in consequence Basson should be prosecuted in terms of the Apartheid Convention[46] certain articles of which may form part of customary international law.[47] However, this argument may be moot as the Rome Statute merely affirms that apartheid is a crime under customary international law and this definition cannot retrospectively be applied to prosecute Basson in the International Criminal Court.[48] Accordingly, we submit that such a prosecution would be ill-advised. In hindsight, customary international law should have been utilised by the state to strengthen the legal basis of their prosecution of Basson. As a member of the SADF Basson was subject to the Defence Act 44 of 1957 which criminalised certain conduct by members of the Defence Force, even if such offences are committed outside of South Africa.[49] In addition, at that stage, Namibia was under the administration of South Africa which undeniably creates a link between the conspiracy and the committal of the crimes.[50] Swart, however, disagrees that customary international law would have been of assistance here. She argues that, even if the international law principle of universal jurisdiction had been applied, customary international law fails to address the situation.[51] Furthermore, the general amnesty which was granted to members of the SADF who operated in Namibia prior to 1989 explicitly indemnifies members of the SADF for their actions and this would render any prosecution doubtful.[52]

5 HEALTH PROFESSIONS COUNCIL'S DISCIPLINARY HEARING

5 1 Introduction

As the curtain fell on the criminal prosecution against Basson the disciplinary hearing brought by the HPCSA commenced in November 2007.[53] The charges for unprofessional conduct brought against Basson related to his involvement in

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44 S 232 of the Constitution, 1996. See also Swart 218.

45 *Idem.*

46 International Convention on the Suppression and Punishment of the Crime of Apartheid (18 July 1976).

47 Adv Trengove SC Heads of argument in *S v Basson* 2005 (12) BCLR 1192 (CC) paras 90–96.

48 As the Statute of the International Criminal Court entered into force on 1 July 2002; Swart 219.

49 *S v Basson* 2005 para 210.

50 *Idem* para 228.

51 Swart 220–222.

52 Administrator-General Government Notice 16 of 1990.

53 https://www.iol.co.za/news/politics/trc-evidence-at-basson-hearing-1547820#.UeV3To2mh3p. The charges were laid against Basson by more than 40 doctors in 2007. https://citizen.co.za/news/south-africa/281620/heard-hpcsa-dr-wouter-basson-struck-roll/ (accessed 15-01-2020). It appears that the NGO, Section 27, was one of the complainants.

Project Coast and were derived from his testimony in the criminal trial. Basson was acquitted on the charges pertaining to illegal research with only the following charges remaining:[54]

(a) Charge 2.2: During or about the period 1986 to 1988 and 1992, as project officer of Delta G, he coordinated the production of the certain drugs and teargases on a major scale;

(b) Charge 4: During the 1980s as Project Officer of Project Coast and on the direct instructions of the Chief of the South African Defence Force he was involved in weaponising thousands of 120 mm mortars with teargas; and/or

During the 1980s he had some 120 mm mortars filled with CR gas, which mortars were supplied by the South African Defence Force to one Savimbi in Angola for use;

(c) Charge 5: During or about 1983 to 1989 he on two to four occasions provided disorientation substances for over-the-border kidnapping ('grab') exercises, where the substances were used to tranquilise the person to be kidnapped;

(d) Charge 6: During 1982 to 1989 he made cyanide capsules available to operational commanding officers for distribution to members of specialised units for suicidal use. It is also alleged that a number of protocols, codes, conventions and regulations would be identified as being the ethical rules relied on.[55]

In essence, the charges before the HPCSA were that while registered as a medical practitioner with the HPCSA and its predecessor, Basson was guilty of unprofessional behaviour because he was the head of a project which manufactured chemical substances for warfare as well as weapons and provided them to be used in combat, and that he assisted in kidnappings and suicide.[56]

Basson raised several defences which included the lack of a doctor-patient relationship between himself and the victims; that he acted in his capacity as a soldier not as a doctor; as well as him being unaware of the relevant conventions which apply to the manufacture and use of chemical and biological weapons.[57] Suffice it to state that his defences were dismissed and he was found guilty on charges 2.2, 4, 5 and 6.[58] Sentencing was delayed to January 2015 as a result of a belated petition from the complainants, including the South African Medical Association (SAMA) and the Rural Doctors' Association of Southern Africa (RUDASA), to have Basson struck from the roll. At that stage it became apparent that two members of the disciplinary committee, professors Hugo and Mhlanga, in fact were involved with SAMA and RUDASA which in December 2014 called for Basson to be struck from the roll.[59]

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54 http://www.politicsweb.co.za/archive/dr-wouter-basson-the-hpcsas-professional-conduct-c (accessed 15-01-2020) (written by Prof Hugo). See also transcription of disciplinary proceedings, 26 November 2014 3 line 11.

55 http://www.politicsweb.co.za/archive/dr-wouter-basson-the-hpcsas-professional-conduct-c (accessed 2-092018) (written by Prof Hugo).

56 http://www.politicsweb.co.za/archive/dr-wouter-basson-the-hpcsas-professional-conduct-c (accessed 2-09-2018) (written by Prof Hugo). See also transcription 26 November 2014 50 line 10.

57 *Ibid.* Lötter thesis 78 84.

58 *Ibid.* See also transcription 27 November 2014 148 line 9.

59 https://www.iol.co.za/news/south-africa/gauteng/basson-uses-loophole-to-delay-sentencing-1865040 (accessed 15-01-2020).

Basson requested the HPCSA disciplinary committee to adjourn the proceedings in order for him to approach the committee in private and, if necessary, to approach the High Court for the appropriate urgent relief against the committee.[60] This request for an adjournment was refused and the committee proceeded with the evidence in aggravation of sanction. Basson then excused himself from the hearing and immediately launched an urgent application to interdict the committee from proceeding until such time as he could institute proceedings to compel the committee members to provide certain information pertaining to their membership of the petitioning organisations.[61]

5 2 First urgent High Court application

On 19 January 2015, an interim interdict was granted prohibiting the committee from proceeding further with the disciplinary hearing. This interim interdict was granted pending the finalisation of the urgent proceedings pertaining to the membership information and leave to apply for the recusal of the committee members.[62] Upon hearing of the main application, the court held that the matter related to the constitutional principle of the right to a fair trial which warrants the need for urgent adjudication.[63] The court rejected the defence of the HPCSA that Basson ought to have waited until the hearing was concluded and then to approach the courts in terms of the Promotion of Administrative Justice Act[64] (PAJA) in light of the seriousness of the situation.[65] In the meantime the committee members had provided the requested information pertaining to their membership to Basson.[66] Basson then successfully petitioned the court to grant an order affording him leave to launch a substantive application for the recusal of the committee members within 10 days of the order.[67]

On 12 March 2015, the recusal application was argued before the committee and, on 13 March 2015, the application was refused and the matter was postponed to May 2015 for sentencing.[68]

5 3 High Court application for review of the refusal of the application for recusal

Consequently, aggrieved by the committee's refusal of the application for the recusal of those members, Basson approached the High Court with a review application to set aside the decision to refuse the recusal application and seeking an order that the two committee members recuse themselves from proceedings against him.[69] The main grounds for review were the following:

(a) Professor Hugo is a member of SAMA and is associated with RUDASA. Considering the stance taken by these two organisations in support of the

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60 *Basson v Hugo* 2019 JDR 0707 (GP) paras 9–10.
61 *Basson v Hugo* 2015 JDR 0144 (GP) para 3. See also transcription 12 March 2015 2 line 5 and 242 line 10.
62 *Basson v Hugo* 2019 JDR 0707 (GP) para 11.
63 *Basson v Hugo* 2015 JDR 0144 (GP) para 9.
64 Promotion of Administrative Justice Act 3 of 2000.
65 *Basson v Hugo* 2015 JDR 0144 (GP) para 16.
66 *Idem* para 18.
67 *Idem* para 21.
68 *Basson v Hugo* 2019 JDR 0707 (GP) paras 15–16. See https://www.iol.co.za/news/south-africa/gauteng/basson-uses-loophole-to-delay-sentencing-1865040 (accessed 15-01-2020).
69 *Basson v Hugo* 2016 JDR 0802 (GP) para 12.

petition for the removal of Dr Basson from the medical register, Basson contended that SAMA and RUDASA are now parties in the disciplinary proceedings and professor Hugo thereby became a judge in his own cause;[70]

(b) Professor Hugo's failure to disclose his involvement with these organisations and his failure to disassociate himself from the position of SAMA rendered his position untenable;[71]

(c) Several decisions of the committee that give rise to bias or a reasonable apprehension of bias on the part of the committee which consequentially infringes his right to a fair trial.[72]

Section 7(2)(a) of PAJA provides that:

> "Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

Basson, anticipating this issue, informed the court that the Health Professions Act[73] does not make provision for an internal remedy and if such remedy exists, he should be exempted from his obligation to exhaust such remedy as his case is an exceptional case with special circumstances as contemplated in section 7(2)(c) of PAJA. Section 7(2)(c) provides that:

> "A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

The HPCSA raised this point of prematurity and opined that the committee should be afforded an opportunity to complete its work and deliver a decision, after which Basson could pursue an appeal under the Health Professions Act.[74] They continued that Basson first should exercise that internal remedy and that there are no exceptional circumstances permitting an exception from that obligation.[75] In effect, if that argument is accepted, the review is not refused but rather deferred until such time as the internal remedies are exhausted.[76] Section 10(2) of the Health Professions Act deals with the establishment of *ad hoc* appeal committees which committee is clothed with the necessary powers to vary, confirm, or set aside a finding of a professional conduct committee or remit the matter to the conduct committee.[77] The court held that Basson enjoys a substantial right of appeal under the Health Professions Act and that he failed to exercise that remedy as required by section 7(2)(a) of PAJA.[78] The exceptional circumstances raised by Basson were the following:

(a) The Health Professions Act and regulations render any decision of the committee (including any penalty of suspension or erasure) of immediate effect, even if an appeal is noted to the appeal committee, and an appeal from the

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70 *Idem* para 13.
71 *Ibid.*
72 *Ibid.*
73 Health Professions Act 56 of 1974.
74 *Basson v Hugo* 2016 JDR 0802 (GP) para 15.
75 *Ibid.*
76 *Idem* para 18.
77 *Idem* para 20. See also s 10(3).
78 *Idem* paras 32–33.

appeal committee to the High Court is likewise brought into effect, pending the appeal;[79]

(b) If a sanction of suspension or erasure was delivered from the committee or the appeal committee and was rendered effective by operation of law, this would cause irreparable harm to his large practice and the countless patients he serves.[80]

(c) The decision of an appropriate sanction which could have such drastic consequences for him would be taken by persons who, it might be determined, should have recused themselves, and consequently he will suffer the exercise of drastic powers by persons whose decisions are ultimately found to be null and void.[81]

The court held that in light of the provisions of section 10(4) and (5), which permit the committee or an appeal committee to determine a later effective date of sanction, Basson still has the opportunity to address the relevant committee to defer the sanction pending review proceedings.[82] The court found that there are no special circumstances compelling exemption from the internal remedies or that in the interests of justice there is a demand that there are. Because the committee has not yet imposed their sanction, the internal appeals could perhaps deal with that issue and if Basson is unsuccessful on internal appeal then all the complaints and irregularities should and could be heard together in the High Court.[83] Although the provisions of the Health Professions Act may be harsh, the court cannot make an adverse finding in that regard as Basson did not challenge the relevant provisions pertaining to that circumstance.

The High Court therefore dismissed the application on the grounds of prematurity as Basson failed to exhaust his internal appeal remedies at the HPCSA in terms of section 10 of the Health Professions Act as required by section 7(2)(a) of PAJA.[84] The court directed Basson to first exhaust his internal appeal remedies and if he is still aggrieved he may approach the court thereafter.[85] Aggrieved by this finding, Basson petitioned the SCA for further relief.

5 4 Supreme Court of Appeal

The issue that the SCA had to determine was whether Basson was compelled to exhaust his internal remedies as required by section 7(2) of PAJA before launching review proceedings.[86] Basson argued that the penalty provisions contained in section 42(1A) of the Health Professions Act provide that a sanction imposed by a committee remains effective until the appeal is finalised and reiterated the grounds of review listed above.[87] The HPCSA stressed that the court *a quo* was correct in its finding and requested the SCA to find that Basson

79 *Idem* para 36.
80 *Ibid.*
81 *Ibid.*
82 *Idem* paras 37 38.
83 *Idem* para 40. See also *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 4.
84 *Idem* para 43.
85 *Ibid.*
86 *Basson v Hugo & Others* 2018 1 All SA 621 (SCA) para 1.
87 *Idem* para 9.

is not entitled to exhaust his internal appeal remedy until the entire hearing has been completed and sanction has been imposed.[88]

The court considered what constitutes exceptional circumstances in terms of section 7(2) of PAJA. By referring to the *Koyabe*[89] judgment, it held that exceptional circumstances depend on the facts and circumstances of the case and the nature of the administrative action at issue.[90] To determine whether exceptional circumstances exist, a court must evaluate whether the internal remedy is effective, available and adequate.[91] It will be considered effective if it offers a prospect of success and can be implemented objectively taking into account the relevant principles and values of administrative justice present in the Constitution and our law.[92] An internal remedy is considered available if it can be pursued without any obstruction either systemic or arising from unwarranted administrative conduct.[93] An internal remedy is adequate if it is capable of redressing the complaint.[94] If these requirements are not met, exceptional circumstances are present which would exclude the requirement to first exhaust internal remedies.

The court found that refusal to recuse will render proceedings a nullity, not merely voidable.[95] What was evident was that Basson from the outset argued that the committee lacked the necessary competency because of the reasonable or actual apprehension of bias on the part of its members, which effectively questions the jurisdiction of the committee to adjudicate the matter *in toto*.[96] Should that finding be upheld, the initial proceedings would be a nullity and any appeal committee would lack jurisdiction as well because Basson cannot appeal against a nullity.[97] Basson further claimed that that an appeal committee would be acting in a manner beyond its powers if it set aside proceedings before the conduct committee *a quo*, because it is clothed with the power only to vary, confirm or set aside the finding of the committee or remit the matter to the committee (own emphasis).[98] These circumstances boil down to the fact that the appeal committee effectively only would receive the transcript of the initial hearing and would not be able to hear new evidence to make a finding.[99] As a result, the internal remedy does not offer a prospect of success or any redress to Basson, rendering it inadequate and ineffective and lacking the requisite constitutional values pertaining to administrative justice.[100]

The court found that impartial presiding officers are a fundamental and crucial requirement for a fair trial and that such officers should not hesitate to recuse

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88 *Idem* para 10.
89 *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)* [2009] ZASCA 23 para 34.
90 *Idem* para 39. See also *Basson v Hugo & Others* 2018 1 All SA 621 (SCA) para 12.
91 *Koyabe* para 39.
92 *Ibid.*
93 *Ibid.* See also *Koyabe* para 44.
94 *Ibid.* See also *Koyabe* paras 42–45.
95 *Koyabe* para 17.
96 *Idem* para 18.
97 *Idem* para 19.
98 *Idem* para 21. See also reg 8 of the Health Professions Act.
99 *Idem.*
100 *Idem* para 23.

themselves in circumstances where any litigant has reason to apprehend that the presiding officer will not be impartial.[101] The court recorded that:

> "The rule against bias is entrenched in the Constitution, which places a high premium on the substantive enjoyment of rights (*Koyabe* supra para 44). Section 38 of the Constitution gives the appellant the right to approach a competent court if a right in the Bill of Rights (s 34) has been infringed or threatened, and the court may grant appropriate relief. In ruling against the appellant, the Committee has set out its position and there is a proper record of the proceedings before it. If the relevant members of the Committee should have recused themselves, the proceedings before it would be null and void; and any appeal to an appeal committee would suffer the same fate. The pursuit of an internal remedy would therefore be futile."[102]

The court further found that Basson enjoys a constitutional right to an independent and impartial hearing before the committee, and objectively evaluated it should not display a reasonable apprehension of bias towards him.[103] It is common cause that the right to a fair and impartial hearing is an absolute right and consequently any proceedings which are found to be unfair for whatever reason, including recusal, in fact are a nullity. The court also addressed the intricacies of section 42(1A) which provides that lodging an appeal against a sanction has no effect on the operation of it pending the outcome of the appeal. The court held that there is a distinction between the consequences of an appeal against sanction and an appeal against the decision of the committee. If an appeal is lodged against both the decision and sanction the operation of the decision is suspended but the sanction remains in force.[104] The court held that irrespective of section 10(4) and (5) the sanctions referred to in section 42(1A) remain in force and cannot be deferred until after conclusion of Basson's further review proceedings.[105] That, coupled with the evidently inadequate internal remedy, alternatively the absence of an adequate remedy, necessitated the requirement of immediate judicial consideration of Basson's allegations of bias.[106] As alluded to previously, if it is found that the refusal to recuse was irregular, the entirety of proceedings are a nullity and cannot be cured merely by setting aside the guilty verdict.[107] One also has to consider the *Oudekraal*-principle which confirms that until an administrative decision is set aside by a court it exists and has legal consequences that cannot be overlooked.[108] This factor further confirms that the appeal committee would be able to set aside only the finding of the committee *a quo* and not the proceedings, which feature distinguishes Basson's matter from cases provided for in section 10.[109]

In conclusion, the court found that there were exceptional circumstances in this matter as contemplated in section 7(2)(c) which justified an exemption from first exhausting internal remedies in terms of subsection 7(2)(a).[110] The court

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101 *Idem* para 25. See also P*resident of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) para 28.
102 *Idem* para 27.
103 *Idem* para 41.
104 *Idem* para 52.
105 *Idem* paras 52–53.
106 *Idem* paras 55–57.
107 *Idem* para 59.
108 *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26.
109 *Basson v Hugo & Others* 2018 1 All SA 621 (SCA) paras 60–61.
110 *Idem* para 64.

held that the internal remedy of an appeal to the appeal committee does not provide an available, effective and adequate remedy to protect Basson's constitutional right to a fair and impartial hearing before the disciplinary committee, on the following grounds:

(a) Basson may suffer irreparable harm if he is unable to secure immediate judicial consideration of his claim of bias on the part of the committee;[111]

(b) the appeal committee is not competent to adjudicate the issue of bias as it lacks the necessary authority to grant the relief requested, namely, setting aside the proceedings on the basis that they are a nullity;[112]

(c) the internal remedy is ineffective and inadequate if it is not objectively implemented without bias, or the reasonable apprehension of bias.[113]

The matter was remitted to the High Court for adjudication of the review on the merits.[114]

5 5 High Court on the merits

After the SCA determined that Basson's right to a fair trial had been infringed by the refusal of the committee members to recuse themselves, the High Court was tasked with adjudicating the merits of the decision of the committee members to refuse. The facts are the same as outlined above.

The HPCSA submitted that the SCA did not make a finding on whether the High Court may adjudicate the review application at the current stage of the disciplinary proceedings, in other words after the verdict but before sanction.[115] The HPCSA maintained that the court should be approached only after the proceedings before the disciplinary hearing had been concluded.[116] This argument was in contrast specifically with what the SCA had determined and accordingly was rejected.[117] The court held that impartial adjudication of disputes is the foundation of the legal system and that the same principles apply to *quasi*-judicial and administrative proceedings.[118] The correct approach pertaining to recusal was considered and the principles as laid down in the *SARFU* judgment[119] reaffirmed, namely 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 a mind open to persuasion by the evidence and submissions of counsel."[120]

Basson persisted with his argument on the *nemo debit esse index in causa propria sua*-principle, that a man may not be a judge in his own cause, by sub-mitting that the committee automatically is disqualified because Professor Hugo is a

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111 *Idem* para 63.
112 *Ibid.*
113 *Ibid.*
114 *Idem* paras 29 and 66.
115 *Basson v Hugo* 2019 JDR 0707 (GP) para 18.
116 *Ibid.*
117 *Idem* para 21. See also para 20 of the SCA judgment.
118 *Idem* para 22.
119 *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 4 SA 147 (CC).
120 *Idem* para 45.

member of SAMA.[121] The court however rejected the argument of an automatic disqualification.[122] We agree with this finding. Although the committee members were not directly involved in the management of SAMA, SAMA endorsed the petition and, according to the testimony on record, no objections to or dissociation from the petition had been received.[123] As a result, the view of Bam J in the 2015 urgent application, wherein he found that the committee members were obliged to furnish a suitable clarification regarding their involvement in and/or knowledge of the petition, cannot be faulted.[124] The court found that the deliberate non-disclosure of Professor Hugo and his not distancing himself from the SAMA petition led to a reasonable apprehension of bias.[125] It was not far-fetched to infer that Professor Hugo deliberately refused to disclose his affiliation with SAMA because he supports the content of the petition.[126] Furthermore, no disclosure was made regarding the committee members' involvement with RUDASA.[127] The court remarked that the refusal to grant a postponement and to proceed with the evidence of Professor Blockman *in absentia* was "astounding".[128] The court found this action to be procedurally irregular and substantively unfair and that the result thereof objectively may reflect bias.[129] Counsel for the HPCSA, also the *pro-forma* prosecutor in the disciplinary hearing, conceded that this action was substantively unfair and undertook that the prosecution would not object to recalling Professor Blockman to allow Basson to cross-examine him.[130] Although the court did not find it necessary to make a determination in this regard, the court remarked *obiter* with concern the appointment of the same attorneys who appointed the *pro-forma* prosecutor to represent the committee members, which may constitute further grounds for a reasonable apprehension of bias.[131] As a result, the court set aside the committee members' refusal to recuse themselves and ordered them to recuse themselves from the disciplinary hearing.[132]

5 6 Further appeal

Dissatisfied with the High Court's ruling, the HPCSA soon indicated that they were to apply for leave to appeal the judgment.[133] The application for leave to appeal was based on the *in medias res*-principle and the allegation or perception that the judgment made it near impossible for the HPCSA to compile a committee for a disciplinary hearing that is unbiased because all potential committee members would belong to SAMA.[134] The court rejected the HPCSA's arguments

121 *Basson v Hugo* paras 24–26.
122 *Idem* para 27.
123 *Idem* para 29.
124 *Idem* para 30. See also *Bernert v Absa Bank* 2011 3 SA 92 (CC) para 53.
125 *Idem* para 31.
126 *Ibid.*
127 *Idem* para 32.
128 *Idem* para 34.
129 *Ibid.*
130 *Ibid.*
131 *Idem* para 37.
132 *Idem* para 38.
133 See https://www.iol.co.za/capetimes/news/hpcsa-appeals-recusal-of-panel-members-in-dr-death-inquiry-22351003 (accessed 15-01-2020).
134 *Health Professions Council of South Africa v Dr Wouter Basson* (unreported leave to appeal judgment) dated 7 May 2019 paras 2–3.

because it was by then common cause that the internal appeal process was unable to rectify the shortcomings of the committee and the committee's findings and, thus, effectively the process was incompetent (as was pointed out decisively by the SCA in the 2018 judgement).[135] The High Court held that mere membership of SAMA is not a disqualification as the committee members could have indicated that they do not align themselves with the petition.[136] Neither was it argued that as a rule SAMA files petitions in support of sanctions.[137] In the event that SAMA does file such petitions in future, the committee members can distance themselves from the petition in which case the presumption of an unbiased presiding officer would favour the committee and they would be able to fulfil their mandate.[138]

The court further held that the conduct of the committee pertaining to sentencing established that a reasonable, objective, informed person would in these circumstances reasonably apprehend that the committee may not be impartial.[139] Consequently, in the absence of a reasonable prospect of success and any other compelling reason why the appeal should be heard, the application was dismissed with costs, including costs of two counsel.[140]

Subsequently, the HPCSA unsuccessfully petitioned the SCA and the CC in an attempt to appeal the High Court's ruling. Its petitions were dismissed with costs.[141]

6 CONCLUDING REMARKS

The findings of the SCA and the High Court cast a lifeline to Basson. The entire disciplinary hearing most likely will have to commence afresh and it is uncertain that at this late stage the HPCSA has the appetite to so do. The delay in bringing the matter to finality will increase substantially as the evidence will have to be presented once more before a newly-constituted committee. This circumstance may expose the entire hearing to further review proceedings and special pleas on the part of Basson. We agree with the judgment of Potteril J in that the application for the recusal of professors Hugo and Mhlanga should have been granted in the first instance and the matter could have been dealt with by a properly-constituted committee, without the need for extensive litigation. However, the approach of the committee leaves the matter pending with neither party bringing it to finality. This failure is a material travesty of justice and has contributed to the vilification of Basson and led to open hostility between the parties.

Despite Basson's conviction by the HPCSA, the future consequences of this decision are uncertain. The SCA has determined that in cases such as this the preceding hearings are a nullity and the sanctioning hearing may not proceed before a new committee. In light of the findings of the SCA and the High Court

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135 *Idem* para 2. See also *Basson v Hugo & Others* 2018 1 All SA 621 (SCA).
136 *Idem* para 3.
137 *Ibid.*
138 *Ibid.*
139 *Idem* para 4.
140 *Idem* para 5. See also *The Mont Chevaux Trust v Tina Goosen & 18 others* 2014 JDR 2325 (LCC) 6 pertaining to the test for applications for leave to appeal as read with s 17(1) of the Superior Courts Act 10 of 2013.
141 *Health Professions Council of South Africa v Wouter Basson* CCT 221/19, court order dated 5 February 2020.

Basson may be entitled to institute another review application setting aside his conviction if the committee does not rescind the verdict. We submit that it necessarily follows that if the refusal to recuse was set aside based on a reasonable apprehension of bias, the conviction reasonably is susceptible to a court challenge.[142] However, after already establishing that Basson transgressed his ethical obligations as a medical practitioner on one occasion (albeit before an improperly-constituted committee) it is unlikely that the HPCSA will abandon the goal of prosecution in its entirety. Considering that this hearing has dragged on for more than a decade with no end in sight and at considerable cost to both parties, we are of the view that this dispute is ripe for settlement in the interest of both parties. Furthermore, Basson is nearing the age of retirement, which in itself could render the conclusion of any disciplinary hearing purely academic.

What is not in dispute is that Basson is a competent cardiologist who continues to run a successful practice. There have been no complaints by patients against him that cast doubt upon his competency or that since entering private practice he has not adhered to ethical principles. This casts doubt on whether it is worthwhile for the HPCSA to pursue this matter further. If the hearing continues, and a guilty verdict is delivered once more, it is probable that the HPCSA will seek the permanent removal of Basson's name from the register of medical practitioners. However, if Basson is acquitted, he may have a case to make for malicious prosecution and damage to his reputation, which undoubtedly has been besmirched in this matter.

Whatever lies in the future, we shall follow the proceedings with a keen interest in the hope that justice may finally be done.

142 It is not known whether the respective legal teams had an arrangement confirming that if the review application succeeds then the entire hearing must commence *de novo*.