CASES AND COMMENTS

DOCTORS ON TRIAL: STEVE BIKO, MEDICAL ETHICS, AND THE COURTS

The year 1977 was fateful for Steven Bantu Biko. In February, at the age of thirty-one, he was elected honorary life president of the Black People's Convention. In March he was charged on two counts of contravening his restriction order, though the case never came to trial. In the same month he was also charged with obstructing the course of justice by interfering with state witnesses in a sabotage trial, was tried and acquitted on all counts. In April he was offered a sponsored visit to America by the US State Department; this he refused because he did not believe that the United States had yet changed its attitude towards the South African government. On 18 August he was arrested at a roadblock in Grahamstown. He was suspected of involvement in the distribution of inflammatory pamphlets. The next day he was handed over to the security police in Port Elizabeth, where, as in the year before (when he had been detained for 101 days), he was detained under the Terrorism Act 83 of 1967. On 12 September he died.

When he died, the then Minister of Police, Mr J T Kruger, seemed unmoved: he said that Biko left him cold ('hy laat my koud'). Yet this death in detention, more than any other, sparked a chain of events, the consequences of which still reverberate eight years later.

A two-week inquest held in the glare of international publicity revealed some of the events leading up to Biko's death. Donald Woods, one of South Africa's leading newspaper editors and friend of Biko, was banned; he subsequently fled the country and wrote a book on the black consciousness leader, which South Africans may not read. Channel 4 in Britain screened a dramatization of the inquest, starring Albert Finney, which South Africans may not see.

Biko's death continues to have serious consequences for the medical profession. The conduct of the doctors who attended the victim when he was in extremis was called into question as a result of the evidence at the inquest, and the absence of any disciplinary action by their peers led to the expulsion of the Medical Association of South Africa from the World Medical Association. Though subsequently readmitted to the world body the South African Association has, after an affiliation of thirty-six years,

become estranged from the British Medical Association. The latter has expressed the view that South African doctors do not seem to have the ethical machinery capable of dealing with the affair (South African Institute of Race Relations (SAIRR) (1983) 37 *Survey of Race Relations in South Africa* 487).

Fortunately there are doctors who remain determined that the possibility of unethical conduct on the part of any of their colleagues should be thoroughly investigated. Their efforts, coupled with those of the lawyers and judges in two important reported decisions, have served to maintain pressure on the South African Medical and Dental Council to conduct a proper inquiry into the conduct of two of the doctors involved. They are Dr Ivor Lang, a district surgeon, and Dr Benjamin Tucker, Chief District Surgeon for Port Elizabeth.

The two court decisions are reported as *Tucker and another v SA Medical and Dental Council and others* 1980 (2) SA 207 (T) *(Tucker)* and *Veriava and others v President, SA Medical and Dental Council and others* 1985 (2) SA 293 (T) *(Veriava).*

THE BACKGROUND

The inquest into Biko's death was held in Pretoria from 17 November to 2 December 1977 by the Chief Magistrate of Pretoria and two assessors, both of whom were professors of forensic medicine. This is not the place to relate all the tragic and sordid facts that emerge from the 2000-page record. (A convenient outline is to be found in the SAIRR's (1977) 31 *Survey of Race Relations in South Africa* at 160-4). Suffice it to say that, although the Chief Magistrate and his assessors were unable to find any particular person or group of persons responsible for the death, and although the verdict was not accompanied by reasons, it is evident that Biko sustained three lesions to the brain some time before 7h30 on the morning of 7 September and that these injuries eventually led to his death. Shortly afterwards the commander of the security police in Port Elizabeth, Colonel (now Brigadier) PJ Goosen, visited Biko. The detainee was acting abnormally. He seemed unable to speak properly or to use his limbs, he would not eat, and he had a 'wild look' in his eyes. The colonel summoned a district surgeon, Dr Lang, who then examined the detainee. Dr Lang certified that he had 'found no evidence of any abnormality or pathology on detainee', a conclusion which he conceded at the inquest to be incorrect as far as the question of abnormality was concerned and 'highly inaccurate' insofar as it related to pathology.

The following day Drs Lang and Tucker examined Biko together. Biko was lying shackled on a mat on the floor of the security police office. After finding that he was displaying symptoms of nervous system malfunction, possibly caused by brain damage, they recommended that he be removed to a prison hospital for specialist examination. Another physician, Dr Hersch, examined Biko at the hospital and found that he was displaying additional untoward symptoms. Dr Keeley, a neurosurgeon, was

consulted after a lumbar puncture had been performed on the victim. The specialist directed that Biko should be sent to the local provincial hospital for examination but this Colonel Goosen refused to allow. Biko was returned to his cell on 11 September.

In the meantime, spinal fluid from the lumbar puncture had been sent to the Institute for Medical Research under a false name. Although the Institute had declared the fluid to be 'clear' and Dr Hersch had signed a bed letter saying that the test was normal, the sample was in fact found to contain red blood cells, indicating significant abnormality.

On 11 September Dr Tucker visited Biko after he had been returned to his cell. He found the detainee collapsed on the floor in 'an apathetic condition', frothing at the mouth and hyperventilating. He recommended readmission to hospital and Colonel Goosen insisted that Biko be taken for treatment to a prison hospital in Pretoria. Biko was placed, naked and semi-comatose, in the back of a police Land Rover and was conveyed in that state on the 1200 km journey to Pretoria. On his arrival he was examined in prison by a Dr A van Zyl, who had not been given the patient's medical history nor been told that the case was urgent. He found Biko to be comatose and seriously ill, and he commenced treatment by administering an intravenous drip and a vitamin injection. Steve Biko died the following day.

The inquest left many questions unanswered: the acceptance by the court that the fatal injury had probably been sustained as a result of a 'scuffle' was extremely controversial, and the failure to give a properly reasoned finding was criticized by leading lawyers (see eg (1977) 31 *Survey of Race Relations* 164; Sir David Napley *Steve Biko Inquest* (Report to the Association of Law Societies, 1977) 4 para 9). Local and international criticism focused not only on the conduct of the security policemen involved but also on that of the doctors. At the inquest there were clear conflicts between the evidence of Colonel Goosen and that of Drs Hersch, Tucker and Lang. In his final address to the inquest court, Mr Sydney Kentridge SC, one of the counsel for the Biko family, described the relationship of the district surgeons to Colonel Goosen as 'one of subservience, bordering on collusion' (quoted by the SAIRR *1977 Survey* 163). A distinguished British observer to the proceedings, Sir David Napley, observed that 'both the Government of South Africa and the Medical Authorities have much to consider and rectify arising out of the conduct of the District Surgeons in this matter' (Napley op cit 17). As will be seen, the members of the inquest court seemed to share this opinion.

THE SA MEDICAL AND DENTAL COUNCIL

It was at this stage that the South African Medical and Dental Council (the Council) became involved.

The medical profession is regulated primarily by the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 and the Council (which consists of twenty-nine members comprising a mixture of private practitioners, state employees and nominees of the Minister of

Health or other statutory bodies) is the principal regulatory body. It has wide-ranging powers under the Act and controls the training, registration, ethics and discipline of members of the medical and various allied professions. It may receive and investigate complaints, made against persons registered under the Act, of improper or disgraceful conduct (s 41). A court of law is also placed under a duty to transmit a copy of the record of its proceedings to the Council whenever it appears to the court that there is prima facie proof of improper or disgraceful conduct on the part of a registered person (s 45 (2)). The Council must then appoint a pro forma complainant and the 'complaint' must be investigated in terms of s 41 (s 45 (3)).

Various regulations govern the investigation of complaints. A complaint must be submitted in writing to the president of the Council; it must be specific and the complainant if required must be prepared to adduce evidence in support. The president must refer the complaint to the registrar and direct him either to call for further information from the complainant, to forward the relevant documents to the accused (or at least inform him of the complaint) and ask for an explanation, or to refer the case to a medical committee of preliminary inquiry (the inquiry committee). The inquiry committee, which is appointed at the beginning of each year from the members of the Council, is charged with the duty of conducting a preliminary enquiry into complaints. If it finds that the complaint, even if substantiated, would not constitute improper or disgraceful conduct, the inquiry committee may take 'such action as it may think fit and report such action and the grounds therefore to the Council'. All its resolutions and actions are subject to confirmation by the Council. If, on the other hand, the inquiry committee should resolve that the evidence furnished in support of the complaint does disclose prima facie evidence of improper or disgraceful conduct, it must arrange to have the case heard by the full Council or its disciplinary committee. A summons is then issued and a formal inquiry takes place.

If after the formal inquiry a registered person is found guilty of improper or disgraceful conduct the Council may caution, reprimand, or suspend the offender, or strike him or her from the register (s 42 (1)). The Council may also exercise these powers upon proof that such a person has been convicted in a court of law of an offence which, in the opinion of the Council, constitutes improper or disgraceful conduct (s 45 (1)).

THE FIRST COMPLAINT

After the inquest, on 20 December 1977, Mr Eugene Reolofse of the Ombudsman Office of the South African Council of Churches wrote to the registrar of the Medical and Dental Council, drawing his attention to the evidence given at the inquest and inviting him to consider whether 'the conduct of the men concerned was in conformity with the requirements of your Council'. On 16 January 1978 he also sent a formal 'complaint' to the Council; this consisted of a number of extracts from press reports as well as a series of specific questions relating to the conduct of Drs Lang, Tucker

and Hersch. Coetzee J subsequently described the complaint as a 'formidable document' (see the *Tucker* decision at 208H).

At about the same time (9 January 1978), the chairman of the inquest court, purporting to act in terms of s 45 (2) of Act 56 of 1974, referred parts of the inquest record to the Council for its consideration. These contained evidence by Colonel Goosen and Drs Lang, Tucker and Hersch. The magistrate explained that the evidence of Goosen and Hersch appeared to 'cast some light' on that of Lang and Tucker, and the members of the inquest court seem to have believed that there was at least prima facie evidence of improper or disgraceful conduct on the part of Lang and Tucker.

The president of the Council treated Mr Roelofse's document as a complaint and directed the registrar to refer it together with the portions of the inquest record to the inquiry committee, and to call for explanations from the practitioners concerned. Dr Hersch responded with an explanation of his role in the affair, but the state attorney, acting for Drs Lang and Tucker, requested a postponement of the inquiry pending the outcome of civil proceedings which had already been launched by members of the Biko family. (The family had brought an action for R90 000 damages against the security police, Drs Lang and Tucker, and the Ministers of health and police. They were eventually paid R65 000 in an out-of-court settlement.) The registrar persisted, however, in his request for an explanation from Drs Lang and Tucker, whereupon their representative adopted the attitude that the complaint lacked the specificity necessary to initiate action by the inquiry committee and that it was defective in certain technical respects.

The two doctors then applied to court for declaratory orders to this effect. This led to the *Tucker* decision in which Coetzee J dismissed their application on the ground that the provisions of the regulations in relation to the preliminary inquiry were purely directory and were not intended to confer any rights upon the accused at this stage. The learned judge took the view that the regulations governing the initial stage of the investigation were merely of an internal and 'administrative' nature. He pointed out that formal proceedings, if any, were only commenced with the service of a formal and detailed summons, whereupon completely different considerations would apply (see *Tucker* 1980 (2) SA 207 (T), especially 212E-213H). (It might be noted, in passing, that Coetzee J's decision appears to be perfectly sound: natural justice, to the extent that it applies to the preliminary stage of proceedings, was not violated in any significant way; indeed, the doctors had been given full copies of the detailed complaint and had been offered a full opportunity for explanation. The potential for prejudice was either non-existent or insignificant. In this respect it would be easy to distinguish decisions apparently to the contrary, such as *Grundling v Van Rensburg NO* 1984 (4) SA 680 (W), where there had been a complete failure to observe audi alteram partem at the preliminary stage of a disciplinary inquiry.)

The inquiry committee continued its investigation by procuring reports

from two further doctors. (For the controversy surrounding these reports, see the SAIRR's (1980) 34 *Survey of Race Relations in South Africa.* It then resolved that no further action be taken, apparently acting in the belief that there was no prima facie evidence of improper or disgraceful conduct. When the full Council met on 17 June 1980 to consider the resolution, two members, Professors Shapiro and Charlton, attempted to move an amendment rejecting the resolution of the inquiry committee. This was put to the vote and defeated, and the resolution of the inquiry committee was confirmed by a majority of eighteen votes to nine (two members had left early).

THE SECOND AND THIRD SETS OF COMPLAINTS

The decision provoked a public outcry. A consequence was that the Medical Association of South Africa (MASA), a non-statutory professional organization, was induced to review the affair. An ad hoc committee of inquiry (the ad hoc committee) was appointed to investigate the general medico-ethical issues arising out of the treatment of Biko by the doctors concerned. This ad hoc committee was, however, unable to conduct a full investigation because it lacked the power of subpoena, and Drs Lang and Tucker, both members of MASA, had been forbidden by the Deputy Director of Health Services to participate in the committee's proceedings. The committee had also been refused permission to inspect the cell in Port Elizabeth where Biko had been held. At the outcome of the investigation, MASA announced that it supported the Council's decision. Nevertheless, it did urge the Council to give urgent attention to various matters relating to the treatment of Steve Biko and other security prisoners. MASA's decision led to widespread controversy and, indeed, to MASA's temporary expulsion from the World Medical Association. (See (1980) 34 *Survey of Race Relations* 572 and the 1981 *Survey* 85-6.)

A positive feature of the MASA investigation was that it provided some assistance to those doctors who were dissatisfied with the decision of the Council and who wished to renew their efforts to have the conduct of Drs Lang and Tucker subjected to full inquiry. For example, further evidence given by Dr Keeley to the ad hoc committee had materially conflicted with that given by Dr Lang at the inquest. On 17 February 1982 five doctors lodged with the Council an 88-page series of charges and complaints concerning the conduct of Drs Lang, Tucker, Hersch and Keeley. The complainants emphasized that their complaints were independent of those of Mr Roelofse and that there were a number of new items of evidence, including the whole of the inquest record (which contained material contradictions between the accounts of the medical practitioners themselves, and between their evidence and that of the police witnesses) and a report of the evidence given by Dr Keeley to MASA's ad hoc committee of inquiry. The complaints also raised a number of new submissions.

Shortly afterwards, on 18 March 1982, a further five practitioners, together with the Health Worker Organisation (a voluntary organization

of black doctors and allied personnel), lodged a separate and detailed list of complaints against Drs Lang and Tucker. Attached to these complaints was a complete copy of the inquest record as well as a copy of the report made by the ad hoc committee.

After acquainting itself with the contents of the documents submitted with these complaints, and after inquiring through the Council's registrar whether the two groups of complainants had anything further to add, the inquiry committee referred the charges and complaints to the doctors concerned. Dr Hersch denied the allegations of improper and disgraceful conduct, and Dr Keeley furnished a full account of his involvement in Biko's treatment. Drs Lang and Tucker, however, declined to add anything, stating, through the state attorney, that they deferred to the expert judgment of the Council.

On 4 March 1983 the inquiry committee resolved, inter alia, that 'as far as Drs Lang, Tucker and Hersch were concerned the committee was of the opinion that all material evidence which had been submitted in support of the present complaint had also been considered by the committee and the Council previously, and that no material new evidence had emerged such as warranted the rescission of the Council's previous resolution'. It was therefore resolved that Dr Keeley's explanation should be noted and that no further action should be taken against any of the four doctors.

The Council considered this resolution at its meeting on 25 April 1983. Professors Shapiro and Charlton again attempted to move an amendment rejecting the resolutions. The amendment was ruled out of order by the president. Acting in the belief that there was no new material evidence, he took the view that the amendment would have the effect of rescinding a previous resolution of the Council (viz that relating to Mr Roelofse's complaint), which resolution was not before the Council. The proposed amendment therefore failed to satisfy the Council's notice requirements in respect of motions to rescind previous resolutions. As a result the amendment was withdrawn and the inquiry committee's resolution was confirmed.

THE VERIAVA DECISION

In the face of yet another refusal by the Council to institute a formal investigation six of the complainants, three from the first group and three from the second, sought judicial review in the Transvaal Provincial Division. They applied for an order setting aside and correcting the resolutions of the inquiry committee and the Council, directing the Council to hear the complaints, and requiring the Council to hold a formal inquiry, either itself or through its disciplinary committee, into the conduct of Drs Lang and Tucker. The two doctors were joined as co-respondents.

The grounds of challenge, as described by Boshoff JP in his judgment (in which O'Donovan J concurred), were that the relevant resolutions were based on 'misdirections and were grossly unreasonable to so striking a degree, either as to warrant the inference of failure to properly apply their minds to the matters that had to be considered by them, or to be

inexplicable except on the assumption of mala fides or ulterior motive' (*Veriava* 1985 (2) SA 293 (T) at 304). In reply, counsel for the respondents not only took direct issue with the applicants' grounds of review, but also challenged their locus standi to seek review. The hearing lasted three days and a lengthy reserved judgment granting the order sought by the applicants was handed down some five weeks later (on 30 January 1985).

Boshoff JP's decision turned upon the resolution of four fairly straightforward issues: namely, whether the Council had any duty to institute a formal inquiry at all; whether there existed prima facie evidence of improper or disgraceful conduct on the part of Drs Lang and Tucker; whether the inquiry committee and the Council had properly appreciated the nature of their powers; and whether the applicants had standing.

Was the Council under a Duty to Institute an Inquiry?

Although the Council clearly has the *power* to institute an inquiry (see Act 56 of 1974, s 41), it might be argued that it is not under a *duty* to do so. The Act is silent in this regard and it might have been intended that the Council has a discretion as to whether it should exercise its powers. If so, in refusing to act it might have been immune from challenge on review irrespective of whether there was any evidence of improper or disgraceful conduct.

Boshoff JP's judgment on this issue is a fine example of Hohfeldian reasoning. After referring to Earl Cairns LC's leading dictum in *Julius v The Lord Bishop of Oxford* (1880) 5 AC 214 (HL) 223-3, where it is pointed out that the possession of a power to act may well be coupled with a duty that the power should be exercised, and after noting that the Council certainly possessed the power to act (*Veriava* at 310 G-J), the learned judge president proceeded to consider whether the Council had been placed under a duty to exercise its powers.

In deducing the existence of such a duty, Boshoff JP considered whether anyone enjoyed a correlative *right*. He observed that the function of the Council under the Act is 'to supervise and control the ethical and professional standards of the medical profession and in this way protect the prestige, status and dignity of the profession and the public interests in so far as members of the public are affected by the professional conduct of registered members of the profession to whom they had stood in a professional relationship' (310J-311B). As members of the medical profession 'have a real and direct interest in the prestige, status and dignity of their profession', he considered that they have a right to expect of the Council that it should exercise its powers to protect this interest; similarly, members of the public to whom a practitioner had stood in a professional relationship had a right to expect the Council to exercise its powers so as to protect them. 'It could not have been the intention of the Legislature', the learned judge president concluded, 'that the Council should be given a discretion to institute an enquiry on a genuine and valid complaint so that in the case of one complaint it would be able to use its powers of inquiry and in the case of another identical complaint it should be able to refuse to use its powers. To allow this would be to make it possible for

discrimination to be exercised between persons' (311E-F).

The existence of a right on the part of members of the profession and individual members of the public having been established, it followed automatically that there was a correlative duty on the part of the Council to exercise its powers, and Boshoff JP was able to construe the words 'shall have the power', as used in the Act, so as to include the imposition of a duty. This reasoning seems incontrovertible.

Was there Prima Facie Evidence?

There certainly was 'evidence' of improper or disgraceful conduct on the part of Drs Lang and Tucker. But counsel for the respondents challenged the relevance of this evidence. In order to justify a formal investigation, what was required was 'prima facie' evidence and the existence of such evidence, he contended, was a matter solely within the discretion of the Council. He argued that the Council was the 'final arbiter of what conduct constituted improper or disgraceful conduct in the medical profession and . . . its finding that there was no *prima facie* evidence thereof was virtually unassailable' (per Boshoff JP at 304). If this were so, it would follow that the court had to accept the Council's resolution that there was no prima facie evidence of improper or disgraceful conduct and that there was therefore no basis for instituting a formal inquiry.

This argument might at first seem conclusive: the decision as to whether a doctor is guilty of improper or disgraceful conduct is vested by Act 56 of 1974 in the Council, and its decision is a discretionary one. There is no definition of improper or disgraceful conduct in the Act, and even when a court of law convicts a registered person of an offence or takes the view that there is prima facie evidence of improper or disgraceful conduct it is still left to the *Council* to decide whether the conduct concerned had indeed been improper or disgraceful from a professional point of view. The characterization of such conduct is left in the hands of the profession. Even when, as in the case of the pharmaceutical profession, a judicial appeal does exist, the courts will accord great weight to ethical judgment of the professional body concerned (see *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (A), 33A-34C; *South African Pharmacy Board v Norwitz* 1982 (2) SA 674 (A), 682). A fortiori, where, as in the case of the medical profession, appeal has been abolished, judicial deference is likely to be still greater (see eg *Groenewald v South African Medical and Dental Council* 1934 TPD 404, 410, 416; *Pretorius v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad* 1980 (2) SA 354 (T); *Meyer v South African Medical and Dental Council and others* 1982 (4) SA 450 (T); and cf *SA Medical & Dental Council v McLoughlin* 1948 (2) SA 355 (A) at 396. The statutory right of appeal against decisions of the Council was abolished by s 8 of the Medical, Dental and Supplementary Health Service Professions Amendment Act 33 of 1976, after the Council had been overturned in the case of *De La Rouvière v SA Medical and Dental Council* 1977 (1) SA 85 (N)). This Boshoff JP fully recognized (see *Veriava* at 306).

Yet, notwithstanding the loose dicta one often encounters in this field of administrative law, the reviewability of factual issues — even those subject to the subjective assessment of the statutory decision-maker — is seldom a clear-cut issue. Justiciability is a matter of degree, and even where *the existence of improper or disgraceful conduct* is not justiciable it does not necessarily follow that this applies to the existence of *prima facie evidence* of improper or disgraceful conduct. Justiciability will depend on the nature of the judgment involved. For example, where a complaint refers to a form of conduct which raises a novel ethical issue it might be inappropriate to regard even the existence of prima facie evidence of improper or disgraceful conduct as justiciable: here the professional judgment of the Council and its inquiry committee would be indispensable in determining whether the complaint, substantiated or not, falls within the notion of improper or disgraceful conduct *at all*.(In this regard Boshoff JP might have misconstrued the intention of one of the regulations governing the functions of the inquiry committee (reg 6), which directs the inquiry committee to 'take such action as it may think fit' where it resolves that '*the complainant, even if substantiated,* would not constitute improper or disgraceful conduct' (my emphasis). The learned judge president took the view that the emphasized words 'can only refer to the evidence furnished to support the complaint' (309). Is it not more plausible to regard the phrase as contemplating not the probity of the evidence but the nature of the complaint itself?) A court would be ill-equipped to gainsay what is, in effect, a policy decision.

On the other hand, where the type of complaint falls well within the realm of conduct which is already recognized, or is likely to be recognized, as improper or disgraceful conduct, the existence of prima facie evidence hardly seems non-justiciable. The courts are as expert as any doctor in detecting the existence of prima facie evidence when the subject of the evidence is not in dispute. This is indeed recognized by Parliament itself, since courts of law are actually placed under a duty to refer such evidence to the Council for further investigation (Act 56 of 1974, s 45 (2) — see above). If they are to perform this duty, it must be acknowledged that they are capable of recognizing prima facie evidence of improper or disgraceful conduct when they see it. And when it is alleged that the conduct in question breaches a formal rule of ethics promulgated by the Council, the existence of prima facie evidence of the breach is surely justiciable.

In the case of Dr Lang, there was evidence that he had signed an inaccurate and misleading medical certificate when he examined Biko on the morning of 7 September 1977, and that in doing so he had relied on remarks by Colonel Goosen to the effect that Biko was 'shamming'. Rule 17 of the Council's rules of conduct for the medical profession prohibits the granting of such a certificate unless the practitioner is satisfied from his personal observation that the facts are correctly stated therein, or has qualified the certificate by the words 'As I am informed by the patient' (see *Veriava* at 3061-J). In the case of Dr Tucker, one of the complaints was that, in permitting Biko to be removed to Pretoria in his seriously ill

condition, the chief district surgeon had showed a disregard for the gravity of the situation and in doing so might have violated Rule 25 of the Council's rules of conduct, which prohibits the performance under improper conditions and/or surroundings of professional acts, except in an emergency.

As far as both doctors were concerned, there was, moreover, the opinion of the members of the inquest court, including the two medical assessors, that there was prima facie evidence of improper or disgraceful conduct. It was this opinion which induced the chief magistrate to transmit extracts of the inquest record to the Council. Although Boshoff JP accepted that an inquest court does not fall within the meaning of a 'court of law' for the purposes of s 45 (2), under which the inquest court purported to act, he nevertheless noted the significance of the fact that the members of the inquest court thought such evidence existed (297F-H).

It is not surprising, therefore, that the court in *Veriava* took the view that there was prima facie evidence of improper or disgraceful conduct on the part of Drs Lang and Tucker and that it could overrule the inquiry committee and Council in this regard. (See Boshoff JP's judgment at 312C-I and 317D-E.) The manifest justiciability of the question before the inquiry committee and the Council seems to be what Boshoff JP had in mind when he emphasized that the inquiry committee 'merely investigates the factual position relating to the complainant and that no discretion is exercised by either the inquiry committee or the Council at that stage' (310F), and that 'what they had to determine was no more than a question of fact' (312B, and see also 317C-D).

Did the Committee and the Council Properly Appreciate the Nature of their Powers?

It was not clear from the facts that the inquiry committee and the Council had found there to be no prima facie evidence of misconduct. If this was indeed the basis for their resolutions, then they had 'erred on a matter of [reviewable] fact' (314I-J). But neither body had given clear reasons for its resolution, although it was evident from the proceedings of the Council on 17 June 1980 that it had indeed assumed there to be no prima facie case (313C-E). What was *certainly* evident from the proceedings of both bodies was that its members had assumed that no new evidence had been placed before them in the second and third set of complaints, and that they had resolved not to proceed with a formal inquiry because of this assumption (302A-303G). In this respect the court held that the two bodies were clearly wrong and that, as a consequence, their members had failed to apply their minds to the complaints at all.

In concluding that there was indeed new evidence before the inquiry committee and the Council, Boshoff JP referred to the report of the evidence Dr Keeley had given to the ad hoc committee appointed by MASA, to the fact that the second and third groups of complainants, being members of the medical profession (unlike Mr Roelofse), had in effect, by lodging the (more thorough and comprehensive) complaints, expressed

expert opinions that the conduct complained of was prima facie improper or disgraceful, and to the material conflicts of evidence in the inquest record as a whole (313H-I, 314B-E, and cf 300B-F).

Boshoff JP therefore concluded that the inquiry committee 'did not direct its mind to the real issues before it' (314E-F) and the Council 'did not give due and proper consideration to the applicants' charges and complaints' 314H); they had 'misdirected themselves by not applying their minds properly or at all' (315A). (See also 316I-317C.)

In other words, either the two bodies wrongly decided that there was no prima facie evidence, or they failed to exercise their discretion at all. On either ground their resolutions had to be set aside. And because the court had itself reached the conclusion that there was prima facie evidence it was prepared not only to set the resolutions aside but also to direct the Council to institute a formal inquiry.

Did the Applicants have Standing?

The last refuge of the respondents' counsel lay in the contention that the applicants lacked locus standi to bring the application because they had failed to demonstrate that they had suffered or would suffer personal injury; they were, he argued, merely seeking to enforce the performance of a general statutory duty.

The standing requirements in South African law are not entirely clear-cut (see generally, Wiechers *Administratiefreg* 2ed (1984) 310-15; Baxter *Administrative Law* (1984) Ch 16, especially 650-64). They were stated accurately enough by Boshoff JP: he observed that, where relying on a breach of a statute, an applicant must show that he possesses a right which 'will be available to him personally' and that the inquiry resulting from the breach of statute 'must be sustained or apprehended by himself' (315E-F). In accordance with the well-known principle adopted in *Patz v Greene & Co* 1907 TS 427 at 433, the courts will, where it is shown that the legislation concerned has been enacted in the interest of any person or identifiable class of persons, presume that such person or member of the class has sufficient interest in bringing the proceedings without this having to be proved (see Boshoff JP at 315F-G, relying on Appellate Division authorities).

The learned judge president concluded that the duty imposed on the Council by the Act had indeed been enacted for the benefit of the medical profession (316G). He referred once again to the fact that the Council is the '*custos morum* of the profession and indeed the guardian of the prestige, status and dignity of the profession' (316E-F). He distinguished a case upon which counsel for the respondents had relied, *O'Brien v Amm* 1935 WLD 68, in which Greenberg J had held that a dentist who had sought an interdict against another dentist had lacked sufficient standing. The dentist, who had been prohibited from using the title 'doctor', had alleged that he was losing business to the respondent who was himself using the title 'doctor' in contravention of s 33 (3) of the Medical, Dental and Pharmacy Act 13 of 1928. Greenberg J had taken the view that the Act had

not been enacted in the interests of the medical and dental professions per se, but in the general interests of the public, and the applicant had, in any event, failed to show that he would probably suffer damage. Boshoff JP distinguished the decision on the ground that, while the old Act had merely been designed to raise the standards of the medical profession in the general interests of the public, the current Act was much more comprehensive, being directly concerned with protecting the interests of members of the profession inter se. He therefore concluded that the applicants had standing.

In terms of the orthodox rules relating to locus standi, individual members of the public would also have standing where they could show a direct personal interest; Biko's family, for example, would presumably have possessed locus standi. The court's decision serves to clarify the precise range of those who possess sufficient interest to challenge the actions of the Council, and in this regard it has important consequences for the Council since it removes any possible doubts as to whether members of the medical profession fall within this range. On the other hand, it is interesting to speculate on how Mr Roelofse would have fared had he sought review of the Council's resolution relating to his own complaint: in the current state of South African law it seems that he would not have enjoyed standing because he would have lacked a direct personal interest, and a clear illegality might have gone unchecked.

CONCLUDING REMARKS

The *Tucker* and *Veriava* decisions have sustained the endeavours to bring those responsible for the death of Steve Biko to book. The Council announced on 1 March 1985 that it would commence a public hearing into the conduct of Drs Lang and Tucker in June (*The Natal Witness* 2 March 1985).

But will this be the end of the matter? The public deserves an explanation from the Council as to why it has had to be forced to institute a formal inquiry. Even more seriously, there are still many unresolved questions concerning the conduct of the security police. The doctors, after all, did not injure Biko. After attending the inquest Sir David Napley had observed: 'Certainly there appears today to remain a strong case for the fullest independent investigation by specially selected police officers into the causes of this unhappy death' (Napley op cit 26). Yet, soon after the inquest, the attorneys-general of the Transvaal and the Eastern Cape declined to take action. The Minister of Justice announced that a departmental investigation had shown that although the policemen involved had committed errors of judgment these were not of such a nature as to warrant the appointment of a police board of inquiry (see *House of Assembly Debates* 1978 cols 7115-22; (1978) 32 *Survey of Race Relations in South Africa* 120).

Now the current Minister of Justice has announced that the attorneys-general of the Transvaal and the Eastern Cape would study the record of the new inquiry (*The Natal Witness* 6 March 1985). If it should ultimately

lead to the complete exposure of all the facts surrounding Biko's death, the *Veriava* decision will prove to be a major landmark in the tragic affair.

POSTSCRIPT

While this issue was in the press a disciplinary committee of the Council conducted an enquiry into the complaints against Drs Lang and Tucker. The following account is based upon information contained in contemporary reports by *The Natal Witness, The Natal Mercury,* the SABC and Capital Radio's Independent News.

The committee consisted of five doctors, assisted by the Honourable Mr Justice W G Trollip, a retired judge of appeal who had been appointed as an assessor (in terms of s 42 (5) of the Act), and was chaired by the current President of the Council, Professor Frans Geldenhuys. The hearing lasted four days, from 1 to 4 July, during which evidence was led from Dr Hersch and Brigadier Goosen and argument was heard from the Council's pro forma advocate and the counsel representing the two accused doctors. The committee announced its findings, decision and recommendation on 5 July 1985.

The committee found Dr Lang guilty of improper conduct in that he had issued an incorrect doctor's certificate and misleading bed letter, had failed to examine Biko properly, had failed to enquire into and ascertain the possibilities of a head injury, had failed to obtain a proper medical history of the patient and had failed to observe him and keep proper notes. As punishment Dr Lang, who intends to continue practising for about five years, was cautioned and reprimanded.

Dr Tucker was found guilty of improper conduct and, in addition, of disgraceful conduct. The committee found that he had wrongly failed to object to Biko's transportation by Land Rover to Pretoria and that he should have insisted on transportation by ambulance with proper medical attendants. It was also found that he wrongly failed to require the submission to Pretoria of an accompanying medical certificate and that he had failed to make a proper check before stating that Biko's central nervous system had shown no change between examinations. The committee recommended that Dr Tucker, who, according to his counsel, is due to retire 'within the next year', should be suspended for three months, but that the operation of this penalty be itself suspended for two years on condition that he will not be found guilty by the Council of any contravention during that period. (Because this sentence would involve more than a caution or reprimand, it is still to be confirmed by the Council in October 1985 (see s 11(5)).) Dr Tucker was given until 1 September 1985 to appeal against the recommendations.

The committee found both doctors not guilty of the charge that they had subordinated Biko's interests to those of the security police.

The proceedings of the committee and its findings and recommendations attracted wide publicity and the sentences strong criticism, the latter

being described, for example, as 'pathetically inadequate' (*The Natal Mercury* 6 July 1985) and merely a 'slap on the wrist' (*Newsweek* 15 July 1985). While it is obvious that the doctors who pursued the complaints against Drs Lang and Tucker, and of course the judge who reviewed the decision of the Council and its inquiry committee, have been fully vindicated, it must be left to the reader to judge whether the questions concerning the conduct of the doctors have been satisfactorily resolved, and whether they or the security policemen involved have duly accounted for their actions.

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THE ABDICATION OF RESPONSIBILITY: THE ROLE OF DOCTORS IN THE UITENHAGE UNREST

THE UITENHAGE SHOOTINGS

The recent shootings at Uitenhage have focused attention on the role of the riot police in situations of unrest. A judicial commission of enquiry was appointed to investigate the 'incident', as the government euphemistically described the shootings (see *Government Gazette* 9674 of 22 March 1985), and the report of the commission has been tabled and debated in Parliament (see *Report of the Commission Appointed to Enquire into the Incident Which Occurred on 21 March 1985 at Uitenhage* RP74/1985). The commission was concerned only with the conduct of the police and was unable to investigate the role of the doctors responsible for the treatment of the victims of unrest.

THE ROLE OF DOCTORS

Information emanating from the Eastern Cape indicates that there has been a persistent pattern of behaviour on the part of certain doctors in provincial hospitals charged with the treatment of victims of unrest. The police appear to have operated on the assumption that a person injured by a bullet or by buck-shot is presumed to have been engaged in acts of public violence. Such an injury usually results in automatic arrest and incarceration pending trial.

It has been repeatedly alleged that doctors actively co-operated with the police in pointing out patients who had suffered such injuries and those patients were then arrested and taken to police cells. If these reports are accurate, they raise issues of vital concern to the medical profession from both a legal and an ethical point of view. The relationship between a medical practitioner's legal obligations and his or her ethical obligations