

THE EASTERN CARIBBEAN SUPREME COURT  
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2021/0515

BETWEEN:

MARY GILBERTHA ST. ROSE

Claimant

And

THE MEDICAL AND DENTAL COUNCIL

Defendants

**Appearances:**

Mr. David Moyston of Counsel for the Claimant

Ms. Diana Thomas with Ms. Cleopatra McDonald of Counsel for the Defendant

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2023: January 31;  
February 9;  
August 25.  
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*Judicial review – Disciplinary procedure – Medical practitioner’s registration and practicing certificate suspended by Medical and Dental Council (the ‘Council’) – Decision to suspend made in the absence of medical practitioner – Whether decision of the Council in breach of the principles of natural justice – Whether decision of the Council made in the absence of the medical practitioner contrary to the provisions of sections 106(6) and 111(2) (a) of the Health Practitioners Act, Cap. 11:06 (the ‘Act’)*

*Judicial review – Complaint made against medical practitioner to relevant Council – Complaint made by Chief Medical Officer (‘CMO’) who held the position of ex officio member of the Council – Whether allegation of bias sustainable – Whether complaint made by Council of its own motion – Whether the Council had followed the complaint’s procedure under the Act – Sections 104, 105, 106, 109, 110 and 111 of the Act*

*Judicial review – Whether decision of Council erroneous, unreasonable, irrational and ultra vires the Act – Claimant alleging that conduct complained of insufficient to satisfy requirements of section 105 of the Act*

*Constitutional law – Claimant alleging breach of constitutional right to freedom of expression – Whether decision of Council amounting to an infringement of the Claimant’s right to freedom of expression guaranteed by section 10 of the Constitution*

**JUDGMENT**

- [1] **INNOCENT, J.:** This is a claim for judicial review challenging the decision of the Medical and Dental Council (the 'Council') dated 23<sup>rd</sup> November 2021 with respect to certain disciplinary action taken against the claimant and the subsequent action taken by the Council on 7<sup>th</sup> December 2021 to suspend the claimant's registration as a medical practitioner and her practicing certificate for a period of six months consequent on the Council's decision made on 23<sup>rd</sup> November 2021.

### **The parties**

- [2] The claimant was at the material time a registered medical practitioner in Saint Lucia since 1981 having been registered as such pursuant to the provisions of the Health Practitioner's Act<sup>1</sup> (the 'Act') which repealed and replaced the Medical Registration Act and the Registration of Medical Practitioners Act. The claimant is also an herbalist and registered as an allied health professional with the Allied Health Council established by section 58 of the Act.
- [3] The Council is a body corporate<sup>2</sup> established under section 5 of the Act and has by virtue of section 8 of the Act the following functions, namely: to monitor and assess whether a medical practitioner or dental practitioner complies with the provisions of the Act; to promote high standards in the practice of medicine and dentistry; to ensure that all medical research is conducted according to ethical standards; to investigate complaints made against a medical practitioner or dental practitioner referred to it by the Commission or of its own motion; to develop, publish and monitor a code of ethics with respect to medical practitioners and dental practitioners; to ensure compliance with this Act; and generally to perform any other functions given to it under the Act or any other Act, among other things.
- [4] In the performance of its functions and in the exercise of its powers conferred by the Act, the Council is mandated to act independently, impartially and in the public interest.<sup>3</sup>

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<sup>1</sup> Cap. 11:06 Revised Edition of the Laws of Saint Lucia

<sup>2</sup> Section 5(2) of the Act; section 19 Interpretation Act

<sup>3</sup> Section 10

## **Chronology**

- [5] The events giving rise to the present proceedings arose within the context of the SARS-COVID-19 pandemic. At the material time the health authorities had declared a public health emergency under the Public Health Act.<sup>4</sup>
- [6] During the period immediately preceding the commencement of the disciplinary action against the claimant, there had been several exchanges between the claimant, the Minister of Health and Wellness (the 'Minister') and the Chief Medical Officer ('CMO') regarding the use of the drug Ivermectin as a treatment for SARS-COVID-19 and the claimant advocating the use of the same publicly and prescribing the same to patients for the treatment of the disease.
- [7] On 19<sup>th</sup> February 2021, the Department of Health and Wellness (the 'Ministry') sent out a press release under the heading "Non-approval of Ivermectin for treatment of Covid-19".<sup>5</sup> The press release outlined the recommended use of Ivermectin and that the recommended dosage which could be ingested by humans for this purpose had not yet been evaluated conclusively. The Ministry's press release strongly recommended and discouraged the purchase and use of the drug Ivermectin by the public for the purpose of prevention and treatment of COVID-19.
- [8] By a letter dated 22<sup>nd</sup> February 2021, the claimant wrote to the Minister critiquing the press release and strongly advocating the use of the drug Ivermectin.<sup>6</sup> The Minister responded to the claimant's missive by letter 23<sup>rd</sup> February 2021 reiterating the Ministry's position regarding the use of Ivermectin and its commitment in promoting the health and wellness of the citizenry.<sup>7</sup> The claimant responded to the Minister's letter by letter dated 26<sup>th</sup> February 2021, again advocating her position regarding the use of Ivermectin for the prevention and treatment of COVID-19.<sup>8</sup>

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<sup>4</sup> Cap. 11:01

<sup>5</sup> Exhibit AM1

<sup>6</sup> Exhibit AM2

<sup>7</sup> Exhibit AM4

<sup>8</sup> Exhibit AM5

- [9] It appeared from the evidence that during the relevant period the claimant had sought to import the drug Ivermectin into the country. The claimant would have sought permission from the CMO to have the shipment released from the customs authorities. The claimant was informed by letter dated 7<sup>th</sup> May 2021, of the Ministry's decision not to permit importation of Ivermectin.<sup>9</sup> This letter was signed by the CMO. The claimant then responded by letter to the CMO dated 8<sup>th</sup> May 2021 lamenting the Ministry's refusal to permit the importation of the drug and again reaffirming her position regarding the use of the drug for the prevention and treatment of COVID-19.<sup>10</sup>
- [10] Subsequent to the foregoing written exchanges, the claimant again wrote to the CMO by letter dated 10<sup>th</sup> May 2021 seeking the necessary approval to obtain the release of the shipment of Ivermectin by issuance of the necessary customs clearance on importation.<sup>11</sup> Thereafter, on 18<sup>th</sup> May 2021, the claimant wrote to the Minister seeking the Minister's intervention in securing the release of the imported Ivermectin which was detained by the customs authorities.<sup>12</sup>
- [11] It appeared from the evidence that on 13<sup>th</sup> May 2021, the claimant had written a certain correspondence addressed "To whom it may concern" regarding the prescription of Ivermectin to a patient who shall remain unnamed, for the prevention and treatment of COVID-19. The document read:
- "Re: Observational Clinical Trial of Ivermectin as Treatment and Prevention against the SARS-CoV-2 virus .... This is to certify that .... is currently registered in a clinical trial and study of the effectiveness of Ivermectin against the SARS-Cov-2 virus. Patient started on 13<sup>th</sup> May 2021 and is currently taking a dose of Ivermectin every 7 days. The above subject is therefore exempt from taking the Covid vaccine for the duration of the clinical trial."<sup>13</sup>
- [12] Sometime on or about 19<sup>th</sup> May 2021, the CMO would have discussed her concerns regarding the use of Ivermectin for the prevention and treatment of COVID-19 on a

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<sup>9</sup> Exhibit AM7

<sup>10</sup> Exhibit AM8

<sup>11</sup> Exhibit AM9

<sup>12</sup> Exhibit AM10

<sup>13</sup> Exhibit AM14

televised public broadcast.<sup>14</sup> On 27<sup>th</sup> May 2021, the claimant wrote to the CMO expressing her disappointment with the views expressed by the CMO in the televised broadcast and again reaffirming her position regarding her position regarding the drug.<sup>15</sup>

[13] By letter dated 25<sup>th</sup> August 2021, the CMO wrote to the Chair of the Council under the rubric "Subject: Complaint against Dr. Gilberta St. Rose".<sup>16</sup> It appeared that the CMO's letter was what initiated the disciplinary action taken by the Council against the claimant. In fine, the substance of the complaint made by the CMO was in effect that the claimant was publicly advocating the prescription and use of Ivermectin for the prevention and treatment of COVID-19. The complaint also highlighted the fact that in April 2021 the customs authorities had detained a consignment of Ivermectin imported by the claimant on the instructions of the Drugs Inspector of the Ministry. The CMO also alluded to the provisions of sections 10 and 30 of the Pharmacy Act.

[14] In order to set the context for what follows the CMO's letter of complaint, it will be necessary to set out in large part the contents of the letter of 25<sup>th</sup> August 2021. The CMO wrote:

"The Ministry of Health, Wellness and Elderly Affairs, has the mandate and responsibility to promote health and wellness and ensure a safe environment for the citizens of St. Lucia. We wish to officially bring to your attention the present situation with one of your licensed practitioners.

It was brought to our attention that Dr. Gilberta St. Rose was publicly advocating and prescribing the use of Ivermectin for the prevention and treatment of COVID-19. After receiving correspondence from Dr. St. Rose and conducting review of clinical trials and receiving guidelines from FDA, WHO, PAHO, CARPHA, MERCK correspondence was sent to Dr. St. Rose as far back as February 23, 2021 on the non-approved use of Ivermectin in country for COVID-19...

In relation to present recommendations by all relevant recognised public health agencies Ivermectin is not approved for treatment for Covid-19. The only approved use of Ivermectin is for clinical trials. She has previously indicated that she is conducting clinical trials on 400 citizens in St. Lucia.

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<sup>14</sup> Exhibit AM12

<sup>15</sup> Exhibit AM13

<sup>16</sup> Exhibit AM 17

The Ministry of Health, Wellness and Elderly Affairs wishes to indicate that the Health Practitioners Act which establishes the Medical and Dental Council, with one of the functions according to section 8(g) provides:

“to ensure that all medical research is conducted according to ethical standards,”

To exercise these powers the Council established the Ethics Research Committee which must give approvals to conduct clinical trials. Based on the investigations she has not been given permission to conduct human clinical trials in St. Lucia. The Ministry of Health and Wellness advises that she obtains ethical approval at the soonest to facilitate the safe use of Ivermectin.

Please do not hesitate to contact the undersigned should any further information or clarification be required.

Copies of correspondence is attached.”

It is apparent that it was this letter from the CMO that precipitated the Council’s investigation and the subsequent complaint against the claimant.

### **The complaint**

- [15] The complaint against the claimant was dated 24<sup>th</sup> September 2021<sup>17</sup> and was purportedly brought by the Council pursuant to its powers under section 104(2) of the Act of its own motion and related to the following alleged conduct on the part of the claimant, namely:

“Between February 8, 2021 and August 30, 2021 and continuing did commit acts of professional misconduct, to wit, by performing your duties as a medical practitioner in a negligent and incompetent manner by:

- (1) prescribing and supplying Ivermectin to your patients for Covid-19 in the absence of authorization for such use by the Ministry of Health or the Chief Medical Officer;
- (2) contrary to the express advice of the Chief Medical Officer publicly encouraging the use of Ivermectin as a treatment for Covid-19;
- (3) conducting an “Observational Clinical Trial of Ivermectin against the SARS-Cov-2 virus” without the approval and/or monitoring of any local entity or organisation authorised to oversee such clinical trials in the interest of public health and safety.”

### **Procedure on Complaint**

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<sup>17</sup> Exhibit AM18

- [16] The complaint was served on the claimant on 24<sup>th</sup> September 2021. By an affidavit sworn on 5<sup>th</sup> October 2021,<sup>18</sup> the claimant sought an extension of time to make a proper response to the complaint. In the same affidavit she lamented that she had not received any documentary evidence or any affidavit disclosing any evidence grounding any of the allegations made against her in the complaint; which in her view, was in contravention of section 106(6) of the Act and therefore, procedurally unfair. The claimant also asserted that by not disclosing such evidence she was being denied an opportunity to properly conduct her defence.
- [17] The documentary evidence requested by the claimant was served on her on 8<sup>th</sup> October 2021. By letter dated 8<sup>th</sup> October 2021, the Council responded to the claimant's concerns and informed that the hearing would be rescheduled to 27<sup>th</sup> October 2021. The Council, by the same letter, also informed the claimant that whereas the CMO had provided an evidentiary basis for the complaint, the CMO was not the complainant in the proceedings and that the complaint was brought by the Council of its own motion. The Council's letter also stated that notwithstanding the Council's decision to initiate the complaint of its own motion, the CMO had agreed to recuse herself from the proceedings.<sup>19</sup>
- [18] On 11<sup>th</sup> October 2021, the claimant applied to the Research Ethics Committee of the Saint Lucia Medical and Dental Council ('SLMDC') seeking their approval of her application to conduct randomised controlled trial of the use of Ivermectin.<sup>20</sup>

### **The hearing**

- [19] The hearing of the complaint was duly convened on 27<sup>th</sup> October 2021. The claimant was represented at the hearing by an attorney-at-law. The court was provided with a transcript of the proceedings at the hearing of the complaint.<sup>21</sup> There appears from

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<sup>18</sup> Exhibit AM22

<sup>19</sup> Exhibit AM23

<sup>20</sup> Exhibit AM15

<sup>21</sup> Exhibit AM29

the transcript some degree of commonality between some of the issues raised at the hearing and certain of the issues raised in the present proceedings. For this reason the court will at times refer to certain portions of the transcript in resolving some of the issues raised by the claimant presently.

### **The Council's decision**

- [20] The Council rendered its decision in writing on 23<sup>rd</sup> November 2021.<sup>22</sup> The decision was served on the claimant on 24<sup>th</sup> November 2021. Ultimately, the Council found that the claimant had a case to answer in respect of all three allegations contained in the complaint. The claimant was invited to make submissions to the Council on the possible actions that should be taken pursuant to the provisions of section 109(9) of the Act at a hearing to be convened on 30<sup>th</sup> November 2021.

### **Events subsequent to Council's decision**

- [21] On 27<sup>th</sup> November 2021, the claimant wrote to the Council acknowledging receipt of the Council's decision and requested that her legal representative be present at the hearing. However, she indicated that her legal representative would be unavailable on the scheduled date and requested that the hearing be rescheduled to 11<sup>th</sup> January 2022.<sup>23</sup>
- [22] The Council replied by letter dated 29<sup>th</sup> November 2021 inviting the claimant to have her legal representative submit written submissions to the Council in lieu of his physical appearance at the hearing. This apparently, according to the Council, was to avoid further delay and with a view to bringing closure to the matter. The claimant was also informed that the hearing would be rescheduled to 2<sup>nd</sup> December 2021 in order to provide her adequate time to prepare for the hearing by providing written submissions.<sup>24</sup>

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<sup>22</sup> Exhibit AM31

<sup>23</sup> Exhibit AM33

<sup>24</sup> Exhibit AM34

[23] The claimant's legal representative wrote to the Council by letter dated 1<sup>st</sup> December 2021, requesting further time for preparation of his submissions and that in view of the nature of the submissions which he intended to lay before the Council at the hearing, it was preferable that his representations were made orally and in person. By the same correspondence he indicated his unavailability on the date fixed for the hearing and requested that the hearing be rescheduled for 11<sup>th</sup> January 2022.<sup>25</sup>

[24] The Council responded to the claimant's legal representative by letter dated 2<sup>nd</sup> December 2021<sup>26</sup> in the following terms:

"In light of Dr. St. Rose's admissions at the first hearing and her statements in the local media subsequent to having been served with the Council's decision document on her, that she will continue to engage in the very behaviour that was the subject of the complaint, the Council is of the view that an adjournment of the second hearing, scheduled for today Thursday December 2, 2021 is not in the interest of the public.

Accordingly, if Dr. St. Rose elects not to attend, the Hearing will proceed in her absence ..."

#### **Action taken by the Council**

[25] By a written decision dated 7<sup>th</sup> December 2021,<sup>27</sup> the Council resolved to take the following action purportedly pursuant to section 109(9) of the Act. With respect to the complaint regarding alleged unapproved and unmonitored clinical trial, a fine of \$10,000.00 was imposed to be paid in 30 days upon receipt of the notice. On the complaint of prescribing and supplying Ivermectin to her patients as a treatment for COVID-19 in the absence of authorisation for use by the Ministry or the CMO, the Council suspended the claimant's registration and practicing certificate for a period of 6 months commencing from the date of the receipt of the notice with the provision that the claimant was at liberty to make a written application at any time before the end of the 6 month period for the review of her suspension upon receipt of by the Council of satisfactory proof that she had ceased and gave an undertaking to the

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<sup>25</sup> Exhibit AM35

<sup>26</sup> Exhibit AM36

<sup>27</sup> Exhibit AM37

Council in writing to desist from prescribing and supplying Ivermectin as a treatment for COVID-19. The foregoing action also applied in respect of the complaint related to publicly encouraging the use of Ivermectin as a treatment for COVID-19. The terms of the suspension were to run concurrently. By the same document the claimant was advised of her right of appeal to the Appeals Board established by section 113 of the Act.

- [26] It appears that the Council deliberated and rendered its decision on 2<sup>nd</sup> December 2021 without any representations being made by the claimant or her legal representative and in their absence.

### **The claim for judicial review**

- [27] In the substantive claim for judicial review, the claimant sought ostensibly the following orders, declarations and relief, namely: (1) an order of certiorari quashing the Council's decision dated 24<sup>th</sup> November 2021; (2) a declaration that the Council's decision to sanction the claimant's public advocacy of the use of Ivermectin for the prevention and treatment of COVID-19 contravened her fundamental right to freedom of expression guaranteed by section 10 of the Constitution; (3) a declaration that the Council's decision was illegal, irrational and in breach of the principles of natural justice; (4) that the Council's decision was ultra vires the provisions of section 106(6) of the Act; (5) an order of mandamus directed to the Council ordering them to reinstate the claimant's registration and practicing certificate; and (6) damages for loss of income from 3<sup>rd</sup> December 2021 to 18<sup>th</sup> February 2022.

### **Discussion**

- [28] There appeared to be no factual dispute between the parties regarding the claimant's prescribing the drug Ivermectin for the prevention and treatment of COVID-19. In fact, this appeared to be the case purely by the claimant's own admission. The claimant conceded that she commenced prescribing the "off-label"

use of Ivermectin for the prevention and treatment of COVID-19 in January 2021.<sup>28</sup> However, the claimant denied that she engaged in clinical trials of Ivermectin as treatment for COVID-19.<sup>29</sup> In the course of the substantive proceedings there appeared to be disagreement with respect to what amounted to a clinical trial.

[29] That having been said, before proceeding to summarise the case of the respective parties, it is necessary that the court states from the very outset that the process of judicial review is not concerned with the decision arrived at by the relevant authority so that the court cannot substitute its own decision or findings for that of the authority. On the contrary the court's power of judicial review is confined to reviewing the manner in which the decision was arrived at.

[30] The distinction between the court's appellate jurisdiction and judicial review was highlighted in the case of **Reid v Secretary of State for Scotland**<sup>30</sup> where Lord Clyde delivering the judgment of the court said:

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency as, for example, through the absence of evidence, or of sufficient evidence to support it, or through account being taken of an irrelevant matter, or through failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

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<sup>28</sup> affidavit 4<sup>th</sup> March 2022 at para 5

<sup>29</sup> *Infra* at para 13

<sup>30</sup> [1992] 2 AC 512

- [31] This afore-cited passage in **Reid v Secretary of State** succinctly sets out the difficulty which the court is placed in the current instance. It appears that the present claim has the semblance of grounding a claim both pursuant to the appellate process and by way of judicial review. The difficulty, however, lies in the fact that the claimant in the present case is primarily seeking to have the court review findings of fact and errors of law made by the Council.
- [32] Although not raised by any of the parties in the present proceedings or at the leave stage, the Act itself by virtue of section 111(2)(c)(ii) gives the claimant a right of appeal to the Appeals Board established by section 113(1) of the Act. A health practitioner aggrieved by a decision of the Council may appeal to the Appeals Board on grounds that the suspension or revocation of a person's practicing certificate or licence<sup>31</sup> or a decision of the relevant Council under section 109.<sup>32</sup>
- [33] The Act does not confer on a health practitioner any automatic right of appeal to the High Court from a decision of the Council. In the court's view, the health practitioner is obliged to follow the procedure set out in the Act unless there is some compelling reason for following some other procedure such as judicial review. A health practitioner cannot, by merely inserting a claim for redress under the Constitution, seek to invoke the supervisory jurisdiction of the court by mounting an administrative claim. This is not to say that a health practitioner after having exhausted the appellate process under the Act cannot avail themselves of the procedure related to appeals and review by the High Court.
- [34] The Appeals Board is empowered by section 114 of the Act to confirm the decision of the relevant Council; set aside the decision of the relevant Council; or set aside the decision of the relevant Council and substitute any other decision that the relevant Council has jurisdiction to take as the Appeals Board specifies.
- [35] In the present case, the claimant at times sought to invoke the court's appellate jurisdiction and not its supervisory jurisdiction. The court is of the view, for reasons

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<sup>31</sup> Section 113(3)(e)

<sup>32</sup> Section 113(3)(g)

already stated that it can exercise no appellate jurisdiction in the present case. Therefore, the court was not entitled to substitute its own decision for that of the Council.

[36] Therefore, this court not exercising any appellate jurisdiction cannot decide whether the sanction imposed was appropriate, proportionate and necessary in the public interest or was excessive and disproportionate and, in the latter event, the court exercising a supervisory jurisdiction cannot substitute some other penalty or remit the case to the tribunal for reconsideration.

[37] Therefore, in the present case, the court is restrained from conducting any analysis of whether the sanctions imposed by the Council were appropriate and necessary in the public interest or whether the sanctions were excessive and disproportionate. It would be impermissible for this court to embark on any analysis of the assessment of the Council, so that it was necessary for the court itself to determine whether the sanction imposed on the claimant was wrong. In the circumstances, the court makes no determination as to whether the sanction imposed by the Council had been both necessary and appropriate for the protection of the public and to ensure public confidence in the medical profession.

[38] Therefore, for the foregoing reasons, the court will refrain from interrogating any of the matters raised by the claimant with respect to any specific finding made by the Council with respect to professional misconduct, or whether the sanctions imposed by the Council were unreasonable, excessive or disproportionate. The court cannot engage in any rehearing of these matters.

[39] By the same token, the court is not prepared to consider any of the issues raised by the claimant with respect to whether or not the claimant had engaged in clinical trials. This is clearly not within the province of the court but rather that of the Appeals Board or a court exercising an appellate jurisdiction.

[40] The court is not qualified in this instance to question the findings of a body of experts on these points. The court confesses that it simply does not have the expertise to

do so in the present proceedings; and clearly, these issues fall to be resolved within the field of expert medical and scientific knowledge.

[41] In this instance, the court is purely concerned with matters pertaining to the procedural irregularities in the course of the proceedings before the Council of which the claimant complained. The foregoing involve questions of law, upon which, for obvious reasons, the Appeals Board is disqualified from making any decision.

[42] In the court's view, the following issues are dispositive of the present claim for judicial review, namely: (1) whether the Council failed to adhere to the rules of procedural fairness under section 106(6) of the Act; (2) whether the claimant was denied an opportunity to be heard before the Council imposed sanctions on the claimant; (3) whether the Council had jurisdiction to hear the complaint; and (4) whether the sanction imposed on the claimant was an infringement of her constitutional right to freedom of expression guaranteed under section 9 of the Constitution.

### **Procedural fairness**

[43] The claimant's assertion that the Council failed to adhere to the principles of procedural fairness in the conduct of the proceedings arises in several respects.

[44] It appears from the claimant's pleaded case that she adopted the posture that the proceedings before the Council was tainted for at least two reasons. Firstly, that the CMO who was an ex officio member of the Council, was the same person who had initiated the complaint even though the Council insisted that the complaint was brought of the Council's own motion. The court understood the claimant's argument to be that even though the CMO had recused herself from the proceedings only a few days prior to the proceedings, there existed the likelihood that she would have discussed the matter of the complaint with members of the Council prior to hearing and the Council's deliberations.

[45] The suggestion appeared to be that the CMO may have used her position as CMO and ex officio member of the Council to influence in one way or the other the

Council's decision to proceed with the complaint or their decision. In addition, the claimant asserted that the CMO, testified in the present proceedings that she was indeed the person who had made the complaint to the Council in respect of her use of Ivermectin for the prevention and treatment of COVID-19.

- [46] Secondly, in relation to the question of the sanctity and fairness of the proceedings before the Council, the claimant complained that the legal practitioner who undertook the robust cross-examination of her at the hearing also sat as a member of the Council who adjudicated on the matter.<sup>33</sup> In short, the claimant's argument was that the legal practitioner's conduct during the proceedings created a reasonable suspicion of improper influence on the Council and accordingly the decision arrived at by the Council should be set aside.
- [47] It appeared, that on the foregoing bases, the claimant was asserting that the Council had failed to show demonstrably that it had complied with the requirements of section 106(6) of the Act.<sup>34</sup>
- [48] Although only subtly and not expressly articulated, it appears that the claimant's complaint also interrogated the provisions of section 106(1), 106(2) and 106(3) of the Act. On the facts raised by the claimant it appeared to the court that the claimant was relying on the argument that the procedure set out in the foregoing provisions of the Act had not been complied with; and therefore, this procedural irregularity had the result of rendering the entire proceedings a nullity.
- [49] With respect to the first limb of the claimant's argument, the Council responded by submitting that the Council's investigation into the alleged conduct was indeed prompted by the CMO's letter of 25<sup>th</sup> August 2021; and that this investigation was initiated by the Council of its own motion. At a meeting of the Board of the Council, convened on 30<sup>th</sup> August 2021, it was resolved that the matter would be investigated. The investigation ensued during the month of September 2021.<sup>35</sup> The

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<sup>33</sup> Claimant's affidavit at paras 15-18

<sup>34</sup> *infra* at para 19

<sup>35</sup> At paras 37-39 affidavit of Dr. Andre Matthew

Council also claimed that the foregoing action was in keeping with the Council's supervisory role with respect to the adherence by health practitioners of the ethical and professional standards that ought to guide health practitioners.

- [50] Section 106(1) of the Act sets out the procedure for making complaints and requires that the complaints shall be lodged with the Commission. Section 106(3) of the Act provides that on receiving or initiating a complaint, the Commission shall deal with the complaint in accordance with the Health Services Complaints and Conciliation Act and may in accordance with that Act refer the matter to the relevant Council for determination. Section 106(4) of the Act provides that on receiving a complaint under subsection (1) or on initiating a complaint of its own motion the relevant Council shall record the date on which the complaint was received or initiated; and within 30 days of receipt or initiation of the complaint, determine whether to accept or reject the complaint.
- [51] Therefore, in the court's view, section 106 of the Act envisages two different kinds of complaints. In the first instance, complaints made to the Health Services (Complaints and Conciliation) Commission established under section 3 of the Health Services (Complaints and Conciliation) Act<sup>36</sup> are dealt with by that Commission in accordance with that specific legislation or refer the matter to the Council. The other instance, is that which is contemplated by section 106(4) of the Act whereby the Council may act on a referral from the Commission or otherwise initiate a complaint of its own motion.
- [52] In the present case, the claimant alleged that the complaint was not initiated by the Council of its own motion but was made by the CMO. In the court's view, this dichotomy is artificial and irrelevant. The simple point is that the Council having received a complaint from the CMO exercised the power that it had under section 106(4) (b) of the Act by making a determination to accept the complaint. Therefore, it can be properly said, when taken within the context of section 106(4) (b) that the complaint was initiated by the Council of its own motion.

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<sup>36</sup> Cap.11.19

- [53] Now the court finds the claimant's assertions attributing unfairness and procedural irregularity to the proceedings on the basis of conflict of interest or apparent bias on the part of the CMO quite perplexing to say the least.
- [54] It appears from the record that by letter dated 26<sup>th</sup> October 2021<sup>37</sup>, the Council wrote to both the claimant and her attorney-at-law acknowledging receipt of the claimant's letter of 18<sup>th</sup> October 2021 wherein she sought the recusal of the CMO from sitting as a member of the Council at the hearing of the complaint. Paragraph 5) of the letter read:
- “Notwithstanding Council's decision to initiate Complaint No: 03-2021 of its own motion, Chief Medical Officer Dr. Sharon Belmar-George has agreed to recuse herself from the Hearing.”
- [55] The court also makes the observation that at the hearing, the claimant and the claimant's legal representative would have lamented the fact that the CMO who had initially written a letter of complaint to the Council was not called to testify at the hearing. In fact, the CMO was not present at the hearing; and it was at the insistence of the claimant and her attorney-at-law that the CMO was summoned to appear and testified at the hearing.
- [56] In court's view, the posture adopted by the attorney-at-law appearing for the claimant at the hearing as appears from the transcript of the proceedings, was that the proceedings ought to have been conducted in an adversarial rather an inquisitorial manner.
- [57] The court accepts that the decision of the Council ought to be its own independent decision uninfluenced by any other person or authority. Therefore, the question for the court is whether the conduct of the attorney-at-law had any significance or bearing upon the ultimate decision of the Council.
- [58] Indeed, the attorney-at-law who was present at the hearing cross-examined the claimant and examined the CMO after which the CMO was cross-examined by the

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<sup>37</sup> Exhibit AM28

claimant's attorney-at-law. However, it does not appear anywhere on the record of the proceedings before the court or by virtue of anything of evidential value, save the claimant's own speculation, that the attorney-at-law who appeared in the proceedings actively engaged in the decision making process in such a way as to influence the ultimate decision of the Council.

[59] The claimant also appeared to be raising the question of apparent bias on the part of the attorney-at-law on the basis that being a member of the Council he had also played a significant part in the inquiry.

[60] In answering this question the court has asked itself whether the same could have been said assuming that the inquiry was conducted by the Chairman of the Council or some other member of the Council who at the conclusion of the hearing adjudicated thereon and was part of the decision making process? The court fails to see how the question of apparent bias arises when examined in this context.

[61] The inquiry, in the court's view could have been conducted by any or all of the members of the Council who were free to put questions to the claimant. The mere fact that this duty was delegated to one member of the Council who happened to be also an attorney-at-law is insufficient to raise in the court's view, the likelihood that a fair minded and informed observer having considered the facts would consider there existed a real possibility that the Council was biased or that a fair minded and informed observer having considered the facts would consider there was a real possibility that the attorney-at-law had improperly influenced the decision of the Council. After all he was a member of the Council.

[62] A somewhat similar issue arose in the case of **Emmanuel Dibua Nwabueze v General Medical Council**<sup>38</sup> where on a charge of professional misconduct the doctor was asked questions by a lay member of the Committee, who had undisclosed local connections from where the doctor had worked as a trainee. The Privy Council held that there was no foundation for the allegation of the danger or

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<sup>38</sup> [2000] 1 WLR 1760 (PC)

possibility of bias on her part; that nothing in the manner of her questioning the doctor or the subject matter of her questions, would suggest to a reasonable observer that it was possible that she was biased against the doctor; and accordingly she had properly sat on the inquiry.

[63] The court has carefully scrutinised the transcript of proceedings in the present case and has made the following assessment of the questions put to the claimant by the attorney-at-law who also sat on the Council during the inquiry. The court found that the questions put to the claimant were well within the bounds of legitimate questioning by a member of the Council on matters which were relevant to the case. The court has formed the view that there was nothing in any of the questions that gave rise to a bias against the claimant.

[64] The respondent is an independent statutory body. In the exercise of its powers it is a quasi-judicial body, constrained to act fairly in the discharge of its responsibilities, which is the registration, licensing and discipline of members of the medical profession. Though its members are appointed by the Minister of Health, it is not an extension of the executive and performs a quasi-judicial function which must be fairly discharged notwithstanding that it had a wide discretion as to procedure.

[65] The Act does not stipulate the procedure that the Council must follow in conducting a disciplinary hearing of this nature. However, it appeared from the record of the proceedings that the complaint served on the claimant set out in detail the particulars of the complaint accompanied by the documents which formed the basis of the complaint.

[66] It cannot be said that to achieve fairness in disciplinary proceedings of this nature that the Council ought to be held to the high standard that would obtain in a criminal trial. What is required, however, is that substantial elements of justice must be found to have been present at the hearing. The accused party must have notice of the particulars of the complaint so that they knew and understood the case that they had to meet; and they must be given an opportunity to be heard.

- [67] Therefore, the question in the present case is whether the procedure adopted by the Council was a bona fide exercise of the wide discretion as to procedure which it possessed; and that it complied sufficiently with the requirements of natural justice. In the present case, the court answers this question in the affirmative. It is not sufficient to say that some other procedure which the Council could have or failed to adopt would have been fairer. The claimant must show demonstrably that the procedure followed was indeed unfair.<sup>39</sup>
- [68] By virtue of the Council's letter of 26<sup>th</sup> October 2021 it appears that the Council had received written submissions from the claimant's attorney-at-law dated 25<sup>th</sup> October 2021 and legal submissions from him on 9<sup>th</sup> October 2021. This letter also specifically set out the procedure to be followed at the hearing.
- [69] The transcript of the proceedings shows that the chairman of the Council presented the evidence that the Council relied on in support of the complaint. The claimant presented her case with the assistance of her legal representative. The claimant's legal representative was then permitted to make closing submissions. It was at this juncture that the claimant's legal representative sought to have the CMO called to testify at the hearing so that she could be cross-examined by him. The CMO appeared at the hearing and was cross-examined. The chairman of the Council then gave a summary of the evidence lead at the hearing. Both the claimant and her legal representative were permitted to address the Council.
- [70] With respect to the claimant's assertions and complaint regarding the nondisclosure of evidential material from the World Health Organisation ('WHO') and the Pan-American Health Organisation ('PAHO') regarding the use of Ivermectin for the prevention and treatment of COVID-19, the court has formed the view, that these evidential pieces of documentation have no bearing on the question of whether the proceedings were conducted fairly. On the contrary, they may very well be relevant to the merits of the Council's decision upon which the court declines to make any finding. Therefore, in the court's view, the failure of the Council to disclose these

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<sup>39</sup> Leeson v General Council of Medical Education [1889] 43 Ch. R 366 at 383

documents, if indeed that were the case, does not interrogate the fairness of the proceedings.

- [71] In the premises, the court does not accept the claimant's contentions that the proceedings were conducted unfairly; and accordingly, the claimant does not succeed on this ground.

### **Jurisdiction**

- [72] The jurisdictional argument advanced by the claimant arose in the following respects. The claimant asserted that she was not obliged to follow what was essentially the opinion of the CMO and the Minister with respect to the use of Ivermectin for the prevention and treatment of COVID-19. The claimant did not consider the press release issued by the Ministry as amounting to any policy directive by which she as a private health practitioner was bound. To that extent, she argued that she had committed no contravention of any directive that warranted any complaint being made by the CMO and therefore, the Council had no jurisdiction to have initiated any complaint at the CMO's behest.
- [73] The claimant also took the position that in any event, if any such directive or policy existed, it pertained only to public health practitioners operating the public health care system and not to private health practitioners.
- [74] Distilled to its very essence, the claimant's argument appeared to be that there was no evidence of any alleged wrong doing contained in the complaint made by the CMO or alternatively that which could have triggered the Council's jurisdiction under section 106(4) (b) to initiate the complaint. In this way, the claimant seemed to be suggesting that it was the Council which took it upon itself to interpret the CMO's letter of 25<sup>th</sup> August 2021 as a complaint against her. Therefore, if the court understands the claimants point correctly, in the absence of a complaint from the CMO, the Council went beyond the jurisdiction given to it by the Act by initiating the complaint and adjudicating upon it.

- [75] The Council's arguments in respect of the first limb of the claimant's contentions on the question of jurisdiction were premised on the respective roles that the Minister, the CMO and health practitioners generally, played during the COVID-19 pandemic as part of the national effort to control the spread of the virus within the public healthcare system.
- [76] In respect of the first limb of the claimant's argument on jurisdiction, the Council contended that the office of CMO is accepted by medical professionals as the authority for establishing protocols for the diagnosis, treatment and suppression of communicable and infectious diseases. This they claimed is fortified by the provisions of the Public Health Act<sup>40</sup> which confers certain functions and powers on the CMO.
- [77] According to the Council, the provisions of the Public (Communicable and Notifiable Diseases) (Amendment) Regulations<sup>41</sup> made pursuant to sections 9 and 25 of the Public Health Act amended Schedules 1 and 2 of the Public Health Regulations by including COVID-19 as a communicable and notifiable disease. The Council argued that in these circumstances the claimant had a duty by virtue of section 4 of the Public Health Regulations to give notice to the CMO upon having a reasonable belief that any patient who attended her practice was infected with COVID-19. Therefore, the claimant was mandated to follow the protocols and guidelines set out under the Public Health Act and not purport to treat patients in the manner that she did or ignore the provisions of the Public Health Act and the regulations made thereunder. In other words, the claimant was bound by the provisions of the Public Health Act.
- [78] The claimant's assertions do not support the proposition that the Council in this case exceeded its jurisdiction if it embarked on an enquiry in the absence of a complaint from the CMO. What in fact can be stated as a correct proposition is that if there was no evidence to say that the claimant had been guilty of misconduct in a professional respect the Council would have exceeded its jurisdiction in entertaining

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<sup>40</sup> Cap. 11.01

<sup>41</sup> S.I. No 19 of 2020; 24<sup>th</sup> February 2020

the case and proceeding to adjudicate upon it. In this instance, the Council having found that there was merit in the allegation of professional misconduct on the part of the claimant was entitled to initiate a complaint and adjudicate on it. This is not the same thing as saying there had to be a complaint from a medical practitioner. In any event, the jurisdiction of the Council is not dependent on a complaint made to it by a medical practitioner.

[79] In the court's view, the purpose and intent of section 106(4) was to enable the Council to initiate an enquiry for the purpose of determining whether a member has been guilty of misconduct, and for that purpose to make the allegation of misconduct itself giving the requisite particulars to the member concerned.<sup>42</sup>

[80] The Council itself may therefore make the allegation and its jurisdiction to initiate an enquiry is not dependent on a complaint made to it. In any event however, it seems to me that the claimant's submission is misconceived for the other simple reason that there was a complaint by the CMO directed at the claimant, which in any event, the CMO was entitled to make and which was within the purview of the Council to determine whether it would reject or accept the complaint and thereafter initiate a complaint of its own motion.

[81] Therefore, the court finds no merit in the claimant's argument that there being evidence of any alleged wrong doing contained in the complaint made by the CMO, that the Council had no jurisdiction to hear the complaint.

[82] The abovementioned reasoning is supported by the scheme of the legislation itself. Section 4 of the Public Health Act provides:

"The Minister shall be responsible for the administration of the provisions of this Act and without limiting the generality of the foregoing his or her functions shall include—

(a) the prevention, treatment, limitation and suppression of a disease or a public health hazard, including the conduct of an investigation and inquiry to determine whether there is a risk to human health;

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<sup>42</sup> Medical Board of Trinidad and Tobago v des Vignes (2000) 60 WIR 375, 380

(b) the publishing of reports, information and advice concerning public health, including advice to the government and the education of the public in the preservation of health;”

[83] Section 8(1) of the Public Health Act provides:

“Except as the Minister may otherwise direct the Chief Medical Officer shall discharge the functions conferred on the Minister under this Act and every medical officer of health, public health nurse, environmental health officer or other public officer shall discharge functions under this Act as directed by the Minister or the Chief Medical Officer and in so doing shall be deemed to be acting under the authority of this Act.”

[84] Section 4(1) of the Public Health (Communicable and Notifiable Diseases) Regulations made pursuant to section 9 of the Public Health Act mandates that every medical practitioner who has reason to believe that any person professionally attended by him or her is suffering from a notifiable disease shall forthwith give notice in the prescribed form to the medical officer of health which according to the dictionary to the enactment means a person duly appointed or authorised to act as a medical officer of health under the enactment and includes the Chief Medical Officer.

[85] The powers of the Public Health Board in respect of communicable diseases is provided for in section 9 of the Public Health Act. The Public Health Board with the advice of the Chief Medical Officer or medical officer of health possessed the power to establish suitable places as isolation stations or hospitals or convalescent home; and to provide treatment and medical facilities for persons suffering from communicable disease, or contacts or carriers.

[86] Coronaviruses-Severe Acute Respiratory Syndrome (SARS CoV) was listed as a communicable disease in Schedule 1 of the Regulations at the material time and Coronaviruses – Severe Acute Respiratory Syndrome (SARS CoV) was listed as a notifiable disease in Schedule 2 of the Regulations at the material time.

[87] Therefore, the claimant’s argument that she was not mandated to act under any direction of the Minister and more particularly the CMO is defeated by the very scheme of the Public Health Act.

### **Irrationality**

- [88] The court will deal with the question of irrationality raised by the claimant with respect to the decision arrived at by the Council quite briefly in light of the conclusions already arrived at by the court in these proceedings. The court does not find that it warrants any extensive treatment particularly in light of the court's discussion regarding its role on a claim for judicial review.
- [89] The test for irrationality has been aptly described by the Court of Appeal in **Cove Hotels (Antigua) Limited v The Hon. Gaston Browne Prime Minister of Antigua and Barbuda and others**<sup>43</sup> where the Court held that the decision of a public body is irrational where it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided, could have arrived at it.<sup>44</sup>
- [90] In the present case, the court is not in a position to say that the Council's decision was irrational; particularly in light of the observations that the court would have made regarding the hearing. Additionally, the court cannot presume to know the nuances, intricacies and exigencies of the medical profession and the ethical considerations that guide it. Such a determination is best left to an appellate body such as the Appeals Board. To hold otherwise would be tantamount to the court usurping the functions of the Council.
- [91] Therefore, the court is in no position to set aside the Council's decision on the ground of irrationality. To do so would be a perverse exercise of the court's supervisory jurisdiction. In any event, the court does not think that the complaints made by the claimant have reached the threshold test for irrationality given what has been canvassed in the present proceedings. Accordingly, the claimant is not entitled to succeed on this ground.

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<sup>43</sup> [2019] ECSCJ No. 348

<sup>44</sup> Per Webster JA at para [52]

### **Opportunity to be heard**

- [92] The claimant also complained, that the Council, had by their conduct, in not granting her request for an adjournment of the mitigation hearing scheduled for 2<sup>nd</sup> December 2021 denied her an opportunity to be heard and accordingly was in breach of the principles of natural justice.<sup>45</sup>
- [93] The court understood the claimant's argument to be that due warning should have been given to her of any impending adverse decision, notice of the matters to be considered in making the decision, and an adequate opportunity to make representations prior to such a decision being taken.
- [94] In addition, it also appeared that the claimant alluded to the Council's decision not to defer the mitigation hearing had been made arbitrarily and capriciously and, in not affording the appellant a right to be heard, the Council had acted unfairly and unlawfully.
- [95] In response to the claimant's contention that she had been treated unfairly, in so far as she was deprived of her right to be heard at the mitigation hearing which resulted in the Council's failure to observe the principles of natural justice, the Council took the position that the decision to proceed with the mitigation hearing in the claimant's absence was in fulfillment of the Council's mandate under the Act.
- [96] In fine, the Council took the view that it had legitimate reasons for arriving at the decision which it did to deny the claimant an adjournment. These legitimate reasons are canvassed in the affidavit of the Council's chairman.<sup>46</sup> It appeared that the Council took into account certain public pronouncements attributed to the claimant on 16<sup>th</sup> November 2021, after the conclusion of the disciplinary hearing and the delivery of the Council's decision.
- [97] According to the Council, this showed utter disregard for the proceedings and the Council's decision. In the premises, the Council took the view that if the mitigation

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<sup>45</sup> *infra* at paras 21-25

<sup>46</sup> At paras 53-54

hearing was further postponed there existed the likelihood of the existence of the risk that the claimant would continue to engage in the offending conduct which had the very nature of the complaint adjudicated upon by the Council.

- [98] The Council also sought justification for its decision not to adjourn the hearing on the basis of what they described as the claimant's public pronouncements being emblematic of her defiance to the decision already arrived at by the Council. In the premises, the Council claimed to have apprehended the likelihood of harm to the public bearing in mind that the claimant was still a registered medical practitioner with a practicing certificate; and for that reason it was more than likely that the public would still repose their trust and confidence in her in respect of the use of Ivermectin for the prevention and treatment of COVID-19.<sup>47</sup>
- [99] The Council maintained that its decision not to further delay the mitigation hearing was premised entirely on the need to act expeditiously to avert what they perceived to be likely harm to human health and life. The Council insisted that its refusal was for the purpose of protecting the public.
- [100] In addition, the Council contended that the claimant had been given an opportunity to be heard of which she failed to avail herself. To this extent the Council's posture was that their letter of 2<sup>nd</sup> December 2021 duly informed the claimant that should she fail to appear at the hearing fixed for the same date the Council would proceed in her absence.
- [101] It appeared from the evidence before the court, that although the Council had given the claimant notice of its decision at the disciplinary hearing, it did not give the claimant any warning of the sanctions that it was minded to impose so that she could make representations to the Council which would have afforded her an opportunity to influence the Council in respect of what sanction to impose.

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<sup>47</sup> At para 55

- [102] At first, the court was loath to criticise the Council's decision to refuse an adjournment. In the court's initial view, the timing of the request for an adjournment by the claimant's attorney-at-law at the twelfth hour fell far short of what was required to support an application at that stage of the proceedings. Clearly, in the court's view, the decision was one for the Council, and for the reasons which they expressed, they were fully entitled to arrive at the decision which they did.
- [103] Notwithstanding the court's initial approach, in the court's view, there are other considerations of which the court must be mindful before it can arrive at a definitive position on this issue.
- [104] In the court's view, the correct approach would have been for the Council to have borne in mind the nature of the profession or office held or status enjoyed by the claimant; together with the gravity of the allegation; and the circumstances in which the Council, being the deciding party, was entitled to intervene; and when the latter's right to intervene is proved, the sanctions it can impose. It was only on a consideration of all of those matters that the application of the principle '*audi alteram partem*' can properly be determined.<sup>48</sup>
- [105] It appears to the court, that whether the claimant's case was formulated as a case of natural justice, or fairness, or the right to a fair hearing under section 8 of the Constitution, given the status of claimant as a medical doctor, and the serious consequences of the Council's decision to the claimant, namely the possibility of ruin to her professional career, there was an obligation to hold a hearing, whether to give the claimant an opportunity to influence the Council, or for securing a fair process.
- [106] In the court's view, the obligations imposed by fairness relative to the right to be heard depends on the circumstances, however, in proceedings such as this, that at least due warning should be given of any impending adverse decision, notice of the matters to be considered in making the decision, and an adequate opportunity to

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<sup>48</sup> Shanmugavel v Bahamas Medical Council 80 WIR 11 at [56]

make representations prior to such a decision being taken, are the basics that ought to have been afforded to the claimant.<sup>49</sup>

[107] The court is fortified in its view upon an examination of the provisions of section 109 (2) of the Act which provides that if the relevant Council decides to suspend or revoke the practicing certificate or the licence of a health practitioner, it shall except in the case of subsection (1) (c), where only notice of such suspension under paragraph (c) is required give the health practitioner an opportunity to be heard.

[108] A disciplinary and supervisory body such as the Council, in exercising its discretion, ought to give consideration to the nature of the charge and the gravity of the consequences if the charge is proved. Assuming that the Council did in fact have a discretion then, if the Council failed to exercise a discretion which it had, then this would amount to a breach of the principles of natural justice. In exercising its discretion a disciplinary tribunal such as the Council in this instance, ought to take into account the need to ensure that a party appearing before it is afforded a full opportunity to present their case; the seriousness of the charge and the potential penalty and consequences; whether any points of law are likely to arise; the claimant's capacity to present her own case; the need for reasonable speed in making an adjudication; and the overriding need for fairness.

[109] In any event, the court is not quite sure that the Council had any discretion in the matter considering the provisions of section 111(2) of the Act which in the court's view is mandatory and not directory. It appears that the Act envisages a three-step procedure; the giving of a decision; giving notification to the health practitioner of the sanction which the Council intends to impose; and giving the health practitioner the opportunity to be heard.

[110] The court is firmly of the view, and firmly believes that the Council's decision not to grant the claimant an adjournment of the mitigation hearing was arbitrary and

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<sup>49</sup> See: *Barnwell v Attorney General and Another* (1993) 49 WIR 88

capricious in light of the reasons which they gave. Therefore, the court finds that in not affording the claimant a right to be heard, it acted unfairly and unlawfully.

### **Freedom of expression**

[111] In essence, the claimant asserted that she had a constitutional right like every other private citizen to express her personal opinion on matters of public interest notably the right to express her views regarding the prevention and treatment of COVID-19. This she claimed was so particularly at a time when there was no concrete evidence that the COVAX vaccine was the only recommended drug prescribed for use in preventing and treating COVID-19; and the fact that the COVAX vaccine was administered strictly on a voluntary basis.

[112] In the circumstances, she claimed that the Council's decision to suspend her registration and practicing certificate for a period of 6 months pursuant to section 109(9) of the Act for publicly encouraging and or advocating the use of Ivermectin as a treatment for COVID-19 infringed her right to freedom of expression guaranteed to her under section 10 of the Constitution.

[113] Having considered the written submissions made by the claimant's legal practitioner both in his skeleton arguments and closing address, the court finds no merit at all in this ground that would warrant the declaration sought by the claimant.

[114] The Council's position on this point was that the sanction imposed was not unreasonable or disproportionate; but instead, was in keeping with the supervisory role of the Council and the ethical considerations that ought to guide all legal practitioners. The Council also took the view that the sanction imposed on the claimant was intended to also foster public confidence and trust in the medical profession and to protect the public.

[115] Section 10 of the Constitution provides that:

“(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and

information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

However section 10(2) seeks to abrogate the right guaranteed under section 10(1) in the following manner and provides:

“(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) ...; or

(c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

[116] The question with which the court must concern itself is whether the sanction imposed by the Council on the claimant was reasonably required in the interest of public health and safety that it amounted to a necessary abrogation of the claimant's right to freedom of expression.<sup>50</sup>

[117] When deciding this issue, the court must also consider whether the sanction imposed pursued a legitimate aim and was proportionate to it. The court has arrived at the conclusion that there was no breach of the claimant's constitutional right to freedom of expression. The purpose of the sanction imposed by the Council and which it was entitled to impose by virtue of section 109(9) (e) and 109(13), of the Act, was in keeping with the supervisory role of the Council over medical practitioners and to protect the public from harm.

[118] Therefore, in light of the importance of the regulation of medical professionals, the sanction was clearly and understandably for the protection of the public interests. The sanction in the court's view, did not, on any reasonable interpretation go beyond what was required for the maintenance of a high standard of professionalism in the medical profession and the protection of the public from what the Council seemingly

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<sup>50</sup> Weel v Attorney General of Barbados 78 WIR 22; Suratt v Attorney General of Trinidad and Tobago (2007) 71 WIR 391

described as irresponsible advocacy of the use of Ivermectin for the prevention and treatment of COVID-19 during a public health emergency while the drug was not approved for that specific use.

[119] Clearly, what the sanction intended to achieve was the promotion of professionalism and preventing irresponsible and misleading advocacy, which included canvassing and promoting the use of Ivermectin which was not susceptible to scientific verification for preventing and treating an infectious disease.

[120] For the foregoing reasons, the court finds that the sanction imposed on the claimant was proportionate to its purpose and objective; the public interest in obtaining relevant and appropriate information about the treatment and prevention of COVID-19 which was scientifically tested and approved. To that extent the sanction was reasonably justifiable in a democratic society.

### **Conclusion**

[121] For the reasons which the court has expressed in this judgment the court declares that the Council's decision not to grant the claimant an adjournment at the mitigation stage of the proceedings was in breach of the principles of natural justice and unlawful being contrary to the provisions of section 109(2) of the Act.

[122] The question that arises is the nature of the remedy to which the claimant is entitled. In the court's view, the only appropriate remedy would be to quash the decision of the Council dated 7<sup>th</sup> December 2021 and remit the matter to the Council to provide the claimant the opportunity to make representations to the Council with respect to the likely sanction to be imposed.

[123] The court makes no order with respect to damages where there has been a declaration that a public body has acted unlawfully. In any event, in the present case the court can make no findings with respect to damages as the claimant did not provide any evidence or proof of damages suffered by her, if any.

[124] Costs is awarded to the claimant to be assessed if not agreed within 21 days of the date of this judgment.

**Shawn Innocent**  
High Court Judge

**By the Court**

A handwritten signature in black ink, appearing to be 'J. M.', written over a horizontal line.

**Dp. Registrar**