

SOUTH AFRICA / JUDGMENT

De Vos v Health Professionals Council of South Africa (66658/2020) [2022] ZAGPPHC 471 (17 June 2022)

[2022] ZAGPPHC 471

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlamohlaka

CASE / FILE NUMBER

66658/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number: 66658/2020

REPORT

ABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES/NO

17

June 2022

In

the matter between:

JACQUES
DE
VOS APPLICANT
And
HEALTH
PROFESSIONS COUNCIL
OF
FIRST RESPONDENT
SOUTH
AFRICA
DR
M KWINDA NO
SECOND RESPONDENT
MR
ZOLILE
GAJANA
NO
THIRD RESPONDENT
MEDICAL
AND DENTAL PROFESSIONS BOARD FOURTH
RESPONDENT
OF
THE HEALTH PROFESSIONS COUNCIL OF
MR
ANDRE
SWART
NO
FIFTH RESPONDENT

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] The Applicants seeks the review and setting aside of the decision of the Third Respondent and secretariat of the First and Fourth Respondent to not reconvene the Professional Conduct Committee (PCC) hearing against Applicant.
- [2] The Applicant further seeks a mandatory order directing the Respondent to take all steps necessary and do all things required to reconvene the aforesaid Professional Conduct Committee and to set a date for the continuation of the inquiry and hearing which has commenced against the Applicant. The relief is sought in terms of the Promotion of Administrative Justice Act, Act 3 of 2000(PAJA), alternatively as a legality review.

BACKGROUND AND FACTS

- [3] During May 2018 the Applicant was informed by the HPCSA's officials of the charges against him relating to Professional misconduct.
- [4] The Applicant was further informed that a hearing would be conducted on 3 and 4 August 2018.
- [5] During July 2018, the hearing was postponed and ultimately on 27 July 2018, the applicant was informed by the pro-forma complainant, the fifth respondent that the charges had been withdrawn.
- [6] Charges were reinstated against the applicant during November 2018 and ultimately the hearing commenced during August 2019. During December 2019, the committee set aside two of the four charges against the applicant. The two remaining charges were ultimately withdrawn during October 2020.
- [7] The applicant was informed that the PCC would not reconvene. This is the alleged impugned decision which forms the basis of this review application.

THE APPLICANT'S CASE

- [8] The main thrust of the applicant's case can be summarised as follows:

8.1 That the second and third respondents are not empowered to prevent the enquiry from continuing and are bound by the peremptory provisions of the Regulations to allow such enquiry to proceed.

8.2 That in terms of the Rules of natural justice, he is entitled to be either convicted or acquitted on the charges to which he was pleaded and that the Registrar, alternatively the pro-forma complainant is duly-bound to set the matter down for hearing and reconvene the hearing in conjunction with the chairperson of the PCC.

8.3 That the respondents have no authority or power in law to refuse to reconvene the PCC and thus allow the working of the PCC to continue to finality.

8.5 The decision to not reconvene the PCC is clearly administrative in nature and falls to be scrutinised in terms of the provision of PAJA.

8.6 The decision by the pro:-forma complainant to not reconvene or to "block" any reconvention has been made without the authority or power to make such decision and falls to be set aside on the grounds of being administratively unjust and unfair alternatively constitutionally illegal.

8.7 That the PCC has misunderstood and misconstrued the provision of the Act and Regulations as the PCC cannot close file, and js obliged to carry out its statutory duty.

- [9] While the purported decision stands, the applicant states that he suffers prejudice in that his superiors have refused to sign off his internship, allegedly because of the complainant.

[10] Furthermore, it is said that he has no other remedy but to approach the Court as, in terms of Regulation 11(1) of the Regulations, an appeal lies against the findings or penalty of the PCC. There being no decision, there lies no appeal.

THE RESPONDENT'S CASE

[11] The Respondent's opposition rests on the basis on that the applicant's failure to register as a medical professional was not because of the pending disciplinary hearing but rather because the applicant is unable to satisfy the requirements for registration which has nothing to do with the disciplinary hearing

[12] With the charges withdrawn, the matter is moot/academic as the PCC has not made a ruling or finding. It follows that there is no decision to review.

[13] All of the respondent's contention are well-founded and tenable.

[14] The bases for the respondent's opposition are that:

14.1 The reason why the applicant's duty certificate was not signed and why he has not registered as a medical practitioner was not due to the complaint but rather due to the applicant not completing his Obstetrics and Gynaecology rotation.

14.2 Neither the complainant nor the withdrawal have prevented the applicant from completing his internship and registering as a medical practitioner.

14.3 There is nothing irregular about the decision to withdraw the charges given that the complainant had withdrawn the charge.

14.4 The applicant has no right to not be found guilty or discharged in the absence of a complainant. There is no complainant therefore no charge. No such rights exist in our law.

14.5 The decision to withdraw the complainant was authorised in terms of the resolution taken on 8 December 2017 and was also authorised by the Acting General Manager: Legal Services.

THE REGULATORY FRAMEWORK

[15] Section 3(n) provides as follows:

"The objects and functions of the Council are; (n) to ensure the investigation of complaints concerning persons registered in terms of this Act and to ensure that appropriate disciplinary action is taken against such persons in accordance with this Act in order to protect the interest of the public. "

[16] Section 41 of the Act provides as follows:

"Enquiries by professional boards into charges of unprofessional conduct;

- (1) A professional board shall have the power to institute an enquiry into any complaint, charge or allegation of unprofessional conduct against any person registered under this Act, and on finding such person guilty of such conduct, to impose any of the penalties prescribed in section 42(1)."
- (2) A professional board may, whenever it is in doubt as to whether an enquiry should be held, in connection with the complaint, charge or allegation in question consult with or seek information

from any person, including the person against whom the complaint, charge or allegation has been lodged."

[17] Regulation 9 stipulates the procedure for conducting a hearing before the Professional Conduct Committee.

[18] Section 15 of the Act permits the HPCSA to establish a professional board with regard to any health profession with regard to any health profession in respect of which a register is kept.

THE RESPONDENTS' CONDUCT

[19] It cannot be denied that the applicant has a right in terms of PAJA, section 33 and 34 of the Constitution as well as in terms of the rules of natural justice to a fair procedure in the professional conduct enquiry held before the PCC.

[20] It is common cause between the applicant and the respondents that the disciplinary enquiry against the applicant was aborted by the respondents and therefore there is currently no pending disciplinary enquiry against the applicant.

[21] The question is whether the applicant should be entitled to a verdict even though the respondents decided to stop the enquiry after the applicant has pleaded. In *Attorney-General v Additional Magistrate, Middledrift and Others*[1] the following was said:

"It has always been our law that, once having pleaded to a charge, an accused person is entitled to a verdict in regard to that charge."

[22] Counsel for the applicant also referred me to section 6(b) of the Criminal Procedure Act[2] which provides as follows:

"An attorney-general or any person at the instance of the State or any body or person conducting a prosecution under section 8, may-

At any time before an accused has pleaded, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of the charge."

[23] The respondents contend that the Committee's role as referred to in sub-regulation 3 and 4 was to ensure that only sustainable complaints were proceeded with. The committee is not, contends the respondents, obliged to conduct enquiries, especially when such enquiries are evidently tenuous as a result of lack of evidence or where they have effectively been withdrawn by the complainant. Reference in this regard was made to *Veriava and Others v President, SA Medical and Dental Council and Others*[3], where the following was said:

"The question then presents itself whether the Council or the Disciplinary Committee is obliged to institute an enquiry and exercise it poses as a quasi-judicial body if it is established by the enquiry committee that the evidence furnished in support of the complaint discloses prima facie evidence of improper or disgraceful conduct. Section 41 of the Act merely provides that the Council shall have priority in instituting an enquiry. It does not provide expressly that the Council shall be obliged to institute an enquiry. The words shall have the power of themselves only mean that it will be possible and competent for the Council to institute an enquiry into a complaint, a power which it would otherwise not have. The natural meaning is enabling only. There may, however, be circumstances which may couple the power with a duty to exercise."

[24] The respondents contend that there is no decision to review in terms of PAJA because the respondents had not yet made any decision against that applicant. This argument is in my view, meritless because the decision not to proceed with the enquiry after the applicant has pleaded is an administrative decision and therefore PAJA is applicable.

[25] However, I am of the view that by suggesting that the respondents may resuscitate the charges after the file was closed the applicant is speculative and not backed by any

facts.

[26] It has not been disputed that the applicant's failure to sign off and get admitted as a medical practitioner is that he failed to satisfy the training requirements, and not because there is a pending disciplinary enquiry against him.

CONCLUSION

[27] After having considered the applicant's case I am of the view that the decision to withdraw the charges against the applicant and not to reconvene the committee was not irrational. The application should therefore not succeed.

COSTS

[28] The respondents are seeking costs on a punitive scale. I find no justification for award of costs on a punitive scale because the applicant was not malicious in bringing this matter to court.

ORDER

[29] In the result I make the following order:

The application is dismissed with costs.

KGANKIPHAHLAMOHLAKA

ACTING JUDGE OF THE

HIGH COURT

Delivered: this judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Case lines. The date for handing down is deemed to be 17 June 2022.

JUDGMENT

RESERVED ON 01

February 2022

FOR THE APPLICANT ADV

A R DUMINY

INSTRUCTED BY DE

WET WEPENER ATTORNEYS

FOR THE RESPONDENTS

ADV M MAJOSI

INSTRUCTED BY NGENO & MTETO INC.

DATE OF JUDGMENT 17

June 2022

[1] 1987 (4) SA 914 (CK)

[2] Act S1 of 1977

[3] 1985(2) SA 293(TPD)

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Prepared on 11 October 2026 · Esheria