

SOUTH AFRICA / JUDGMENT

Dowley v Health Professions Council of South Africa (A75/2023) [2024] ZAGPPHC 305 (28 March 2024) [2024] ZAGPPHC 305

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa, Le Grange

CASE / FILE NUMBER

A75/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NUMBER: A75/2023

1. Reportable: No

2. Of interest to

other judges: No

3. Revised: No

28 March 2024

In

the matter between:

BRYAN

JOHN

DOWLEY APPELLANT

and

HEALTH

PROFESSIONS COUNCIL OF SOUTH AFRICA

RESPONDENT

Coram:

Baqwa J
and Le Grange AJ

This

judgment is handed down electronically by uploading it to the electronic file of this matter on Caselines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

ORDER

On

appeal from: a
decision of an Appeal Committee of the Health Professions Council of South Africa (HPCSA) held through Microsoft Teams Virtual Platform on
16 February 2021:

1.

The appeal is
upheld.

2.

The Appeal
Committee's first, second, fifth and sixth orders are set aside and replaced with an order that Mr. Dawley is found not
guilty on Count

1.

3.

The

respondent is ordered to pay the costs of the appeal, to include the cost of two counsel where so employed.

JUDGMENT

Le Grange AJ (Baqwa J concurring):

[1] Before this Court is an appeal in terms of section 20 of the Health Professions Act 56 of 1974 against a decision of the respondent's

Appeal Committee (HPCSA) finding the appellant (Mr Dawley) guilty on the charge:

'That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that during the period January 2019 - February 2020, in respect of your patient and/or client Adele Camarera-Eichinger, you and/or your practice and/or associates were touting, in that text messages were sent to your patient/client informing her that when she consults at Specsavers, she will acquire double clicks card points.'

Facts

[2] The facts relevant to this judgement are largely common cause and as follows:

[3] The charge(s) stem from a text message sent by Clicks to its customers, which reads:

'Clicks: Need an eye test? Earn DOUBLE Club Card points at Spec-Savers! Reply YES to Book & get FREE scripted sunnies up to R 3000. T&Cs Reply STOP to opt out' and pertain to unprofessional conduct as prohibited by the Health Professions Act 56 of 1974 (act) and the Ethical Rules of Conduct for Practitioners Registered Under the [act] (rules)[1].

[4] Mr Dowley is a non-practicing optometrist and registered as such at the HPCSA.

[5] Mr Dowley is further a non-executive director of Spec-Savers SA and the CEO of its holding company KFML holdings.

[6] Spec-Savers SA is the franchisor to a multiple of Spec-Savers franchisees who practice in the field of optometry and is registered with the HPCSA.

[7] In essence, the unprofessional conduct pertains (more specifically) to 'touting' as prohibited by the rule 3, and as extended in terms of rule

8.4[2] to Mr Dawley in person - for being the face of Spec-Savers.

In limine

[8] Mr Trengove SC (on behalf of the appellant) advanced 3 points in limine.

[9] The first being that the offence of 'touting' requires, per the definition in the rules, that the 'offender' must be a 'practicing' optometrist with a practice - as only a person practicing (or a practice) can (per the said definition) entice people to his/her offer(s) (or practice). It being common cause that Mr Dawley is non-practicing it would mean the end of the matter.

[10] The rules define 'touting' as:

'[C]onduct which draws attention, either verbally or by means of printed or electronic media, to one's offers, guarantees or material benefits that do not fall in the categories of professional services or items, but are linked to the rendering of a professional service or designed to entice the public to the professional practice. Emphasis added.

[11] The argument goes further that this understanding, is re-enforced by rule 3(2) which provide that:

'A practitioner shall not canvass or tout or allow canvassing or touting to be done for patients on his or her behalf.' Emphasis added.

which conduct again necessitates a 'practitioner' (i.e. a practicing optometrist) and (his/her) 'patients'.

[12] This Court finds that the suggested interpretation does not just hold water on a plain reading of the quoted definition and rule as argued, but also from a reading of rule 8.4 which provides that:

'A practitioner shall not practise in any other form of practice which has inherent requirements or conditions that violate or potentially may violate one or more of these rules or an annexure to these rules. Emphasis added.

- which, again, necessitates conduct by a 'practicing' practitioner.

[13] It being common cause that Mr Dowley is non practicing with no patients and registered at the HPCSA as such - he should never even have faced a charge under any one of the aforementioned rules.

[14] In the premises, the appeal must succeed on the first hurdle.

A.J. LE GRANGE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

SELBY BAQWA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the appellant: Mr W Trengove SC on instruction of Pierre Marais

Attorneys, Pretoria

For the respondent: Mr L Mgwetyana on instruction of Mfinci Bahlmann

Inc, Pretoria

Heard: 19 March 2024

Delivered: 28 March 2024

[1] Ethical and Professional Rules of The Health Professions Council of South Africa as contained in Booklet 2 dated September 2016 [2] Para 23 and 80 of the judgement of the Appeal Committee

[1] Ethical and Professional Rules of The Health Professions Council of South Africa as contained in Booklet 2 dated September 2016

[2] Para 23 and 80 of the judgement of the Appeal Committee

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