

SOUTH AFRICA / JUDGMENT

Haeck v Health Professions Council of South Africa (2021/11449) [2022] ZAGPJHC 690 (13 September 2022) [2022] ZAGPJHC 690

COURT

South Gauteng High Court, Johannesburg

BEFORE

Crutchfield

CASE / FILE NUMBER

2021/11449

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO:2021/11449

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
13
September 2022
In

the matter between:

HAECK,
SANDRINA VALERIE PHYLLIS LUDWIG
Applicant
and
HEALTH
PROFESSIONS COUNCIL OF SOUTH AFRICA
Respondent

JUDGMENT**CRUTCHFIELD J:**

[1] The applicant, Sandrina Valerie Phyllis Ludwig Haeck, a Professional Therapist and Clinical Psychologist practising under the name and style of Haeck House Family Wellness Centre, sought relief against the respondent, the Health Professions Council of South Africa ('HPCSA'), in the following terms:

1.1 That the HPCSA's findings contained in the resolution letter dated 15 February 2021 be overturned and that the applicant be found not guilty of the complaint laid against her;

1.2 That the HPCSA be ordered to dismiss the complaint against the applicant; and

1.3 Costs of suit.

[2] The HPCSA opposed the application on the basis inter alia that the proceedings and findings made by it to date were of an interim nature.

[3] Whilst the heading to the applicant's founding affidavit indicated that it brought the application in terms of rules 20(1) and

(2) of the Health Professions Act 56 of 1974 ('the Act'),

the applicant in fact relied on section 20 of the Act.

[4] Section 20 of the Act provides for a right to appeal in the following terms:

"(1) Any person who is aggrieved by any decision of the council, a professional board or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision.

(2) Notice of appeal must be given within one month from the date on which such decision was given."

[5] The defendant did not contend that the plaintiff was not entitled to appeal the decision of the preliminary investigation committee.

[6] The applicant rendered therapeutic services in her capacity as a clinical psychologist, and, in addition, lifestyle coaching and mediation services that allegedly fell outside of the clinical psychology discipline and the jurisdiction of the HPCSA.

[7] The facts relevant to this matter, briefly stated, were the following:

7.1 The applicant, together with an attorney, incorporated a private company named 'Divorce Diplomats (Pty) Ltd' ('Divorce Diplomats'), that provided a bespoke, non-therapeutic alternative to couples considering divorce. Divorce Diplomats offered a range of courses, including a life-coaching programme, developed by the applicant over many years. The courses drew on the applicant's attendance at coaching courses in the United States of America by an allegedly globally renowned coach.

7.2 According to the applicant, the services offered by Divorce Diplomats ('the Divorce Diplomats' programme') fell outside of the clinical psychology arena and provided an alternative to divorce litigation.

- [8] This application arose out of a complaint laid by former clients of the applicant ('the complainants'), with the HPCSA. The complainants underwent coaching by the applicant and participated in the applicant's marriage counselling and Divorce Diplomats' programme during 2017.
- [9] The complainants alleged that they abandoned the marriage counselling and elected to proceed with the Divorce Diplomats' Programme. Prior to commencing the latter programme, the complainants paid the full cost in the sum of R111 336.00, as required.
- [10] The complainants participated in the first session of the Divorce Diplomats' programme, reconciled and decided not to proceed with the remainder of the sessions. The complainants demanded a refund but the deposit was not refundable. Hence, they complained to the HPCSA ('the complaint').
- [11] The complainants sought a refund of the cost of the unused marriage counselling and Programme sessions from the HPCSA in an amount of R111 412.92, calculated as to R18 076.92 for the unused marriage counselling sessions and R93 336.00 for the Programme sessions.
- [12] It is not necessary, on the view that I take of this matter, for me to set out the details of the complaint and the supporting documentation.
- [13] The complaint comprised two parts, one in respect of the applicant as a marriage counsellor and the other in respect of the applicant as a divorce counsellor.
- [14] The complainants alleged they were not informed that the deposit was non-refundable and did not sign the Programme contract and that the 'Contractual Agreement Of Understanding' they signed in respect of their marriage counselling could not be used for the Programme as well.
- [15] By way of correspondence dated 20 May 2019, the HPCSA informed the applicant of the complaint and the ensuing procedure. The complaint would be placed before the HPCSA board's committee of preliminary enquiry (the 'committee') for consideration. The HPCSA required the applicant to provide a written response to the complainant prior to the committee considering the complaint.

- [16] On 7 August 2019, the HPCSA acknowledged receipt of the applicant's response and advised that she would be informed of the committee's resolution within 14 days after the committee met.
- [17] The applicant's response included:
- 17.1 The complainants' signed Programme contract and the applicant's clinical practice, which included terms that refunds would not be paid and that the Programme and the applicant's psychological services comprised two separate organisations.
- 17.2 Coaching, coupleship encounters and mediation did not constitute psychological services as defined or regulated by the HPCSA as they are life coaching courses and developed outside of traditional therapeutic services.
- 17.3 Payment in advance was required of any potential participant prior to commencing the Programme, which operated through a separate entity as it was not therapeutic in nature and not regarded as therapeutic by the HPCSA or the medical aids.
- 17.4 The complainants participated in the coupleship programme and Divorce Diplomats Programme but not in therapy. As a result, the complainants contracted with a separate entity falling outside of the applicant's psychology practice or any form of therapy and beyond the scope of the respondent.
- [18] Preliminary investigations are regulated under regulation 4 of the Act.
- [19] A committee of preliminary enquiry is defined in terms of the regulations as a committee established by a professional board under s 15 of the Act, for the preliminary investigation of complaints and to inquire into minor transgressions including cases of contempt of council and to make determinations in respect thereof.
- [20] The preliminary enquiry allegedly comprised a fact finding enquiry. The committee required the applicant to attend a meeting of the committee on 26 October 2020 in order to provide the committee with further information.
- [21] The applicant was on maternity leave at the time and unable to obtain necessary documentation as her offices were closed due to the covid-19 pandemic. Notwithstanding, the respondent refused to reschedule the meeting and gave the applicant a choice of attending the meeting or having it proceed in her absence.
- [22] Prior to the meeting, the applicant's attorney requested an agenda for the meeting and an indication of the information that the committee required from the applicant. The applicant's attorney advised the committee that it would be procedurally unfair for the applicant to attend the meeting without any indication of the additional information required of her. Furthermore, the applicant would not be able to prepare accordingly.

- [23] The committee declined to provide the applicant with an agenda and refused to allow the applicant legal representation at the hearing.
- [24] The committee informed the applicant at the hearing that it required clarity in respect of the difference between therapeutic and non-therapeutic services, including life coaching or mediation. The committee did not allow the applicant an opportunity to consider or prepare her response prior to her addressing the committee.
- [25] The hearing on 26 October 2020 was cut short by the committee running out of time. As a result, the committee adjourned the hearing prior to the applicant completing her response to the committee, informing the applicant that they would revert to her.
- [26] Subsequently, the applicant received correspondence from the HPCSA dated 2 November 2020, informing her that the committee had resolved to ‘defer and refer’ the matter for the opinion of an expert in respect of the ‘bridging of ethical rules i.e. sharing of rooms, informed consent and performing a psychological act in an enterprise not registered as a psychological practice’.
- [27] The HPCSA did not inform the applicant of the identity or qualifications of the expert but advised that the expert should be ‘versed in practice management, marriage/divorce counselling, mediation and coaching versus counselling.’
- [28] The appointed expert did not contact the applicant for information whilst executing the committee’s mandate. Nor did the applicant receive an opportunity to discuss the issues with the expert.
- [29] The committee failed to provide the applicant with the expert’s report and recommendations once completed, and failed to afford the applicant an opportunity to respond thereto. The HPCSA, however, made the expert’s report available to the applicant as an annexure to its answering affidavit in these proceedings, a disclosure made at such a late stage that it was of no value to the applicant whatsoever.
- [30] Notwithstanding the limited hearing afforded to the applicant on 26 October 2020 and the committee’s subsequent receipt of the expert’s report, the committee did not reconvene the hearing of 26 October 2020 or convene a fresh hearing with the applicant in respect of the expert’s report.
- [31] The applicant expressed her disquiet at the respondent’s approach by way of correspondence dated 13 November 2020. This was to the effect that the respondent, some four years after the complainants raised their complaint, saw fit to amend the complaint and ‘refer and defer’ the complaint as amended to an expert, on issues not raised with the applicant. In addition, the expert was not present at the committee meeting attended by the applicant.

[32] The HPCSA, in correspondence dated 15 February 2021, advised the applicant of the committee's resolution, (the 'resolution'), that:

32.1 The applicant was guilty of unprofessional conduct and that the matter be referred to the Professional Conduct Enquiry in terms of the Regulations, into assumed unprofessional conduct with no option to pay an admission of guilt fine.

32.2 The 'points of enquiry' were:

32.2.1 Sharing of rooms with an entity not registered in terms of the Act;

32.2.2 Entering into potential conflicting roles with the client, by acting as a clinical psychologist and a life coach under the Divorce Diplomats' Programme company;

32.2.3 Referring clients to the company in which the applicant had a financial interest; and

32.2.4 Charging fees for services not rendered.

[33] Thus, the respondent resolved prima facie that the applicant was guilty of misconduct on issues not raised with the applicant previously and in respect of which the applicant was not heard by the committee.

[34] On 16 February 2021, the applicant informed the HPCSA of her intention to appeal the resolution in terms of s 20 of the Act. The applicant contended that she was deprived of her right to fair process by the committee and that the resolution was tainted as a result.

[35] The respondent argued that the committee's prima facie view did not bind the disciplinary appeal committee and that the applicant would be afforded her full trial rights at those proceedings. Those rights included the right to legal representation and to raise in limine objections such as the respondent not having jurisdiction over the complainants' complaint.

[36] Regulation 4(8), (in terms of which the committee referred the matter to the professional conduct enquiry), provides a mechanism to refer a matter in circumstances where there is preliminary evidence that the practitioner committed professional misconduct. The respondent likened the committee's prima facie finding to a determination to institute charges against an accused, in respect of which a review is not competent. This application, however, was an appeal in terms of s 20 of the Act and not a review.

[37] The applicant argued correctly that she was entitled to due process and fairness at every stage of the proceedings not only before the professional committee disciplinary hearing.[1] A person in the position of the applicant ought to have the right to a fair trial and the right of appeal and should not be told that she must be satisfied with an unjust trial and a fair appeal.
[2]

[38] Section 41A(1) and (4) of the Act provide that 'the Registrar may, where necessary in order establish more facts, appoint an officer of the professional board as an investigating officer for the purposes of this section ...'

- [39] The referral to the expert in this matter went far beyond a mere fact finding mission. The committee ‘referred and deferred’ the complaint to the expert, rather than the expert being appointed to establish additional facts.
- [40] The preliminary enquiry committee is a product of the Health Professions Act and limited in terms of its functions and powers to those vested upon it in terms of the Act and the regulations. The Act entitled the preliminary enquiry committee to glean such further information as was required by it, in terms of s 41A.
- [41] The Act did not entitle the committee to ‘outsource’ the dispute and its determination to an expert appointed in terms of the section, as the respondent did in this matter.
- [42] The committee ought to have submitted the enquiries upon which it required further facts, to the expert. The decision of the committee ought to have been taken independently by the committee itself, without any deference to the expert, regard being had to the complaint, information and explanation provided by the respondent and the report of the investigation.
- [43] The resolution by the committee ought to have been seen to be reached by the committee, in a manner that was fair to the complainants and the applicant.
- [44] The referral to the expert violated the provisions of the Act, rendering the process adopted by the committee in its entirety, unfair and unjust.
- [45] It is material that the issues referred to the disciplinary enquiry were far removed from the complaint laid by the complainants. Whilst the applicant was afforded an opportunity to respond to the complainants’ complaint, albeit that the committee did not inform the applicant of the issues it was investigating pursuant to the complaint and requested the applicant to deal only with the variance between therapy and life coaching.
- [46] The applicant was not afforded an opportunity to respond to the issues referred to the disciplinary enquiry, being those underlying the prima facie view that the applicant committed a breach of the ethical rules. Such conduct served to violate the applicant’s fundamental right to audi alteram partem.
- [47] In effect, the HPCSA’s conduct amounted to a prima facie view being taken against the applicant on issues upon which the applicant was not given an opportunity to be heard, a breach of s 41A(8)(b)(i) and (iii). The section provides for the report of the investigating officer, being the expert, to be made available to the registered person concerned, being the applicant, if the report does or does not reveal prima facie evidence of unprofessional conduct contemplated in the Act.
- [48] The applicant ought to have been furnished with the expert’s report and allowed an opportunity to address the committee on the report pursuant to which the committee resolved on a prima facie view of guilt without the option of an admission fine.

- [49] In the circumstances outlined above, the applicant complained, justifiably, that her procedural right to fairness was breached by the process and procedure adopted by the committee.
- [50] As a result of the procedure adopted by the committee, the applicant was deprived of an opportunity to give an explanation of a shared room and to indicate to the committee that she did not share her rooms in which she conducted her psychology practice. The point is that if the applicant had been allowed such an opportunity, the committee would have placed itself in a position to fairly consider the submissions of both the applicant and the expert against the

background

of the complaint.

- [51] The applicant contended that Section 10(3) of the Act comprised an appeal in the narrow sense[3] as a result of which it was inadequate.

- [52] Section 10(3) provides that:

“An appeal committee referred to in subsection (2) shall have the power to vary, conform or set aside a finding of a professional conduct committee established in terms of section 15(5)(f) or to refer the matter back to the professional conduct committee with such instructions as it may deem fit.”

- [53] Section 10(2) provides that:

“The council shall establish ad hoc appeal committees, each consisting of ... from the profession of the registered person in respect of whose conduct a professional conduct committee of a professional board had held an inquiry, and a member of the council appointed to represent the community.”

- [54] The applicant contended that an internal remedy such as that articulated in s 10(3), was ineffective and inadequate. The applicant relied in this regard on Professor Hoexter[4] to the effect that because the appellate body in a narrow appeal is confined to the record, the “taint” that resulted in the unfairness that characterised the preliminary enquiry, is “inevitably carried forward to the appellate hearing.”
- [55] As a result of the failure of the committee to afford the applicant an opportunity to deal with the expert’s report and the issues referred to the disciplinary committee, the record does not contain the applicant’s version to the relevant issues. Thus the record is “tainted” and reliance placed solely on the record will inevitably result in a breach of the applicant’s procedural right to fairness.
- [56] In the circumstances, the applicant was justified in launching this application in terms of s 20 of the Act.
- [57] By virtue of the aforementioned, I grant the following order:

57.1 The HPCSA's findings contained in the resolution letter dated 15 February 2021, are set aside and dismissed.

57.2 The applicant is found not guilty of the complaint laid against her;

57.3 The respondent is ordered to pay the costs of the application.

CRUTCHFIELD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 13 September 2022.

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DATE OF THE HEARING:

26 January 2022.

DATE OF JUDGMENT:

13 September 2022.

[1] Slagment (Pty) Ltd v Building Construction and Allied Workers' Union & Others

[1994] ZASCA 108; 1995 (1) SA 742 (A) at 756.

[2] National Director of Public Prosecutions v Freedom Under Law (67/14) [2014] ZASCA 58 (17 April 2014) at para 20.

[3] Tikly & Others v Johannes NO & Others 1963

(2) SA 588 (T) at 591.

[4] Hoexter Administrative Law in South Africa 2ed (2012) at 388.

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