IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2/12/22
DATE

SIGNATURE

CASE NO: A243/2021

In the matter between:

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA First Appellant

***PRO FORMA* COMPLAINANT** Second Appellant

and

DR ADRIAAN JACOBUS VAN DER WALT Respondent

JUDGEMENT

TSHOMBE, AJ:

[1] The first and second appellants have launched this appeal in terms of section 20 of the Health Professions Act 56 of 1974 against the whole of the judgement and orders handed down by the *ad hoc* Health Professions Appeal Committee ("the Appeal Committee"). The appeal is not opposed by the respondent and a notice to abide by the decision of this Court was filed.

THE CHARGE AGAINST THE RESPONDENT

[2] The respondent, Dr Van der Walt was charged and appeared before the Professional Conduct Committee on 6 March 2020. The charge that he faced read as follows:

> *"Your are guilty of unprofessional conduct or conduct which when regard is had to your profession is unprofessional in that during the period June 2014, in respect of Dr A J Jansen van Vuuren, you acted in a manner that is not in accordance with the norms and standards of your profession in that you failed and/or neglected to inform (the) patient of (the) PSA results which prejudiced his claim."*

[3] The Professional Conduct Committee found the respondent guilty of unprofessional conduct and sentenced him to 12 (twelve) months suspension, which is wholly suspended for a period of three years on condition that he is not found guilty of a similar transgression during the period of suspension.

THE APPEAL TO THE APPEAL COMMITTEE

[4] The respondent filed a notice of appeal to the Appeal Committee in terms of Regulation 11 of the Regulations Relating to the Conduct of Enquiries into Alleged Unprofessional Conduct (Government Notice R102, Government Gazette 31859 of 6 February 2009). The respondent (as the appellant before the Appeal Committee) filed all his documents timeously. In terms of Regulation 11(5) the second appellant had to file his reply, containing a summary of his arguments, within 30 days from the date on which the respondent delivered his papers to the Registrar.

[5] The second appellant was apparently unable to file his reply timeously. He then made a request to the respondent's legal representatives for an indulgence for the late filing of his reply. According to the record this request was motivated as follows in an email dated 31 January 2021:

> *"Please note that due to some changes at our offices during this Covid-19 Pandemic period all our finalised files were removed from our office and sent to Metrofile for safekeeping. As a result thereof we were unable to trace the file in order to enable us to draft our heads of argument in the appeal matter of Dr Van der Walt, which were due to be submitted to yourselves on 30 January 2021 as per our email dated 21 December 2020. We therefore request for you indulgence to give us an opportunity to trace the relevant file, document until 31st March 2021 to enable us to prepare our heads of argument."*

[6] In answer thereto the legal representatives of the respondent replied as follows:

> *"Thank you for the email below. We understand that the Regulations provide for the late submission of your reply to the appellant's Regulations 11(6) papers, provided that an application for indulgence for late submission accompany the papers. We look forward to receiving your papers and the necessary application for an indulgence."*

[7] The second appellant did not file a formal application for an indulgence supported by an affidavit. However, in paragraph 3 of his heads of argument (which were filed out of time) the second appellant stated the following:

> *"The respondent hereby applies for an indulgence for the aforementioned late submission in terms of Regulation 11(6) of the Regulations Relating to the Conduct of Inquiries into Alleged*

Unprofessional Conduct under the Health Professions Act, 1974 ... as far as it may be necessary."

THE HEARING BEFORE THE APPEAL COMMITTEE

[8] At the hearing before the Appeal Committee the respondent's legal representative raised a point *in limine* with regard to the late filing of the second appellant's reply (heads of argument) to the respondent's appeal. In argument the second appellant referred the Committee to his email communication with the respondent's legal representative setting out his request for an indulgence. The second appellant further made oral submissions to the Appeal Committee in an attempt to explain the reasons for the late filing of his reply and it was contended that Regulation 11(6) does not require a substantive application.

[9] The application for condonation for the late filing of the replying papers was dismissed by the Appeal Committee for mainly three reasons. First, the explanation given by the second appellant that Regulation 11(6) does not require a substantive application, but a mere oral submission, is unacceptable. Second, the second appellant did not give full reasons covering the entire period of the delay. Finally, no application as envisaged by Regulation 11(6) was placed before the Appeal Committee for consideration.

[10] As a result of the Appeal Committee's ruling the second appellant was not allowed to participate any further in the appeal proceedings as it was "*now unopposed*". After having heard only the respondent's counsel, the Appeal

Committee concluded that the appeal should succeed, and the appeal was then upheld.

DISCUSSION

[11] In their notice of appeal, the appellants rely, *inter alia*, on the grounds that the Appeal Committee erred in dismissing the appellants' application for an indulgence for the late filing of its reply as well as that the Committee erred in dealing with the appeal as an unopposed appeal, when papers were indeed filed on behalf of the appellants and there was a legal representative present on behalf of the appellants during the appeal proceedings.

[12] While there maybe merit in the argument that the wording in sub-regulation 11(6) implies the filing of a substantive application, arising from the use of the words *"such copies are accompanied by an application for indulgence"* (I make no finding in this regard), this does not mean that the Appeal Committee had no discretion whatsoever in dealing with this issue.

[13] After the Appeal Committee had the opportunity to deliberate on the issue, the question was put to both counsel what the consequences would be if the application for an indulgence were to be dismissed. Counsel for the respondent pointed out that *"the results would be that the appeal is unopposed, because they would not have filed heads of argument and there would be no basis for opposition that have been put forward to the committee"*.

[14] Whilst the Appeal Committee was in control of the proceedings, and the consequences having been made clear to its members, the Committee

proceeded to hear the appeal without affording the second appellant the right to be heard. When applying common-sense, the question arises why could the matter not have been stood down, for a period to be determined, to allow the second appellant to file a formal application for an indulgence, instead of dismissing the oral application without affording the second appellant the right to be heard? When considering this question, the Appeal Committee should, in my view, also have taken into account:

(a) the fact that the second appellant had prior to the hearing already approached the respondent's legal representative and explained the difficulty he was facing with respect to the office files.

(b) the clear indication that the second appellant had at all relevant times the intention to oppose the appeal and that heads of argument had already been filed.

(c) the inclusion of an application for an indulgence in paragraph 3 of the second appellant's heads of argument, albeit that this application was not supported by an affidavit.

(d) that there would have been no prejudice to the respondent as the reply had already been received and the merits of the matter could be considered by the committee with the benefit of arguments from both sides.

(e) the prejudice that would be caused to the appellants if the second appellant would not be allowed to participate in the proceedings.

[15] When considering the question whether the Appeal Committee should have allowed the matter to stand down to allow the second appellant the opportunity to file a formal application, it should also be taken into account that the right to be heard is protected by the Constitution. Section 34 provides as follows:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[16] The purpose behind the constitutional protection of this fairness requirement was explained as follows by Mokgoro J in *De Lange v Smuts N.O.* 1998 (3) SA 785 (CC) at par 131:

> *"Everyone has the right to state his or her case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."*

[17] The requirement of a fair hearing is also encapsulated in the maxim *audi alteram partem* which requires that persons affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision (*De*

Lange v Smuts N.O. supra, par 131). The Appeal Committee upheld the appeal without affording the second appellant the right to state his case and to make submissions in opposing that appeal.

[18] According to the judgement of the Appeal Committee it appears that the main reason for refusing the second appellant the right to be heard is to be found in the fact that the second appellant failed to file a formal application for an indulgence. This, according to the Appeal Committee, is a requirement of Regulation 11(6). Even if one accepts that the filing of a formal application is a requirement, a simple and practical solution to the problem would have been to allow the matter to stand down for the filing of a formal application for an indulgence. The potential prejudice which could have been caused by following this approach, is far less than the prejudice that will be caused if a party is denied the right to be heard.

[19] By considering this issue, I take into account that the second appellant did not ask for the matter to stand down. However, the Appeal Committee was in control of the proceedings, and it should have, in the interest of justice, considered that possibility *mero motu* before it made the decision. The committee failed to do so.

[20] I also take into consideration the thorny question whether such a failure can be cured by an appeal. In *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union* 1995 (1) SA 742 (A) at 756G it was pointed out by the Appellate Division that it is not possible to lay down a general rule as to whether a failure of natural justice may be cured on appeal. Some defects in the initial

hearing, such as bias, are so fundamental as to be regarded as incurable (Administrative Law in South Africa by Cora Hoexter, 2nd Ed, p 388).

[21] In the appeal before us the proceedings concerned was an appeal before the Appeal Committee. The record will therefore remain the same. The appellants also do not rely on the ground that the committee was biased. If the matter is referred back for a reconsideration *de novo* by a newly appointed tribunal there will be no real prejudice to any of the parties. Furthermore, if this failure cannot be cured by an appeal the consequences of not allowing a party to be heard, will still stand. That will not be in the interest of justice. Therefore, in my view, the decision of the Appeal Committee to refuse the indulgence without affording the second appellant the opportunity to file a formal application, and to allow the appeal to proceed in the absence of the second appellant, is an issue which can and should be cured by an appeal.

THE RELIEF

[22] The relief sought in the notice of appeal is for an order setting aside the whole of the judgements and orders of the Appeal Committee and substituting them with the following:

> *"The appellant is granted an indulgence to present its heads of argument and to argue the merits of the appeal before a different Health Professions Appeal Committee".*

[23] During argument the question was debated with counsel for the appellants whether it should not be more appropriate to uphold the appeal and to allow the second appellant the opportunity to serve and file a formal application

for an indulgence to be considered by a different Health Professions Appeal Committee. This was agreed by counsel for the second appellant.

[24] The notice of appeal also indicates that costs of this appeal should be paid by the respondent only if the respondent opposes this appeal. As there is no opposition, no order as to costs should be made.

ORDER

In the result I propose the following order:

1. The appeal is upheld and the orders of the Appeal Committee dismissing the second appellant's application for an indulgence and upholding the appeal of the respondent, are both set aside.

2. The matter is referred back for the respondent's appeal to be heard *de novo* before a different Health Professions Appeal Committee.

3. The second appellant is granted leave to file a formal application, supported by an affidavit, for an indulgence for the late submission of his reply (heads of argument), within 21 days from date of this judgement, which application must be considered by the newly appointed Appeal Committee before the appeal on the merits is heard.

4. There shall be no order as to costs.

N TSHOMBE
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree, and it is so ordered.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 2/12/22

Date of hearing: 8 November 2022
Counsel for the appellants: Advocate M Mkhatshwa
Instructed by: Matwa Nongogo Attorneys