


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 9100 / 2012

Delete whichever is not applicable	
(1) Reportable: No.	
(2) Of interest to other judges: No	
(3) Revised.	
25 October 2022 Date	 Signature

In the matter between:

JACOBUS FRANCOIS SCHOLTZ

PLAINTIFF

And

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

DEFENDANT

This judgment has been handed down electronically and shall be circulated to the parties via email. Its date and time of hand down shall be deemed to be 25 October 2022.

JUDGMENT

Munzhelele J

[1] The plaintiff, Dr. Scholtz, a special plastic surgeon, claims damages from the defendant on the basis that the defendant, the Health Professions Council of South Africa '(HPCSA)' made a false statement in a letter dated 19 March 2010 to the Health Authority of Abu Dhabi '(HAAD)' which caused him to lose his employment at Tawam Hospital. The letter sent to the HAAD stated that "*the plaintiff was not registered with the Health Professions Council of South Africa.*"

[2] The plaintiff alleged that due to this false statement, HAAD cancelled his license to practice medicine and his employment at Tawam hospital was terminated. It is common cause that the HPCSA admitted the offending statement to be incorrect and false. However, the HPCSA denies that such a statement was the reason for the plaintiff's termination of his employment at Tawam hospital. The HPCSA alleges that at the time when the HAAD decided to cancel the plaintiff's license, the defendant had already corrected the offending statement by sending emails and documents to the HAAD, and it was immediately made clear that the plaintiff was indeed registered with the HPCSA. The plaintiff and Mr. Schaffer also confirmed the emails during their testimony.

[3] In terms of rule 33(4) of the Uniform Rules of Court, the parties agreed to separate the merits from quantum, and the court made such an agreement an order of court. The trial proceeded on merits. Again by agreement between the parties, the evidence in chief for the plaintiff and his witness Mr. Schaffer was presented by handing in their statements, and after that, cross-examination by the defendant took place. The plaintiff called only two witnesses, and no evidence by HAAD officials was led. After the plaintiff closed their case, the defendant requested absolution from instance in which the application was dismissed. The defendant closed their case without leading evidence.

Evidence by the plaintiff - Dr. Scholtz

[4] Dr. Scholtz is a specialist plastic and reconstructive surgeon registered with the

HPCSA. He successfully applied for a permanent position to practice as a Doctor at Abu Dhabi Tawam Hospital. To practice as a Doctor in Abu Dhabi, Dr. Scholtz needed to be registered as a medical practitioner with the HAAD. Dr. Scholtz alleged that HAAD would license him to practice in Abu Dhabi on the strength of his registration with the HPCSA. He was then employed as a senior consultant at Tawam hospital in Abu Dhabi on 03 April 2005. Dr. Scholtz was already over the age of 60 years, and his contract had to be renewed every year.

[5] On 13 December 2009, the HAAD sent a letter written and signed by Al Blooshi to the HPCSA in which HAAD indicated that it had recently encountered certain medical/legal information that required more detailed clarification concerning the plaintiff. Mrs. Blooshi requested the HPCSA to give the following details concerning the plaintiff:

1. Date of registration
2. Registration profession title
3. Any ethical queries or professional conduct issued during his registration
4. Any complaints, legal encounters, or guilty verdicts during his registration.

[6] On 19 March 2010, the HPCSA, through D Molatjane, responded to the letter or email dated 13 December 2009 from HAAD. Molatjane addressed the letter to Yousif Al Blooshi about Dr. Jacobus Francois Scholtz, and the letter reads thus:

'The above and your letter dated 13/12/2009 bears reference.

In total, 54 counts of unprofessional conduct related to the competence of the above practitioner date from 1994. Some of the files have been sent away from storage. It is not easy for me to provide details on all his legal queries. He was found guilty on some counts and not guilty on others.

He is currently not registered with the Health Professions Council of South Africa, and some issues need to be resolved with him by the South African Police Service (see annexure A). Please find annexure B with an indication and response to your first and second bullet points for any clarity-seeking questions. Do not hesitate to contact the writer thereof.'

[7] On 03 May 2010, Mr. Scholtz was called for a meeting by Mr. Schaffer. In the meeting, he was informed by Mr. Schaffer that the HPCSA informed HAAD that he was not registered as a Doctor in South Africa. Because of non-registration with the HPCSA, his license to practice in Abu Dhabi has been cancelled, and his services at Tawam Hospital are no longer permitted.

[8] Dr. Scholtz received a letter translated from the Arabic language to English which was dated 29 April 2010. This letter was written by Dr. Ali Abaid Alall, the director of health Regulations with HAAD, which reads as follows:

'We present to you our sincerely greetings and compliments and appreciate your cooperation with us.

Please be informed that the license of Dr Jacobus Francois Scholtz, who has worked at Tawam hospital as a plastic surgeon consultant since 2005, has been verified; it has been communicated with the South African Licensing Authority, which indicated that there are 54 complaints against the Doctor mentioned above, he was found guilty in some of those complaints while the investigation is underway in the remaining complaints. He is currently unregistered in the register of those licensed to work in South Africa.

According to the aforementioned, we inform you to cancel the license of Dr. Jacobus Francois (GD9884) as of the date hereof. You must suspend him from duty immediately and notify us.'

[9] Dr. Scholtz's services were suspended and terminated in a letter dated 2 May 2010. From 03 May 2010, he was no longer permitted to return to the hospital. From 03 May 2010, Dr. Scholtz was then given a period of grace to continue to reside in Abu Dhabi because he had made representations to Tawam hospital insisting that he was registered with the HPCSA. HAAD gave this grace period hoping that the cancellation of Dr. Scholtz's license to practice in Abu Dhabi could be resolved. The grace period was six (6) months, from May to October 2010.

[10] On 05 May 2010 and 28 May 2010, the HPCSA issued a certificate confirming that the plaintiff was still registered. On 01 June 2010, Mrs. Blooshi wrote to the HPCSA expressing his shock to see Dr. Scholtz registering with HAAD well knowing that, he was found guilty on some accounts of unprofessional conduct related to his competency to practice. On that note, the HPCSA was again asked to clarify the situation to justify Dr. Scholtz's re-registration with HAAD. On 19 August 2010, Boikanyo sent a letter to the HAAD addressed to Mrs. Blooshi to confirm that the statement in Ms. Molatjane's letter of 19 March 2010 was incorrect and that the plaintiff was registered with the defendant. This is the letter which was said to be unsigned. Both Dr. Scholtz and Mr. Schaffer agreed during their testimony that the HPCSA addressed the registration issue of Dr. Scholtz before six months lapsed in October 2010.

[11] Dr. Scholtz alleged that if the defendant had kept a register as they were required to do in section 18 of the Health Profession Act 56 of 1974, they would not have failed to see that he had remained a registered medical practitioner with the HPCSA. He further alleged that he could not obtain a new license with HAAD because of the negligence of the HPCSA and ended up repatriating to South Africa. The plaintiff alleges that, as a result thereof, he suffered damages.

Mr. Schaffer's evidence

[12] Mr. Schaffer testified that he was the Chief Executive Officer of Tawam Hospital in the United Arab Emirates from 08 January 2010 until 16 June 2016. He said that practitioners who wanted to practice as doctors in Abu Dhabi were required to register with HAAD and the medical regulatory body of the place a person is coming from. In this regard, Dr. Scholtz was required to be registered with the HPCSA. Mr. Schaffer confirmed that Tawam Hospital employed Dr. Scholtz. He further confirmed that Dr. Ali, a senior official from HAAD, terminated the employment of Dr. Scholtz. He further testified that the reason for the termination of the employment of Dr. Scholtz, as he heard from Dr. Ali, was that Dr. Scholtz was not registered as a medical professional with the HPCSA. Mr. Schaffer confirmed that he was even given a letter for cancellation of Dr. Scholtz's license

to practice with HAAD. He further confirms that Dr. Scholtz was then suspended. However, a period of grace was given to him for six months so that he could clear his registration issue; Mr. Schaffer agrees that Dr. Scholtz attempted to resolve the registration issue; there were certificates and letters written to HAAD from the HPCSA and Dr. Scholtz, he assesses that HAAD was never satisfied with all the efforts done by the HPCSA and Dr. Scholtz. The plaintiff, after the two witnesses had testified, closed his case. The HPCSA also closed their case without leading any evidence.

[14] The issue to be proved by the plaintiff is whether the false statement is the proximate cause of harm. The plaintiff has to prove through evidence that there exists a causal connection between the false statement made by the HPCSA and the termination of the contract of Dr. Scholtz, which resulted in him suffering damages. The plaintiff should adduce such evidence to prove on a balance of probabilities that the false statement was the cause of harm. In *Minister of Police v Skosana*¹, the Appellate Court expressed itself regarding the test for factual causation in the following terms:

'Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent Act or omission in question caused or materially contributed to . . . the harm giving rise to the claim. If it did not, then no legal liability can arise... If it did, then the second problem becomes relevant, viz. whether the negligent Act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.'

Arguments by the defendant

[15] The counsel, Advocate (Adv.) Burger SC argued that the evidence adduced during the trial does not support the plaintiff's pleaded case because it is clear that the offending statement is neither the factual nor legal cause of the plaintiff's damages. He quoted the

¹ 1997 (1) SA 31 (A) at 34E-34H

case of *Home Talk Developments Pty Ltd and others v Ekurhuleni Metropolitan Municipality*², para 45, and *International shipping Co Pty Ltd v Bentley*³ to illustrate the but for test or the test for factual and legal causation.

[16] Counsel for the defendant substantiated his above argument by stating that there can be no doubt that by the time the HAAD decided finally to terminate the plaintiff's license, it had been informed on several occasions that the offending statement was an error, that the plaintiff was registered with the HPCSA, and that the plaintiff had never been removed from the register of doctors, and is entitled to practice in South Africa. It follows that the offending statement could not have been the reason for the HAAD's decision to close its file on the plaintiff.

[17] Counsel further argued that by applying 'but for test,' HAAD would still have cancelled the plaintiff's license for the remainder of the information on the letter rather than the offending statement. Further, the information which HAAD had, when it wrote to the HPCSA a letter dated 13 December 2009, which was never disclosed, could have been serious such that it was a reason enough for termination of the employment of Dr. Scholtz.

[18] Counsel contends that the court would never know what caused the final termination of the plaintiff's license without Dr. Ali or Mrs. Blooshi from HAAD's testimony. Shaffer's testimony was hearsay and inadmissible. Adv. Burger submits that the HAAD witnesses had to testify and clarify whether it was Dr. Scholtz's professional conduct an issue during his registration with HAAD or his legal encounters or guilty verdicts against him, or outstanding complaints relating to the death of Mrs. Marais or some other matter that led to the termination of Dr. Scholtz's contract. Dr. Ali and Mrs. Blooshi should also clarify whether they considered the offending statement to be the cause of harm even after the corrections. This information is crucial for the plaintiff to prove his case.

² 2018 (1) SA 391 (SCA)

³ 1990 (1) SA 680 (A) para 700 E-I

[19] Counsel for the plaintiff Adv. Naude argued that the incorrect statement gave rise to the plaintiff's damages if the 'but for test' is applied to the common cause and the undisputed facts. Counsel further argued that the court should accept the hearsay evidence because of its cogency. Evidence should be admitted when considered in its context because it is reliable and justifies its admission. The incorrect statement accords with the letter of the 02 May termination notice and the 08 May 2010 email requesting reconsideration of the cancellation of his license. Further argument was that the false statement was admitted to be false by the HPCSA. Counsel argued that the HPCSA breached its statutory duty in terms of section 18(1) of the Act. Counsel further argued that the damages suffered by Dr. Scholtz were foreseeable by the HPCSA.

Analysis of evidence

[20] It is a common cause that the statement made by the HPCSA was false and incorrect. It was irresponsible of the HPCSA to have acted in that manner when they informed HAAD through their letter dated 19 March 2010 that Dr. Scholtz was not registered with the HPCSA.

[21] However, the question to be answered through evidence by the plaintiff is whether such a statement or other issues such as fifty-four (54) complaints, the fact that the plaintiff was found guilty on some of the complaints, the outstanding investigations or the undisclosed concerns which led HAAD to write a letter to the HPCSA on the 13 December 2009 were regarded as the reasons for HAAD to terminate the contract of employment for the plaintiff and suspend him to work at Tawam Hospital. This leaves the court speculating what could be the reason for the termination of the plaintiff's contract, mainly because the HPCSA had corrected the statement, which was false through letters directed to HAAD.

[22] The plaintiff has to prove on a balance of probabilities in his case by adducing evidence as to what caused the harm giving rise to the claim. The plaintiff should have called the people from HAAD to testify in this regard. Therefore because of such failure

to call HAAD people, the plaintiff failed to establish on a balance of probabilities which negligent act materially contributed to the harm.

[23] The plaintiff has to prove on a balance of probabilities that HAAD terminated his contract based on the incorrect statement made by the HPCSA. In other words, if Dr. Scholtz was still registered with the HPCSA while having an outstanding inquest hanging over his head, or having been found guilty on some complaints or having 54 complaints, would HAAD, on the balance of probabilities, have registered him still as a practitioner to continue and work at Tawan Hospital.

[24] The plaintiff failed to answer this question decimally because it would require him to speculate. In all fairness, the plaintiff has failed to discharge the onus of whether HAAD would have still registered him as a professional Doctor.

[25] What also aggravated the situation again against the plaintiff is that even before the defendant could feed the HAAD with a piece of incorrect information about his non-registration with the HPCSA, HAAD had a concern about the plaintiff, which was never disclosed, which prompted them to write to the HPCSA on the letter dated the 13 December 2009.

[26] The plaintiff requested this court to accept the evidence of the witness Mr. Schaffer which is hearsay. In terms of section 3 (4) of the Law of Evidence Amendment Act⁴, hearsay evidence is defined as evidence, whether oral or in writing, whose probative value depends on the credibility of another person other than the person giving such evidence. Hearsay evidence is generally not admissible in legal proceedings as the source thereof will not be present at the proceedings to be cross-examined by the opposing party. Whether or not hearsay evidence may be admitted into evidence is subject to the presiding officer's discretion. This discretion should be exercised with due

⁴ 45 of 1998

regard to the exceptions as provided in section 3 (1) of the Law of Evidence Amendment Act. In terms of this section, hearsay evidence may only be admitted into evidence if;

- a. the opposing party consents to the admission thereof; or
- b. the original source testifies at such proceedings; or
- c. the Court, having regards to the following factors;
 - (i) the nature of the proceedings;
 - (li) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (Vi) any prejudice to the party which the admission of such evidence might entail; and
 - (Vii) any other factor which should, in the opinion of the Court, be taken into account is of the opinion that such evidence should be admitted in the interests of justice.

[27] In this case, there are so many issues which could have been the reasons for HAAD to terminate the contract of Mr. Scholtz, so, for the plaintiff to say that the court should only have regard to non-registration of the plaintiff with the HPCSA would not be fair, especially that this issue was already cleared with the HAAD. If this was the only reason for the termination of the contract by HAAD, HAAD should have come and testified in confirmation of Mr. Schaffer's evidence. The letter which was handed to the plaintiff during the trial coming from HAAD would have only written that the reason for termination was the fact that the plaintiff was not registered but instead they have also included on the letter the 54 complaints and the verdict of guilty on ten counts. We also know through evidence led during the trial that there was an outstanding inquest. We also know about their dissatisfaction with the plaintiff, which led them to write a letter to the HPCSA on 13 December 2009. It will be inappropriate to speculate what HAAD would give as a reason for the termination of Dr. Scholtz's contract.

[28] I cannot accept the hearsay evidence as it will not be in the interest of justice and

will create an unjustified result. There are multiple causes, so it will be difficult without evidence to say which conduct caused the termination. The plaintiff has to prove his case through credible and reliable evidence.

[29] Further, the plaintiff contends that the HPCSA breached their statutory duty in terms of section 18(1) and (2) of the Health Professions Act⁵ to keep registers in respect of persons registered in terms of the Act and to keep the registers correctly and in accordance with the Act. The plaintiff further argued that the HPCSA was required to keep registers up to date.

[30] On the other hand, the defendant referred to *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*⁶ at para 19, where the SCA emphasized that the breach of an administrative duty is not necessarily wrongful and the basis for delictual liability unless the nature and motive behind it are explicit.

'Undoubtedly, the appellants were entitled to proper administrative legal proceedings. But, that did not mean that the breach of the administrative duties as set out in the particulars of claim necessarily translated into private law duties giving rise to delictual claims.[see *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2005] ZASCA 120; 2006 (3) SA 151 (SCA); [2006] 1 All SA 478 para 1. It must be accepted that an incorrect administrative decision is not *per se* wrongful.see *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 23. It is thus unhelpful to call every administrative error 'unlawful', thereby implying that it is wrongful in the delictual sense, unless one is clear about its nature and the motive behind it. Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction. The breach of every legal duty, especially one imposed by administrative law, does not necessarily translate into the breach of a delictual duty. If the legal duty invoked is imposed by a statutory provision, the focal question is one of statutory interpretation. Whether the existence of an action for damages

⁵ 56 of 1974

⁶ 2018(1) SA 391 9 (SCA)

can be inferred from the controlling legislation depends on its interpretation, and it is indispensable to have regard to the object or purpose of the legislation. This involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common-law duty existed.'

[31] The defendant further argued that section 18 of the Health Professions Act 56 of 1974 does not confer a right of action for damages due to a negligent misstatement by a defendant's employee or official. The defendant further contends that section 47 provides no liability for damages claimed based on section 18 of the Act.

[32] To claim damages in circumstances where the statutory provisions do not require the defendant to be held liable for not keeping the register would be unjustifiable. I have already found that the plaintiff did not prove through evidence that the misstatement by the official of the HPCSA was the cause of HAAD's termination of the contract. Again one can only speculate. However, courts work on the basis of evidence from which facts are established, not conjecture. It remains speculation, as well, on the part of the plaintiff to advance an argument that had the HPCSA official kept the register, there would not have been any misstatement, and Dr. Scholtz would not have lost his job. There is no factual basis for such an argument. Nobody knows how the HAAD deliberated in their meeting when faced with a Doctor who had 54 complaints, wherein 10 of those complaints he was found guilty and further that there were still outstanding investigations with the police regarding inquest. We all do not know what was indeed the decision of the HAAD personnel. Therefore, I fail to see how the keeping of the register by the HPCSA would bring a different result in this regard.

[33] Wrongfulness is found where there is a legal duty to avoid damage; in this case, I agree with the defendant that section 47 excludes such liability. However, on the other hand, the factual causing of pure economic loss is not *prima facie* wrongful. Therefore, there should be evidence adduced that proves that the defendant intentionally caused the loss. Equally important is whether the defendant could have taken practical steps to prevent the economic loss, which the defendant has done in this case and the two

witnesses who testified attested to that.

Order

[34] As a result, the plaintiff's claim is dismissed with costs, including the costs of two counsels.

A handwritten signature in black ink, consisting of a large, stylized 'M' with a horizontal line crossing it, followed by a vertical line and a small dot. The signature is written over a horizontal line.

M. Munzhelele

Judge of the High Court Pretoria

Virtually heard: 27 May 2022

Electronically Delivered: 25 October 2022

APPEARANCES:

For the plaintiff: Adv. G. Naude SC

Adv. G. Kyriazis

Instructed by: Boshoff Smuts Inc

For the defendant: Adv. De Beer SC

Adv. T. Manchu

Instructed by: Gildenhuys Malatji Inc