IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 4414/2022

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

5 July 2023
Date

Signature

In the matter between:

DR REUBEN RESHOKETSOE MAKINTA **APPLICANT**

And

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **FIRST RESPONDENT**

ADV T BOIKANYO **SECOND RESPONDENT**

ADV J ADAMS SC **THIRD RESPONDENT**

JUDGMENT

SETHUSHA-SHONGWE AJ

Introduction

1. This is a review application against a decision of the Professional Conduct Committee (PCC), which decision was appealed against by the applicant, (Dr R. R Makinita) to the ad hoc appeal committee of the first respondent, the Health Profession Council of South Africa, (HPCSA). The appeal was dismissed against both the conviction and sentence.

2. The applicant's contention is that the findings and the judgment of the PCC and the appeal committee are demonstrably irrational and should be reviewed and set aside. On the other hand, the first and second respondents oppose the review application, inter alia, on the grounds that the relief sought by the applicant has become moot or academic in that the applicant has already served his sentence fully.

Background facts

3. Ms Khoza, a patient of Dr Makinita, filed an official complaint against him to the first respondent for his unprofessional conduct. She alleged that he neglected to attend to her, failed to follow up or refer her to another specialist, and did not provide care for her post-operation complications. On the second count, the applicant has been charged with unprofessional conduct, as he neglected to reply to the council's communication, which is seen as a disregard for their authority. This breach of conduct does not meet the professional norms and standards expected of him.

4. The applicant pleaded not guilty to both charges, however, he was subsequently convicted and sentenced to a period of 24 months suspension from the register of practitioners of which 12 months was suspended for 5 years on certain conditions. On appeal, the appeal committee confirmed both the conviction and sentence.

5. The applicant is now before this court in terms of the Promotion of Administrative Justice Act[1] (PAJA) and on the constitutional principle of legality. The applicant is challenging the procedural fairness of the conduct inquiry and to have it set aside as being procedurally unfair and unlawful. And also, to have the findings and judgment of the PCC and the appeal committee reviewed and set aside as irrational in terms of PAJA and unlawful in terms of the principle of legality.

6. The respondents are opposing the application on the grounds that the application has become moot or academic as well as on procedural and substantive issues raised by the applicant. The respondents argue that there is no merit in the applicant's case. The respondents further submitted that the applicant was afforded a fair opportunity to present his case before the PCC and his right to a fair trial was not infringed.

7. It is common cause that during the hearing by the PCC, the pro forma complainant led the evidence of Ms Khoza who testified that on 12 April 2012 she underwent an operation procedure performed by Dr Makinita. On 13 April the following day she was discharged, although the discharge was done by some other doctor (Dr Manana) and not the applicant. Four days later she called the applicant to report that there was puss coming out of the wound where she had been operated. Ms Khoza and the applicant agreed to meet on 20 April 2012. On 20 April 2012, the applicant fell ill and could not meet up with Ms Khoza. Another appointment was made for the 21 April 2012, this meeting also did not take place but the Applicant gave instructions that Ms Khoza may go home and he will call to arrange another date. Ms Khoza was unhappy and she was experiencing some pains. She decided to consult another doctor, (Dr Kolodi). On 22 April 2012, the Applicant called Ms Khoza to arrange to meet later that day to remove the stiches and he gave her a prescription to collect from the clinic. On 23 April 2012, Ms Khoza was re admitted and operated on 30 April 2012.

8. In this court, after filing the notice of motion, the respondents failed to file their answering affidavit timeously and when they did, they failed to attach an

---

[1] Act 3 of 2000.

application for condonation. As a result, the matter was placed on the unopposed motion court roll. The matter had to be removed from the roll and placed on the opposed motion court roll. When the matter was heard in the opposed roll, the applicant raised a point in limine, being the late filing of the answering affidavit, which the respondents opposed. The respondents also raised a point in limine that the main application has been overtaken by events and is therefore moot and/or academic.

9. The applicant argued that the respondent served answering affidavit after expiry of thirty days as prescribed by Rule 27 of the Uniform rules of court. Further the reply affidavit was not accompanied by condonation application, and it was served after the matter was placed on the unopposed roll on 22 June 2022. Therefore, the respondent should be made to pay costs incurred for the 22 June 2022. The respondent in motivation of the application for condonation gave reasons for delay amongst others being contributed by administrative processes inherent of government as well as having to obtain a counsel who understand the content of the main application. Respondent further submitted that the applicant suffered no prejudice as a result of the delay and that it was in the interest of justice that it be granted. And that the granting of condonation will allow the court to adjudicate issues in disputes in a better position. As such the application for condonation of late filling of the answering affidavit was granted and costs were reserved. I will give reasons as I progress with the judgment.

10. The respondent argued that the applicant was convicted and sentenced to twenty-four-month suspension of which twelve months was suspended for five years, on certain conditions from medical practitioner from January 2021 which period ended on 26 January 2022. The applicant served his full sentence hence the mootness of this application. The applicant argued on the contrary that should the applicant be found guilty of a similar offence in future, this sanction will be taken into consideration as a previous conviction by the first respondent. I now proceed to deal with the main application on the merits.

11. Applicant's submission on the procedural unfairness raises regulation 8 of the Health Professions Act[2], in that the applicant was served with a notice of inquiry dated 12 June 2019 indicating that the inquiry was set down for the 30 and 31 January 2020. Instead the matter was heard on 7 October 2019. And that was after one Mr Madube, an employee of HPCSA had a telephonic conversation with the applicant on 4 October 2019, of which that telephonic conversation turned out to be a pre-trial conference. The applicant was made to sign the same as a pre-trial minute in the morning of the 7 October before the inquiry could proceed. Thus, contrary to regulation 8 (1) as such applicant was ambushed and was not afforded adequate time to prepare for his defence as guaranteed by section 35(3) of the constitution, so it was argued. This unfairness was never raised during the appeal proceedings, it is only raised now on review. The appeal inquiry would have dealt with it and made a finding on it. It appears as an afterthought on the part of the applicant.

11. Further the applicant submitted that he pleaded on count one on 7 October 2019 after the inquiry in respect of another matter (Nhlapo) against the applicant was heard and completed by the same committee. The applicant was only made to plead in respect of count two some days after on 5 March 2020 after the first responded amended the charges on count two bringing in new evidence into the picture. And that was after the applicant finished testifying in respect of count one. The applicant submitted that as such that was contrary to section 81 of the criminal procedure act 51 of 1977 and procedurally incompetent of the prosecutor to do so. Even this point was brought about on review, it was never raised during the appeal proceedings and again the appeal committee would have made a finding to be reckon with on review.

12. Further applicant raised an issue relating to the constitution of the PCC in his matter when Ms Khoza was involved in the proceedings on 27 November 2019, when one PPC member, Dr T.G. Mothabeng, was appointed in terms of the letter dated 30 September was replaced by Prof JAL van Wyk yet the chairperson recorded that "the committee is still constituted as it was on the last occasion."

---

[2] Act no. 56 of 1974.

The involvement of Prof van Wyk in the PCC is consistent with Regulation 8, hence the applicant's complaint in this regard is without any basis.

13 The applicant indicated that the sequence of facts was understood incorrectly as such it led to irregular findings and was prejudicial to the applicant. On the finding:

The applicant states that the court found that the applicant failed to provide post operative care to Ms Khoza from the period 12 April 2012 to 30 April 2012 and arrived at a finding of eighteen days of neglect to the patient Ms Khoza by the applicant. Yet Ms Khoza was in essence seen by the applicant on 12 April 2012 then got admitted on 23 April 2012 and seen by the applicant on that day and was operated on 30 April 2012, the applicant saw Ms Khoza.

References amongst others was made to *Dumani v Nair*[3], as well as section 6 (2)(d) and section 6(2)(f)(ii)(cc) of PAJA.

14. The applicant submitted that, *inter alia*, the finding of guilty in Nhlapo' s matter was argued and found to be an aggravating factor constituting a previous conviction. Therefore, the judgment based on material factual errors, on these grounds alone, stands to be reviewed and set aside.

15. The respondent submitted that there is no merits pertaining to the grounds raised by the applicant. The factual error of PCC's finding on the sequence of days upon which the applicant did not attend to Ms Khoza, being 18 days, it does not fall within the ambit of what the applicant is charged with in terms of count one. Ms Khoza denied that she was seen by a doctor on 24 and 30 April 2012 being sent by the applicant, same applies to the 27 April 2012 the applicant testified that he saw Ms Khoza which she denies. In, her testimony she denied that the applicant ever came to see her when she was in hospital from 24 April until 30 April 2012. The applicant does not have proof of records to support his visit to Ms Khoza of the days he states to have visited her post operation.

---

[3] 2013 (2) SA 274 SCA para 29.

16. Concerning strict non-compliance with regulation 8, the respondent indicated during the hearing, in this court, that it was upon the applicant's request to Mr Madube on 4 October 2019 that he would like to have Ms Khoza's matter to be brought forward so as to proceed with Ms Nhlapo's matter which was on the roll for 7 October 2019, as he intends to plead guilty. As a result, he signed the pre-trial minutes in the morning of the 7 October 2019. Further the applicant did not raise any displeasure to the PCC about the pre-hearing conference and that he told Mr Madube that he intends to plead guilty in both matters.

17. The respondents further submitted that the applicant was afforded more opportunity to present his case hence numerous remands including fair opportunity afforded to consider the amended count 2 charge. Same applies to legal representation when the matter was before the PPC for the first time on 7 October 2019, he requested a remand so he could be afforded legal representative the request was granted and the matter was remanded to the 29 October 2019. On 29 October 2019, the matter was postponed to 14 November 2019 at the further request of the applicant.

18. The respondents further submitted that the applicant did not raise any issue about Mr Madube who conducted pre-hearing conference while not being a pro forma complainant or any issues pertaining to procedural prejudice not even to his legal representative who was present throughout the inquiry.

19. The respondents further submitted that regarding the composition of the PCC wherein Prof van Wyk came in as a new member it was on 27 November 2019 the day the applicant pleaded to the amended charge; therefore, the involvement of Prof Van Wyk is consistent with Regulation 8 and it cannot be found to be irregular.

20. The respondents submitted that all the issues and the alleged prejudice that the applicant is raising in this court he did not raise during the Appeal committee for the appeal committee's consideration.

21. In dealing with matters of this nature a frequently cited example is the dictum of Lord Brightman in *Chief Constable of the North Wales Police v Evans*[4] :

> "*Judicial review is concerned, not with the decision, but with the decision -making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.*"

In arriving at a fair and just determination I'm mindful that it is impossible to separate the merits from the rest of the matter as the court cannot judge the legality of the decision without considering the merits as well.

22. Section 33(1) of the Constitution provides that everyone has the right to administration action that is lawful and reasonable and procedurally fair. Further section 39(1) of PAJA caters for administrative action which materially and adversely affects legitimate expectations of any person and be procedurally fair. The importance of good administration is found in the constitution as reflected under section 33(3)(c) which states that the legislation in giving effect to just administrative action (PAJA) must promote an efficient administration. Cachalia JA in the matter of *State Information Technology Agency Soc Ltd v Gijima* Holdings (Pty) Ltd[5] stated:

> "*The proper place for the principle of legality in our law is for it to act as a safety net or a measure last resort when the law allows no other avenues to challenge the unlawful exercise of the public power. It cannot be first port of call or an alternative path to review, when the PAJA applies.*"

23. Wallis JA in the matter of *Minister of Defence v Xulu*[6], states that:

> "*(t)he development of a coherent administrative law demands that litigants and courts start with PAJA and only when PAJA does not*

---

[4] 1882] 3 All ER 141 (HL) at 154 d as referred in the book of Cora Hoexter Glenn Penfold 3rd Edition – Administrative Law in South Africa page 138.
[5] 2017 SA 63 par 33.
[6] 2018(6) SA 460 (SCA) para 50.

apply, they look at principle of legality and other permissible grounds of review lying outside PAJA."

24. Having considered the above, I now have to consider whether the PCC as well as the appeal committee in their conduct acted in a manner that was unfair and irrational in dealing with the applicant's case. The test is whether or not any reasonable committee would come to the same conclusion on the given facts. Reference was made by the respondents to the matter of *SG May v The Health Professions Council of South Africa and 3 Others*[7]:

> "*The test is clear as explained in Duma's case whether the Appeal Tribunal's decision is so unreasonable that no reasonable person would have reached it. The question must be answered, in the present circumstances, is whether this court is satisfied that a reasonable person, in the position of the Appeal Tribunal, on the evidence before it, could have reached a conclusion it had reached. The decision maker, in this instance the Appeal Tribunal, had to take into consideration all matters which a reasonable person would have done, having the same information at its disposal at the time the decision was taken."*

25. I will now address the point in limine raised. Firstly, I will deal with the approval of the condonation of the late filling of the answering affidavit by the respondent in exercising my discretion and being guided by the approach of the courts[8]

> "*As is the case under common law and the PAJA, a court hearing a legality review has discretion to overlook or, put differently, to condone an unreasonable delay. Condonation is to be granted where it is in the interest of justice for court to overlook the unreasonable delay… it entails the exercise of a discretion based on variety of factors, which Khampepe J described in Tasima case*

---

[7] 2003(6) SA at para 47.

[8] See page 736 3rd paragraph of Cora Hoexter text book mentioned supra.

as involving a 'factual, multifactorial and context-sensitive framework'.

The relevant factor includes the length of delay, the reasons for it, and the explanation given for the delay. As Theron J noted in Asla Construction (in re Buffalo City Metropolitan Municipality v Asla Construction '[a] party applying for condonation must give a full and honest explanation for the whole period of the delay'." Another relevant factor is the potential prejudice resulting for, the delay, including the possible consequence of belated setting aside the impugned decision..."

26. In casu, considering that the applicant did not in his reply to the application by the respondent raised any prejudice that he suffered and or will suffer as a result of late filling of the answering affidavit. I was also satisfied with the explanation advance by the respondent. As such I find that the delay was not deliberate and self-created. I therefore find that it will be just and equitable to allow the condonation of late filling so as to be able to be placed with both sides in order to be able to make proper assessment of facts and to arrive at a fair balanced determination.

27. Secondly, on the issue of mootness as raised by the respondent, on the papers before me the applicant was suspended from practising as practitioner for twelve months which period was effective from the date when his appeal was dismissed by the Appeal committee on 26 January 2021. The applicant served his suspension from 26 January 2021 and ended on 26 January 2022. It is not in disputes that he has served the sentence. The applicant contends that given the fact that he does not challenge this matter, the sanction will stand to serve as a previous conviction should he in future be convicted of a similar offence. I agree with the respondent's submission that the conviction and sentence imposed and served will not be regarded as a previous conviction. In terms of section 4(4) of the Health Profession Act, the registrar is bound to have the suspension revoked upon the expiry of the suspended period.

28. I now turn to deal with the test whether or not the decision of the Appeal committee was reasonable. The appeal committee in arriving at a determination of dismissing the applicant's appeal on both conviction and sentence it relied on the record of the evidence presented from the PCC inquiry. It remained unanswered in that all the grounds that the applicant is raising in this judicial review they were not raised before the PCC by the applicant nor did he raised them with his lawyer so as to be entertained by the PCC at the inquiry and allow the PCC to rule on those issues. As such the appeal committee would have had an opportunity to consider those issues in the decision making.

29. In my view, I find the absence of unfairness in the manner in which the proceedings were conducted. The records show that the applicant was afforded opportunity to secure his legal representative as well as to prepare his case. Thus, shown when he sought a remand to consider an amended charge on count 2, the committee acceded to his request was remanded before he could plead to charge. A further consideration in as far as non-adherence with strict requirements of regulation 8 of the Act. The applicant if he was ambushed to be heard on 7 October 2019 as opposed to 30 - 31 January 2020, he could have easily refused to sign the pre-hearing minutes in the morning of the of the 7 October 2019 as well as refused to plead on count 1.

30. I therefore find that the submission by the respondents in the matter of Ms Khoza was brought forward upon the request of the applicant as he wanted the matter to be heard on the same day with that of Mr Nhlapo. The involvement of Prof van Wyk does not constitute any irregularity in the proceedings.

31. In as far as count 2 is concerned the amended charge was read into the record by Mr Mapholisa and not Mr Madube. The applicant was afforded opportunity to prepare himself since he indicated that he was not aware of the charge in its amended form. Similarly, it was argued that the applicant was not supposed to have been convicted on the charge on count 2 in that he never received the correspondence from HPSCA yet he does not deny having received emails forwarded to him from HPSCA. It was expectant from him to make them aware

that much as he received their correspondence, he is unable to open the attachment. I therefore find that the conviction on count 2 was correct.

32. Concerning factual error in sequence of days as raised by the applicant which is undisputed by the respondent in that the PCC's finding is that the applicant neglected the patient from 12 April to 30 April 2012 totalling to eighteen days. In my view the number of neglect days is irrelevant as it is not part of the element of the charge on count 1. On the merits it is clear that on 20 April 2012, the applicant told Ms Khoza to go home and promised to see her on 21 April 2012 which appointment he did not honour. The applicant only saw the patient on 22 April 2012 after he was contacted by Dr Kolodi. On that point alone is a neglect on his part to the patient that falls within count one. I therefore find that the factual error relating to the sequence of dates is not material enough to call upon the court to set aside the decision of the appeal committee.

33. Upon considering all factors presented, I find no prejudice that rendered the proceedings irregular or reviewable. I therefore find that the appeal committee acted within the scope of reasonableness in dismissing the applicant appeal both on conviction and sentence. The applicant review application stands to fail,

34. I therefore make the following order:

1. Application is dismissed with costs.

N.C. SETHUSHA-SHONGWE
ACTING JUDGE
OF THE HIGH COURT GAUTENG
DIVISION, PRETORIA

Appearances

Counsel for the Appellant	: ADV T. MAKINTA
Instructed by	: MACROBERT INC
Counsel for the Respondent	: ADV D.D. MOSOMA
Instructed by	: DK SIWELA ATTORNEYS INC
Date of the hearing	: 4 MAY 2023
Date of judgment	: 5 JULY 2023

Judgment transmitted electronically