THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 786/2010

In the matter between:

LYNETTE MARY ROUX **Appellant**

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **First Respondent**

OLIVER MICHAEL POWELL **Second Respondent**

Neutral citation: *Roux v Health Professions Council of SA* (786/2010) [2011] ZASCA 135 (21 September 2011)

Coram: Navsa, Lewis, Ponnan, Mhlantla and Malan JJA

Heard: 17 August 2011

Delivered: 21 September 2011

Summary: **Health Professions Act 56 of 1974 and regulations – interpretation and application of provisions dealing with disciplinary inquiries – principle of legality – council obliged to act in accordance with its statutory powers – decision of pro forma complainant to add additional charge not sanctioned by Health Professions Council and not sourced in law – additional charge set aside.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following:

'(a) Count 1 of the charge sheet dated 4 September 2009 is set aside.

(b) The first respondent is ordered to hold an inquiry into the appellant's alleged misconduct solely in respect of Count 2, within two months of the date of this judgment.

(c) The first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application.'

JUDGMENT

MHLANTLA JA (**NAVSA, LEWIS, PONNAN and MALAN JJA)** concurring):

[1] This appeal, with leave of the court below, turns on the interpretation and application of the provisions of the Health Professions Act 56 of 1974 dealing with disciplinary enquiries. It also implicates the

regulations relating to the conduct of inquiries into alleged unprofessional conduct, promulgated in Government Notice 765 dated 24 August 2001 and published in Government Gazette 22584, made under the Act. The specific provisions will be referred to in due course. The events leading up to the litigation that culminated in the present appeal are set out hereafter.

[2] The appellant, Ms Lynette Mary Roux, a clinical psychologist, was appointed to conduct forensic work and furnish a report to the office of the Family Advocate in Johannesburg, regarding litigation between the second respondent, Mr Oliver Michael Powell and Ms Linda Petzer about access to a minor child Byron, born of the relationship between them. The appellant furnished the Family Advocate with her report on 19 March 2004. She thereafter assumed the role of a therapeutic psychologist and began treating Byron. During March 2005, and while still treating Byron, the appellant supplemented her March 2004 report.

[3] On 11 April 2005 Powell, through the registrar, submitted a complaint to the first respondent against the appellant which he supplemented in September 2005. The first respondent, the Health Professions Council of South Africa (HPCSA), was established in terms of s 2 of the Act and has as its objects, amongst others, to promote and to regulate interprofessional liaison between health professions in the interest of the public and to control and exercise authority in respect of all matters affecting the profession. The HPCSA must, in terms of s 3(j) of the Act, serve and protect the public in matters involving the rendering of health services by persons practising a health profession. Importantly for this case, one of the functions of the HPCSA is set out in s 3(n) of the Act, which is:

'to ensure the investigation of complaints concerning persons registered in terms of this Act and to ensure that appropriate disciplinary action is taken against such persons in accordance with this Act in order to protect the interest of the public.'

[4] In essence, Powell's first complaint was that the appellant had acted unprofessionally when she assumed multiple relationships, that is, that of being an investigator appointed by the Family Advocate and then also a therapist to Byron. Secondly, Powell complained that the appellant had misdiagnosed his condition and had labelled him a liar. Powell requested the HPCSA to investigate these allegations and institute an inquiry into the conduct of the appellant. Acting in terms of regulation 3(1)b)[1] the registrar forwarded a copy of the complaint to the appellant requesting her to respond. The appellant submitted a written response in February 2006.

[5] Thereafter, in terms of regulation 3(2),[2] the matter was placed before the committee of preliminary inquiry of the professional board for psychology (the committee). The committee obtained an opinion from Professor Charl Vorster, a clinical psychologist, in regard to the allegations of unprofessional conduct. His view was that the appellant should be prosecuted only on the allegation of multiple relationships. It is common cause between the parties that the committee accepted Prof

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[1] Regulation 3(1)(b) reads:
'3(1) The registrar may ─
. . .
(b) within seven working days after he or she received a complaint, notify the accused of the complaint or forward particulars of the complaint to him or her –
(i) requesting a written response from him or her within 21 working days after receipt of such notification or particulars, failing which the complaint will be forwarded to the preliminary inquiry committee without such written response; and
(ii) warning him or her that the written response referred to in subparagraph (i) may be used in evidence against him or her.
. . .'

[2] Regulation 3(2) reads:
'On receipt by the registrar of further information or a written response referred to in subregulation (1) (a) or (b), the registrar shall submit such further information or written response to the committee of preliminary inquiry and if no further information or written response is received, the registrar shall report this to the committee of preliminary inquiry.'

Vorster's opinion. On 18 May 2007 the committee resolved, in terms of regulation 3(3) and (4), that an inquiry into the conduct of the appellant should be held.

[6] The pro forma complainant[3] prepared a draft charge sheet which referred to the multiple relationships charge only. This draft charge sheet was submitted to the chairman of the committee for final approval and was approved by the latter on 18 July 2007 – this procedure is not statutorily prescribed but appears to be established practice. The registrar, acting in terms of regulation 4(a), thereafter issued a notice enclosing the charge sheet to the appellant specifying the date, time and place where the inquiry into this lone charge would be held.

[7] The inquiry was postponed on numerous occasions for various reasons. The charge sheet was also amended on at least three occasions. First, it was amended by the pro forma complainant, without reference to the professional committee, after Powell insisted that the pro forma complainant also prefer the misdiagnosis charge against the appellant. In this regard Powell relied on an opinion from Professor D A Louw, a clinical psychologist. Second, the pro forma complainant withdrew the charge sheet after Vorster advised him that the evidence before the committee of preliminary enquiry revealed only one count of misconduct, that is, the multiple relationships charge. A new charge sheet was served upon the appellant. The third occasion is referred to in para 9 below.

[8] As the inquiry was repeatedly postponed, the appellant launched an application in the North Gauteng High Court, Pretoria for declaratory and interdictory relief against the HPCSA and Powell. She sought an order

[3] Regulation 1 defines a pro forma complainant as 'a person appointed by a professional board to represent the complainant and to present the complaint to a professional conduct committee'.

that the inquiry instituted against her in terms of s 41 of the Act be declared unlawful, unreasonable and/or procedurally unfair and directing that the inquiry be permanently stayed.

[9] Following what is set out in para 7 Powell was even more insistent that the misdiagnosis charge be added. He placed reliance on an opinion from another expert, Dr Louise Olivier, a clinical and counselling psychologist. This stance by Powell led to the pro forma complainant withdrawing the old charge sheet and supplanting it with a new one containing two charges, the multiple relationships and misdiagnosis charges. This charge sheet was served on the appellant on 4 September 2009.The parties were at this stage exchanging affidavits in preparation for the hearing of the application in the court below.

[10] This caused the appellant to file an amended notice of motion in which she sought additional relief, inter alia, a declarator that the charge sheet dated 4 September 2009 be set aside; alternatively, that count 1 thereof (the misdiagnosis charge) be set aside, and that the HPCSA be directed to hold an inquiry only into the alleged misconduct in respect of count 2 (the multiple relationships charge).

[11] In the court below the appellant submitted that the charges be set aside due to the delays caused in bringing the matter to finality as well as the fact that the pro forma complainant had exceeded his authority when he preferred the misdiagnosis charge. The HPCSA and Powell, on the other hand, contended that it was premature for the appellant to approach the court as the actual inquiry had not been conducted and that the pro forma complainant had acted within his statutory authority.

[12] Tuchten J in the court below held that there was insufficient evidence to support the claim for the undue delay in conducting the inquiry. Furthermore, the learned judge held that the committee had not authorised an inquiry into specific conduct, but merely considered the material placed before it and decided, in general terms, that an inquiry should be held. According to the judge, once the committee had decided that the complaint had merit, its function was complete. He held that the ambit of the inquiry was rightly determined by the pro forma complainant. He thus dismissed the application with costs. He later granted leave to this court.

[13] Before us, the litigation between the parties has been reduced to a single issue: whether a pro forma complainant has the authority to prefer charges against a health practitioner which were not authorised by the committee of preliminary enquiry?

[14] As in the court below, counsel for the appellant contended that the pro forma complainant had exceeded his authority when he included the misdiagnosis charge in the charge sheet as he was restricted to formulating a charge as determined by the committee. Put differently, the question concerned the principle of legality. The submission advanced on behalf of the respondents was that the relief sought by the appellant was not competent because the matter was not ripe for review, since the disciplinary enquiry had not even begun and that the pro forma complainant in any event had the requisite authority to determine the nature and extent of the charges to be brought against a health practitioner.

[15] As indicated earlier in this judgment, the answer to this issue depends on the interpretation and application of the provisions of the Act and the regulations. It is thus apposite at this stage to consider the scheme of the Act.

The relevant provisions of s 15 of the Act provide:

'15. **Establishment of professional boards**:

(1) The Minister shall, on the recommendation of the council, establish a professional board with regard to any health profession in respect of which a register is kept in terms of this Act, or with regard to two or more such health professions.

. . .

(5) Regulations relating to the constitution, functions and functioning of a professional board shall at least provide for─

. . .

(f) the establishment by a professional board of such committees as it may deem necessary, each consisting of so many persons appointed by the board as the board may determine, but including at least one member of the board who shall be the chairperson of such committee, and the delegation to any person or any committee so established, such of its powers as it may from time to time determine, but shall not be divested of any power so delegated.'

Section 41 provides:

'41. **Inquiries by professional boards into charges of unprofessional conduct:**

(1) A professional board shall have power to institute an inquiry into any complaint, charge or allegation of unprofessional conduct against any person registered under this Act, and, on finding such person guilty of such conduct, to impose any of the penalties prescribed in section 42(1).

(2) A professional board may, whenever it is in doubt as to whether an inquiry should be held, in connection with the complaint, charge or allegation in question consult with or seek information from any person, including the person against whom the complaint, charge or allegation has been lodged.'

[16] As stated above, s 3(n) empowers a council to investigate complaints against health practitioners and to ensure that appropriate disciplinary action is taken against such persons in terms of the Act.

Section 41(1) confers on the professional board the power to institute inquiries into complaints, charges or allegations of unprofessional conduct. A board may in terms of s 15(5)f) establish committees comprising such persons as the board may deem fit, and shall include at least one member of the board. It may delegate to such committee such of its powers as it may determine.

[17] In terms of s 61(h)(i) of the Act, the Minister is empowered, after consultation with the council, to make regulations relating to the manner in which complaints, charges or allegations brought against a registered person shall be lodged. The regulations promulgated in terms of the Act deal with the manner in which the complaints of alleged unprofessional conduct are to be dealt with. Regulation 2(1) states:

'A complaint shall be in writing and be addressed to the registrar or to the council or to a professional board.'

[18] Regulation 3 sets out the procedure to be adopted upon receipt of a complaint. The registrar may either call for further information, or within seven days forward the complaint to the affected person, calling upon him or her to respond to such complaint or allegations. For present purposes the critical provisions are regulation 3(3) and (4) and regulation 4(a) and (b) and these provide:

'(3) If a committee of preliminary inquiry decides, after due consideration of the matter, that there are no grounds for an inquiry, it shall direct the registrar to communicate in writing its decision to the complainant and the accused stating the reason(s) for such decision.

(4) If a committee of preliminary inquiry decides, after due consideration of the matter, that an inquiry must be held into the conduct of the accused, it shall direct the registrar to arrange for the holding of an inquiry.

4(a) On receipt of a directive referred to in regulation 3(4), the registrar shall issue a notice, which is attached hereto and essentially in the form of Annexure A and

addressed to the accused, stating where and when the inquiry will be held and enclosing a charge sheet as formulated by the pro forma complainant.

(b) The notice referred to in paragraph (a) shall be served on the accused or mailed to him or her at his or her registered address by registered mail at least one month prior to the date of the aforesaid inquiry.'

[19] The primary rule in the interpretation of statutes is to give effect to the object or purpose of the statute. The nature of the statute and the purpose for which it was enacted are important when it comes to matters of interpretation. This court has embraced the purposive approach, whereby statutory words must be interpreted in the context of the statute as a whole including its purpose.[4] In *Stopforth v Minister of Justice; Veenendaal v Minister of Justice*[5] this court confirmed that 'even where the language is unambiguous, the *purpose* of the Act and other wider contextual considerations may be invoked in aid of a proper construction'. It follows therefore that the Act and regulations must be given a purposive construction to give effect to their principal aims and purposes.

[20] Before us, the parties were agreed that the committee's role as referred to in sub-regulations (3) and (4) was to ensure that only sustainable complaints were proceeded with ─ a sifting function.

[21] It was contended on behalf of Powell that the sifting process was not one in respect of which a specific charge or charges was or were to be considered but rather where the committee decided whether all the information before it should form the basis of the charge or charges to be formulated by the pro forma complainant.

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[4]See *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16-19.

[5]*Stopforth v Minister of Justice; Veenendaal v Minister of Justice* 2000 (1) SA 113 (SCA) para 21.

[22] In my view the submission on behalf of Powell is fallacious. The very basis of having a committee to conduct a preliminary inquiry, is to decide, with the skills available to it, which of the complaints put before it were warranted. The committee consists of health professionals who possess skills relative to the regulated profession. *They* are best suited to decide whether there are grounds on which to conduct an inquiry into unprofessional conduct. It is that committee's function to specify the conduct to be the subject of inquiry.

[23] The pro forma complainant in this case is a person legally trained whose task, in my view, is to ensure that the circumscribed conduct is accurately encapsulated in an intelligible form by way of a formal charge sheet. If this were not so, the wrong professionals would be charged with tasks beyond their expertise.

[24] That this is how the scheme of the Act is understood by the HPCSA, is borne out not only by what transpired in this case before the aggressive intervention by Powell, but also by how the process of inquiries is described in general terms by Mr Janzen, who was employed by the HPCSA as a pro forma complainant.

[25] In the present case the committee had authorised only the bringing of the multiple relationships charge. This it did in terms of regulation 3(4). Janzen, who deposed to the answering affidavit and the supplementary answering affidavit on behalf of the HPCSA, stated that the committee had resolved that an inquiry be held in regard to the complaint of the appellant's multiple relationships. In consultation with Vorster, a draft charge sheet was prepared and approved on 4 July 2007. This charge sheet was later submitted to the chairman of the committee

for final approval, who approved it on 18 July 2007. The new charge sheet dated 4 September 2009 which included two charges was never submitted to the chairperson of the committee for approval, nor were the reports by Olivier and Louw presented to the committee for its consideration.

[26] It was submitted on behalf of Powell that the words 'an inquiry must be held into the conduct of the accused' meant that all that the committee was required to do was to decide whether an inquiry should be held into the conduct apparent from the information placed before the committee, without the need for specificity. In my view, this latter submission falls to be rejected. It renders the sifting process nugatory. Furthermore it is at odds with fundamental principles of administrative law, namely that decisions 'affecting individuals' should be based on substantiated information and that the person at the receiving end of disciplinary action should be clearly apprised of the nature of the charges he or she has to face to enable a proper defence to be mounted.[6]

[27] The pro forma complainant accordingly did not have the authority to include the misdiagnosis charge in the charge sheet. He was furthermore not entitled to accept expert opinions sourced by the second respondent and formulate the misdiagnosis charge based on such opinions. He had a duty to act in accordance with the instructions of the committee. In the result the high court erred in finding that the pro forma complainant had the power to determine the ambit of the inquiry, including the specific charges to be preferred.

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[6]Lawrence Baxter *Administrative Law* (1984) at 546. See also Cora Hoexter *Administrative Law in South Africa* (2007) at 334.

[28] Counsel for the HPCSA and Powell submitted that the formulation of the charge sheet did not constitute 'administrative action' as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and therefore that there were no grounds to review the decision.

[29] Administrative action is defined in s 1 of PAJA as:

'any decision taken, or any failure to take a decision, by ─

(a) an organ of state, when ─

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect . . . .'[7]

In my view, Janzen (however misguided), acting on behalf of the HPCSA, in deciding on and proceeding to add the additional charge, was engaging in administrative action. His decision clearly falls within the definition of 'administrative action' and is in the ordinary course subject to review for lack of statutory authority in terms of s 6 of PAJA.

[30] Even if this were not so, the committee and the pro forma complainant exercised public power, purportedly in terms of the provisions of the Act and the regulations. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* the following was said in para 40:[8]

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[7] In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 24 Nugent JA summarised administrative action as 'the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its transition into law, with direct and immediate consequences for individuals or groups of individuals'.

[8] *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC). See also *Gerber v MEC for Development Planning & Local Government, Gauteng* 2003 (2) SA 344 (SCA) para 35 and *Senwes Ltd v Competition Commissioner of South Africa* (118/2010) [2011] ZASCA 99 para 51.

'It is not necessary in the present case to attempt to characterise the powers of local government under the new constitutional order, or to define the grounds on which the exercise of such powers by an elected local government council itself can be reviewed by the Courts. The exercise of such powers, like the exercise of the powers of all other organs of State, is subject to constitutional review which, . . . includes review for "legality" . . .'.

[31] The principle of legality is implicit in our Constitution and applies to every exercise of public power, thus providing an essential safeguard even when action does not qualify as 'administrative action' for purposes of PAJA or the Constitution. As stated by Sachs J in *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amicus curiae)*[9] 'The constitutional principle of legality is of application even when the action in question is an exercise of public power that does not qualify as "administrative action" . . .'. The principle of legality requires that 'power should have a source in law' and 'is applicable whenever public power is exercised. Public power . . . can be validly exercised only if it is clearly sourced in law'.[10]

[32] The principle of legality dictates that administrative authorities such as the HPCSA cannot act other than in accordance with their statutory powers. The decision of the pro forma complainant to include the misdiagnosis charge was not 'sourced in law' and has offended against the principle of legality. The decision has to be reviewed and nullified for want of statutory power. It follows that the misdiagnosis charge has to be set aside. The inquiry, if it continues, can relate only to the multiple relationships charge.

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[9] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 613.
Premier,Western Cape v Overberg District Municipality 2011 (4) SA 441 (SCA) paras 37-38.
[10] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) para 68.

[33] It is necessary briefly to consider the respondents' submission that the matter was not ripe for review as the inquiry had not been held. This contention cannot be sustained. A person is not prevented from applying to court for relief where his very complaint is the illegality or fundamental irregularity in respect of the decision he seeks to challenge or impugn.[11] There is no reason why a person such as the appellant should first subject herself to an unauthorised inquiry which would entail costs and wasted time before challenging its legality. This is not the kind of case where the question of ripeness arises as the challenge relates to the source of power and the principle of legality. The appellant was entitled to a declaratory order in that regard.

[34] Finally, there is a disturbing aspect of this case that I am constrained to address. The purpose of establishing the HPCSA was to protect the public interest. The complaint was lodged in April 2005. The inquiry is yet to be heard, six years later. Such a state of affairs reflects badly on the HPCSA and affects public confidence in it.

[35] For the reasons stated above the appeal succeeds. The following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following:

'(a) Count 1 of the charge sheet dated 4 September 2009 is set aside.

(b) The first respondent is ordered to hold an inquiry into the appellant's alleged misconduct solely in respect of Count 2 within two months of the date of this judgment.

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[11] *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503A-D.

(c) The first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application.'

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N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES

For Appellant:	P Beltramo SC Instructed by: Bowman Gilfillan Inc, Johannesburg Symington & De Kok, Bloemfontein
For 1st Respondent:	E B Clavier Instructed by: Matabane Incorporated, Pretoria EG Cooper & Majiedt Inc, Bloemfontein
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