THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 54/2007

In the matter between

JULIUS PREDDY **FIRST APPELLANT**

PERCY MILLER **SECOND APPELLANT**

and

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

CORAM: **HOWIE P, MTHIYANE, HEHER, MLAMBO and MAYA JJA**

HEARD: **12 MARCH 2008**
DELIVERED: **31 MARCH 2008**

Summary: **Health Professions Act 56 of 1974 – ss 42 and 43 - medical practitioners guilty of unprofessional conduct – Penalties imposed by Professional Committee of Enquiry suspended on certain conditions – whether such conditions competent.**
Interpretation and application of section 42(1) and 43(1)(b) of the Act – intention to empower sentencing authority to select one or more of the penalties – substitution of 'and' for 'or' not to be lightly resorted to.

Neutral Citation: **Preddy v Health Professions Council of SA (54/2007) [2008] ZASCA 25 (31 March 2008).**

JUDGMENT

MTHIYANE JA

MTHIYANE JA:

[1] The first and second appellants are specialist medical practitioners registered in terms of the Health Professions Act 56 of 1974 ('The Act'). At a disciplinary enquiry conducted by the Professional Conduct Enquiry Committee ('the Committee') in terms of s 41 of the Act, the appellants were found guilty of unprofessional conduct. Their conviction arose from an arrangement in terms of which the appellants referred patients to a radiology firm in return for which they received certain payments. The payments were found by the Committee to constitute perverse incentives ('kickbacks') and their receipt by the appellants, disgraceful conduct. In total the first appellant received R156 792, 00 and the second appellant R756 153, 00 over the period 1993 to 1999.

[2] The appellants were suspended from practice for five years but the operation of the suspension was suspended for five years on the following conditions: (1) that they were not convicted of receiving perverse incentives for a period of five years during the period of suspension; (2) that the amounts received were paid to the Health Professions Council of South Africa ('the Council') within a specified period; (3) that they performed community service in any public service hospital for two years, with the distinction that the first appellant was to serve only one day per week, and the second appellant two days.

[3] The appellants appealed to the Disciplinary Appeal Committee (i.e. an internal appeal in terms of the Act). The appeal succeeded in part to the extent that the conviction was confirmed but the period within which the appellants had to pay the Council was extended by a further six months to one year. In

addition the second appellant's community service was reduced to one day per week.

[4] A further appeal to the Pretoria High Court in terms of s 20 of the Act failed. The convictions of both appellants were confirmed but the penalties were amended to the extent that the condition requiring them to do community service was expressed in hours rather than days. The High Court (Botha J, with Sithole AJ concurring) ordered that:

'1. The appeal against the finding that the appellants were guilty of unprofessional conduct is dismissed.

2. The appeal against the penalties is dismissed except that the third condition of suspension is altered to read: "That [the appellants] perform community public service by practising [their] profession in any public service hospital for 800 hours over a period of two years from this date".

3. The respondents [i.e. the appellants] are to pay the costs of the appeal, which will include the costs of two counsel.'

[5] The appeal to this court with leave of the High Court is confined to the penalties. It turns primarily on whether the conditions of suspension of the penalties imposed by the Committee are competent or *ultra vires* the Act. A related issue raised by the appellants is whether the imposition of the suspension of the appellants from practice was appropriate.

[6] It is convenient first to dispose of the latter issue. In this regard the appellants argue that the penalty imposed upon them was too severe in the circumstances. They maintain that a suspension from practice for a period of three or six months would have been more than adequate. I do not agree. Given the serious light in which the offences were viewed by the Council, it cannot be said that the sentences imposed are unduly harsh or leave one with a sense of shock. It has been said of various predecessors of the Council that each was the

repository of power to make findings on what was ethical and unethical in medical practice (*Meyer v SA Medical and Dental Council*.[1]) and the body *par excellence* to set the standard of honour to which its members should conform (*De La Rouviere v SA Medical and Dental Council*.[2]) That is still so. When the Council says that particular professional misconduct by a practitioner is serious its assertion must be taken to heart unless there are compelling reasons to the contrary. It is not for the court to usurp the function of the professional body in its determination of what is or is not improper or disgraceful. I am not persuaded that there is any reason to interfere with the Committee's finding. In my judgment the penalty imposed was not inappropriate and the appellants' submission to the contrary falls to be rejected.

[7] I turn to the question whether the conditions of suspension imposed upon the appellants are competent. It is necessary first to deal briefly with the penalty provisions in s 42(1) of the Act. The sub-section reads:

(1) Every person registered under this Act who, after an inquiry held by the professional board, is found guilty of improper or disgraceful conduct, or conduct which, when regard is had to such person's profession, is improper or disgraceful, shall be liable to one or other of the following penalties –

(a) a caution or a reprimand or a reprimand and a caution; or

(b) suspension for a specified period from practising or performing acts specially pertaining to his profession; or

(c) removal of his name from the register; or

(d) a fine not exceeding R10 000; or

(e) a compulsory period of professional service as may be determined by the professional board; or

(f) the payment of the costs of the proceedings or a restitution.'

[1] 1982 (4) SA 450 (T) at 455H).
[2] 1977 (1) SA 85 (N) 97E.

[8] The Committee which was empowered to impose the penalties in terms of the above section is a creature of statute and derives its powers from the Act. It can only operate within the four corners of the Act and exercise only those authorities and powers expressly or by necessary implication conferred upon it in terms of the Act. (See *Ndamase v Functions 4 All*;[3] *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*.[4])

[9] As a starting point in the interpretation of a statute the words used ought to be given their ordinary grammatical meaning having due regard to their context. Section 42(1) of the Act provides that upon conviction for improper or disgraceful conduct a practitioner shall be liable for 'one or other' of the penalties, not 'one or more' of the penalties therein specified. The word 'or' appears immediately at the end of each penalty provision, leading one irresistibly to the conclusion that the intention of the Legislature was to empower the sentencing authority to impose any one of the sentences but not a combination of one or more. The appellants, quite rightly in my view, argued that if the Legislature had intended to provide otherwise it would have used language consistent with such an intention.

[10] There is no doubt that there are cases where the word 'or' has been read as 'and', but this occurs in cases where to give the word 'or' its natural meaning would give rise to an interpretation that is unreasonable, inconsistent or unjust. (See *Gorman v Knight Central GM Co., Ltd*.[5]) This is however not the case in the present matter. The penalties prescribed by the section were clearly intended to be alternative options available to the sentencing authority.[6] Moreover, as this

[3]2004 (5) SA 602 (SCA) at 605G–606B.
[4] 1999 (1) SA 374 (CC) paras 56 and 58.
[5]1911 TPD 597 at 610.
[6]This intention is borne out by the original structure of s 42(1)(a), (b) and (c) and the amendments made by Act 79 of 1990 and Act 89 of 1997.

judgment demonstrates, such an interpretation does not render the Committee less effective in disciplining the members of the profession.

[11] Reading 'or' as 'and' has been described as a violent expedient which ought not to be adopted, except in the last resort, for the simple reason that 'or' does not mean 'and', and when the Legislature uses 'or' it must prima facie at all events be taken to mean 'or' and not 'and' (*Colonial Treasurer v Great Eastern Collieries Ltd* 1904 TS 716 at 719). It has been said:

' '[O]r' must always be construed in its ordinary and proper sense as a disjunctive particle signifying a substitution or an alternative, unless the context shows or furnishes very strong grounds for presuming that the Legislature really intended the word *and* to be used. If to use the word 'or' in its proper and grammatical sense would strain the plain object of the Act, the Court will presume … that 'and' was intended for 'or'. But, … the Court must not alter words in an Act of Parliament merely to give it a meaning such as it thinks those who framed it would have done, if the question had presented itself to them.' (See *S v Pretorius*[7])

[12] In similar vein this Court in *Ngcobo v Salimba CC*[8] (per Olivier JA) said:

'It is unfortunately true that the words 'and' and 'or' are sometimes inaccurately used by the Legislature and there are many case in which one of them has been held to be the equivalent of the other (see the remarks of Innes CJ in *Barlin v Licensing Court for the Cape* 1924 AD 472 at 478). Although much depends on the context and the subject-matter (*Barlin* at 478), it seems to me that there must be compelling reasons why the words used by the Legislature should be replaced; *in casu* why 'and' should be read to mean 'or', or *vice versa*. The words should be given their ordinary meaning ". . . unless the context shows or furnishes *very strong grounds* for presuming that the Legislature really intended" that the word not used is the correct one (see Wessels J in *Gorman v Knight Central GM Co Ltd* 1911 TPD 597 at 610; my emphasis). Such grounds will include that if we give 'and' or 'or' their natural meaning, the interpretation of the section under discussion will be *unreasonable*, *inconsistent* or *unjust* (see *Gorman* at 611) or that the result will be *absurd* (*Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others* 1982 (4) SA 427 at 444C-D) or,

[7] 1969 (1) SA 235 (T) at 237 F-G.
[8] 1999 (2) SA 1057 (SCA) at 1067J-1068B.

I would add, *unconstitutional* or *contrary to the spirit, purport and objects of the Bill of Rights* (s 39(2) of the 1996 Constitution).'

[13] It follows therefore that the Committee could select only one of the penal options listed in paragraphs (e) to (f) of s 42(1) and not 'one or more' or a combination of them.

[14] This brings me to the conditions for the suspension of the penalty. Counsel for the appellants drew attention to the monetary value of the professional services rendered by specialist practitioners of their qualification and experience, which, when calculated at the then prevailing rate, amounted to between R800 and R1200. On that basis, counsel submitted that the monetary equivalent of the total periods of community service imposed on the appellants was grossly out of proportion to the largest monetary fine which the Committee was empowered to impose (R10 000, in terms of s 42(1) of the Act). The penalty sections, he said, should be interpreted in a manner which rendered them consistent. Counsel also submitted that the imposition of community service as a condition of suspension was simply an impermissible attempt to levy a fine under another guise. So also was the order for payment to the Council of the amounts received as kickbacks. Finally, in this regard, said counsel, the imposition of community service and the order for payments were duplications of penalties clothed as conditions of suspension; the effect was that the Committee was in reality imposing three penalties when it was empowered by s 42(1) to impose only one.

[15] All these submissions depend on the same fallacy, viz that the conditions which may be imposed under s 43(1)(b) are limited by the terms of the penalty powers of the Council (s 42(1)). Counsel for the respondent submitted that the purpose of conditions of suspension is to ameliorate the penalties. More

correctly, I think, the purpose is to provide a means of avoiding strict performance of the penalty. None of the available penalty options provided for in the section standing alone would have constituted an appropriate punishment. A caution and discharge or a caution or reprimand was out of the question, given the seriousness of the misconduct. So also the removal of the appellants from the roll or an outright suspension from practice for five years, both of which would have been too harsh and totally against the weight of the evidence presented by the respondents in mitigation. A fine would have been too lenient. Such was the dilemma in which the Committee found itself.

[16] In its present form s 43(1)(b) of the Act provides a clear-cut solution. The section provides for the postponement or suspension of the operation of the penalty imposed under s 42(1) on conditions 'as may be determined by' the Committee. It reads:

'(1) Where a professional board finds a person referred to in section 42(1) guilty of conduct referred to therein, it may –

(a) . . .

(b) impose any penalty mentioned in paras (b), (c) or (d) of section 42(1), but order the execution of such penalty or any part of the penalty to be suspended for such period and on such conditions as may be determined by it.'

[17] Although there is no specific provision in the Act for the imposition of a condition requiring an offending medical practitioner to perform community service or to pay the amount of perverse incentives received by him or her to the Council, these conditions are ancillary to the power it had to impose the penalty provided for in s 42.

[18] A condition of suspension cannot multiply penalities. What it can do is to offer the affected person a choice to avoid the single penalty laid down by the

Committee by voluntarily adopting another course of action, (see *R v Hendricks*;[9] *R v Littlejohn*[10]) which in its totality may or may not include or exceed a prescribed penalty. The imposition of a condition does not compel performance with its terms; the affected person is perfectly free to submit himself or herself to the penalty and ignore the conditions. Thus a power to lay down the conditions provides scope for creativity on the part of the sentencing authority (without infringing on its penalty power). As the record shows, the Committee took full advantage of the scope for creativity when deciding on the conditions.

[19] In the court below Botha J correctly referred to *R v Fourie*[11] to justify the conclusion that a condition of suspension may require an accused to do something that would otherwise be outside the jurisdiction of a court. The question in *R v Fourie* was whether the court was limited in the amount of compensation it could award to the complainant upon conviction of the accused. The court concluded that it was not. This is because it was empowered by the relevant section to impose such conditions as 'in its discretion it thinks suitable.' (See *R v Fourie* at 470). The power to impose conditions under s 43(1) is no less broad.

[20] For the above reasons I am of the view that the Committee did not misdirect itself in any way in imposing the conditions it did and there is no basis to interfere with its finding.

[21] Accordingly the appeal is dismissed with costs.

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[9] 1915 CPD 821.
[10] 1946 TPD 161 at 168.
[11] 1947 (3) SA 468 C at 470.

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

HOWIE P
HEHER JA
MLAMBO JA
MAYA JA