



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 73859/2009

DATE: 9/12/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~.

(3) REVISED.

10-01-2011
DATE

[Signature]
SIGNATURE

IN THE MATTER BETWEEN

KOMATHIE MOODLEY

APPLICANT

AND

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

1ST RESPONDENT

WILLIAM O SHISANA

2ND RESPONDENT

JUDGMENT

MAKGOBA, J

Introduction

[1] The applicant makes an application for the following relief:

- 1.1 that the decision by the second respondent on 3 June 2009, refusing a stay of prosecution on count 3 of the charge dated 14 November 2008 preferred against the applicant at a Professional Conduct Inquiry of the Professional Board for Psychology of first respondent, be reviewed and set aside;
- 1.2 that the decision by second respondent on 3 June 2009, refusing a stay of prosecution, be substituted with an order that count 3 of the charge dated 14 November 2008 preferred against applicant at a Professional Conduct Inquiry of the Professional Board for Psychology of first respondent be stayed permanently;
- 1.3 that the respondents be ordered to pay applicant's costs.

[2] The second respondent gave notice that he does not oppose the application and will abide by the court's decision. The first respondent made a substantive application for condonation of its failure to have filed its answering affidavit within a period of thirty days after having entered notice of intention to oppose the application.

[3] At the hearing of this matter I indicated to counsel for the parties that they need not argue the application for condonation as I have, on the papers, made a finding that the first respondent had provided a valid and justifiable reason for the delays which gave rise to its failure to have filed its answering affidavit as provided for in the relevant rule of court. Therefore, the matter proceeded for hearing on the merits only.

1- The applicant, an adult female clinical psychologist, duly registered as such with the first respondent, faced the following charges of misconduct:

4.1 Count 1: "That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that in a psychological report relating to Mr J Hari dated the 30th of June 2003 (a copy is annexed hereto, marked 'A') you made statements and/or expressed opinions on Mr M Pillay and/or Mr G Pillay without having consulted with and/or examined them and thereby contravened Rule 44(2) and (3) of the Rules of Conduct pertaining specifically to psychology (a copy is annexed hereto, marked 'B') issued by the Professional Board for Psychology."

4.2 Count 2: "That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that during or about 2003 and 2004 and in respect of Mr J Hari (your client) you entered into a multiple relationship with your client and thereby contravened Rule 18 of the Rules of Conduct pertaining specifically to psychology (a copy is annexed hereto,

marked 'C') issued by the Professional Board for Psychology."

4.3 Count 3: "That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that during or about 2004 until 2005 you engaged in sexual intimacy with your former client, namely Mr J Hari, and thereby contravened Rule 64 of the Rules of Conduct pertaining specifically to psychology (a copy is annexed hereto marked 'D') issued by the Professional Board for Psychology."

[5] The applicant was arraigned to appear at a professional conduct inquiry. On 2 June 2009, when the enquiry resumed before the Professional Conduct Committee of the Professional Board of Psychology the applicant applied that the prosecution in respect of count 3 of the charge-sheet be stayed permanently on the basis that there has been a delay in the institution of the prosecution from the date on which the decision was taken to prosecute the applicant and that in the cause of the delay, vital evidence for the applicant in the form of a vital witness, has been lost.

[6] In its finding the Professional Conduct Committee dismissed the application for a stay of prosecution. The applicant in turn applied that the proceedings be

postponed *sine die* in order to enable the applicant to approach the High Court with a review application reviewing and setting aside the decision by the Committee to dismiss the application for a stay of prosecution in respect of count 3. The committee granted such application on 3 June 2009.

[7] The present application arises from the disciplinary proceedings instituted by the first respondent in terms of the provisions contained in Chapter IV of the Health Professions Act, no 56 of 1974 read with Regulation 765, *Government Gazette* 22584, dated 24 August 2001, promulgated in terms of the Health Professions Act ("the Regulations").

[8] The Regulations set out the procedure to be followed by the first respondent under which applicant's registration as a clinical psychologist resorts, upon receipt of a complaint against a person registered with the first respondent. A complaint, together with the registered person's explanation in response thereto, is considered by a committee of preliminary enquiry of the relevant professional board under which the person complained against is registered.

[9] A Committee of Preliminary Inquiry that considers a complaint is empowered to decide whether a formal professional conduct inquiry should be held into the conduct of the registered person complained about. The Registrar of first respondent, upon receiving a directive from a Committee of Preliminary Inquiry that a professional conduct inquiry be held, is under a peremptory obligation to

issue a notice to the person complained against stating where and when the inquiry will be held and enclosing a charge-sheet as formulated by the *pro forma* complainant. The notice and charge-sheet must be served on the accused or mailed to him or her by registered mail at least one month prior to the date of the professional conduct inquiry.

[10] In the event of the accused being found guilty of unprofessional conduct by a Professional Conduct Committee at a Professional Conduct Inquiry, such committee is empowered, *inter alia*, to impose a sentence of:

10.1 suspension for a specified period from practising or performing acts specially pertaining to his or her profession;

10.2 removal of his or her name from the register.

The effect of a suspension or removal from the register is that such person is disqualified from practising his or her profession.

Factual background

[11] The charges against applicant emanate from a letter of complaint lodged with the first respondent by a Mr D Pillay dated 12 January 2007. The first respondent wrote to applicant on 25 January 2007, informing her of the complaint and inviting her to submit an explanation in response thereto. Applicant did not receive this letter for reasons which she has not been able to determine. She only became aware of the fact that a complaint had been lodged against her after she had received further correspondence from first respondent on 24 March 2007.

- [12] Applicant requested that the documentation be made available to her. She received the documentation on 21 May 2007 together with a request that her explanation be submitted by 8 June 2007.
- [13] Applicant sought legal assistance in responding to the complaint. The attorneys consulted by her advised her to inform her professional indemnity insurer of the complaint. Her then attorneys informed her professional indemnity accordingly and also wrote to the first respondent on 5 June 2007, advising it that the matter had been referred to applicant's insurers and requesting for an extension of time in which to submit her explanation. There was uncertainty on the part of applicant's insurers whether she was entitled to assistance in responding to the complaint. She was referred to her present attorneys of record (Deneys Reitz) only after this issue has been resolved towards the middle of July 2007. The present attorneys requested a further extension of time from first respondent on 19 July 2007 to 30 August 2007. The first respondent, on 23 July 2007, granted an extension to 31 August 2007. The applicant's explanation was submitted on 31 August 2007 by telefax, e-mail and mail.
- [14] On 20 September 2007 applicant's attorneys telephoned first respondent as to progress regarding consideration of this matter by the Committee of Preliminary Inquiry. They were informed that the chair person of the Psychology Board was overseas and that the date could only be set upon his return, which would be

sometime in mid-October 2007. On 16 October 2007 applicant's attorneys wrote to first respondent requesting to be advised as a matter of urgency when the preliminary inquiry would be held. In response, the first respondent advised that the preliminary inquiry would sit in consideration of the matter on 25 October 2007.

- [15] On 29 October 2007 applicant's attorneys of record were informed telephonically that a decision had been taken that a formal professional conduct inquiry be held. Respondent undertook to send confirmation of this decision by the end of the week of 29 October 2007. This did not happen. Applicant's attorneys on 7 November 2007 again made enquiries, when they were informed that a *pro forma* prosecutor was to be appointed and that they would be advised of developments.
- [16] Applicant's attorneys were informed in a letter dated 13 November 2007 that a certain Advocate L L Peter has been appointed as *pro forma* complainant. He undertook to revert once he was ready to serve the charge-sheet. On 19 November 2007 applicant's attorneys enquired from Advocate Peter when the charge-sheet could be expected. He advised that he would liaise once the charge-sheet has been formulated and further advised that the hearing could take place in February 2008.

- [17] Applicant's attorneys of record again communicated with first respondent on 18 December 2007 to enquire as to progress in bringing the matter to a hearing. They were informed that the *pro forma* complainant had perused the file and, based on "certain information" had decided to refer the matter back to the Committee of Preliminary Inquiry. On 2 January 2008 applicant's attorneys left a message for Advocate Peter requesting him to advise them of developments. He responded on 3 January 2008, advising that the Committee of Preliminary Inquiry would possibly again consider the matter in April/May 2008.
- [18] On 13 February 2008 applicant's attorneys, upon further enquiries, were informed telephonically that the meeting of the committee was to be held on 20 April 2008. The latter date was subsequently postponed to June 2008. No reason was given for this postponement.
- [19] In response to applicant's attorneys' e-mail of 13 May 2008 first respondent advised that the matter had been referred for expert opinion. On 5 June 2008 applicant's attorneys were informed that the Committee of Preliminary Inquiry would again consider the matter on 25 July 2008.
- [20] On 28 July 2008 applicant's attorneys were informed that the Committee of Preliminary Inquiry had, for the second time, decided that the matter must be referred to a formal professional conduct inquiry. First respondent undertook to provide them with the relevant minutes of the committee by 18 August 2008.

- [21] On 1 September 2008 applicant's attorneys received a telefax confirming that "the Committee of Preliminary Inquiry of the Professional Board for Psychology was held on 14 August 2008. The committee resolved that an inquiry into your client's conduct be held by a disciplinary committee and that the Registrar be directed to arrange accordingly."
- [22] On 15 September 2008 applicant's attorneys enquired as to the appointment of a *pro forma* complainant. They were informed on 17 September 2008 that Mr Ernie Janzen had been appointed as *pro forma* complainant and that it was unlikely that the matter would come to a hearing before the end of November 2008. Further correspondence passed between applicant's attorneys and first respondent in October 2008 regarding receipt of the charge-sheet and the date of the hearing.
- [23] On 14 January 2009 Mr Hari was murdered. On 29 January 2009, some two weeks after the late Mr Hari had been murdered and fifteen months after the decision had originally been taken to hold a professional conduct inquiry into the applicant's conduct, first respondent served the charge-sheet, setting the matter down for hearing on 9 and 10 March 2009. The date was subsequently changed, by agreement between the parties, to 25 and 26 May 2009.

[24] The *pro forma* complainant was informed at the pre-trial conference held on 14 May 2009 that the applicant intended to plead guilty on counts 1 and 2 and not guilty to count 3 of the charge. Furthermore the *pro forma* complainant was informed that the applicant intended to raise the delay in the institution of the professional conduct hearing as a point *in limine*.

[25] Before the murder of Mr Hari the applicant and her attorneys had consulted with Mr Hari and have since regarded him as the applicant's witness in the forthcoming professional conduct inquiry. The applicant's case is that it became clear in preparation for the hearing that the delay in holding the hearing only some seventeen months after it had originally been resolved to do so, during which delay the late Mr Hari was murdered, had brought about trial prejudice of a nature which would effectively make it impossible for applicant to defend herself on count 3.

The issues

[26] In this matter it has to be determined whether the length of the delay, having regard to the period between the initial decision that an inquiry be held into the applicant's conduct (that is the 25 October 2007) and service of the notice and charge (that is the 29 January 2009) was avoidable, unnecessary, inexcusable and inordinate. The applicant avers that first respondent and its functionaries have failed to provide acceptable and credible reasons justifying the delay.

- [27] The applicant submits that the death of the late Mr Hari and the irretrievable loss of evidence which was vitally important to applicant in defending herself on count 3 constitute irreparable or insurmountable trial prejudice, amounting to more than the disadvantage caused by the loss of evidence that could happen in any trial. That the loss relates to insurmountable damage to the fairness and integrity of a possible trial.
- [28] Furthermore it is the applicant's submission that the nature of the case against the applicant and the nature of the offence, involving alleged conduct during 2004 and 2005 are such that any prejudice that the first respondent and/or society may suffer in the event of the prosecution on the charge being stayed, will be far outweighed by the prejudice applicant will suffer in the event of the prosecution proceeding and her defence be irreparably deficient due to the trial prejudice complained of.
- [29] The first respondent contends that the delay that has occurred in commencing with the Professional Conduct Inquiry is attributable to both the applicant and the first respondent. Therefore the first respondent denies any existence of trial prejudice complained about by the applicant.
- [30] It is of paramount importance to fix a period within which to determine and assess the alleged delay in this matter. For the purpose of deciding this matter I disregard the period between the date of lodging the complaint by Mr D Pillay

(that is 12 January 2007) and the date of a decision by the first respondent to hold a Professional Board Inquiry (that is the 25 October 2007). Furthermore I disregard the period between the date of service of the charge-sheet on the applicant (that is 29 January 2009) and the date of hearing of the misconduct charge (that is 2/3 June 2009).

[31] In my view the relevant period for determining and assessing the alleged delay and subsequent trial prejudice shall be the period between 25 October 2007 (decision to hold formal inquiry) and 29 January 2009 (date of service of charge-sheet and fixing of trial date). That is a period of fifteen months.

[32] I take notice of first respondent's contention that the starting point for assessment of whether the right of the applicant to be heard without unreasonable delay is the date on which the charge-sheet was served on the applicant and not the date upon which the Committee of Preliminary Inquiry resolved that the professional conduct inquiry be held into the applicant's conduct.

I do not agree with first respondent's submission in this regard as I have already stated in paragraph [31] above.

[33] The right to a trial without delay only accrues to an accused person and that time accordingly only runs once someone becomes an accused person and only for as long as he remains one. In *Zanner v Director of Public Prosecutions*, *Johannesburg* 2006(2) SACR 45 and at p55, NUGENT JA said:

"[29] ... The right to be brought to trial without unreasonable delay is a right that protects the integrity of the prosecution process: it accrues to an accused person and endures for only so long as he or she stands accused.

[30] It is not necessary to decide in this case precisely when a person can be said to be an 'accused person' for purposes of section 35(3)(d) and I do not suggest that that requires that he must have been formally charged."

[34] *In casu* the decision to subject the applicant to a formal professional conduct inquiry was taken on 25 October 2007 whereas the charge-sheet containing a date of hearing was served on the applicant on 29 January 2009.

Grounds for review

[35] The applicant relies on the following seven grounds of review in support of her application:

- 35.1 that the second respondent erred in taking into account, in coming to his decision, that there has been a delay on applicant's part prior to the Committee of Preliminary Inquiry having resolved on 25 October 2007 that a Professional Conduct Inquiry should be held;
- 35.2 that the second respondent erred in finding that the applicant's legal representatives had indicated that they would not be available during the period November 2008 and January 2009 to conduct the hearing;

- 35.3 that the second respondent erred in finding that the delay on the part of the *pro forma* complainant and/or first respondent was not unreasonable;
- 35.4 that the second respondent erred in finding that the period it took to bring the matter to the inquiry stage is not beyond the norm regarding inquiries by first respondent;
- 35.5 that the second respondent erred in taking into account, as part of the reasons for his decision, that the applicant had indicated that she intended pleading guilty to counts 1 and 2, which second respondent stated in the finding to be part of the very complaint that applicant argues was delayed unduly;
- 35.6 that the second respondent erred in finding that the defence had conceded that a case may proceed with a single witness;
- 35.7 that the second respondent erred in not taking into account the potential prejudice which will arise if the applicant were to be convicted in count 3, in the absence of the late Mr Hari's evidence.

[36] I do not intend to deal with each and every ground of review raised by the applicant as set out above save to state that my answers to some of them will be accommodated during the course of this judgment and the ultimate findings I shall make.

The legal principles

[37] Professional conduct inquiries such as provided for by the Health Professions Act, 1974 constitute administrative action as defined in section 1 of the Promotion of Administrative Act, no 3 of 2000 ("PAJA"). An accused at a Professional Conduct Inquiry is constitutionally entitled to administrative action that is lawful, reasonable and procedurally fair. See: section 33 of the Constitution of the Republic of South Africa Act, no 108 of 1996 read with section 3 of PAJA.

[38] The right to a fair trial, which includes the right to have the trial begin and concluded without unreasonable delay; to be presumed innocent and to have the right to adduce and challenge evidence, as contained in section 35(3) of the Constitution, should also apply to an accused at a Professional Conduct Inquiry by virtue of the penal nature of such inquiry. These rights are also largely encompassed by the common law rules of natural justice.

[39] An accused is entitled to institute proceedings in a court for the judicial review of administrative action and a court has the power to judicially review an administrative action if:

1. the action was materially influenced by an error of law;
2. the action was taken:
 - 2.1 because irrelevant considerations were taken into account or relevant considerations were not considered;
 - 2.2 arbitrarily or capriciously.

See section 6 of PAJA.

[46] In *Zanner v Director of Public Prosecutions, Johannesburg* 2006(2) SACR 45 (SCA) the appellant challenged the validity of a charge of murder and applied for a stay of the prosecution, contending that he would suffer trial-related prejudice if the prosecution were allowed to continue after the lapse of ten years. The court held that a permanent stay of prosecution is a drastic remedy which is granted sparingly and only for compelling reasons. One such reason would be trial-related prejudice, which referred to the prejudice suffered by an accused due to the unavailability of witnesses, or the fading memories, due to the delay. The remedy could, however, be granted in the absence of trial-related prejudice where extraordinary circumstances prevailed.

[47] It was further held in the *Zanner* case that while a long lapse of time is central to the enquiry as to whether there has been an unreasonable delay, a long delay cannot *per se* be regarded as an infringement of the right to a fair trial. It was necessary to consider the circumstances of each case, including factors such as the length of the delay and the reasons therefore, the likelihood of prejudice to the accused, and the accused's assertion of his or her right to a speedy trial.

The court dismissed the application, finding the grounds advanced by the applicant to be speculative, and that he had not established prejudice.

See also: *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) at 52F-G.

[42] In the *Sanderson* case (*supra*) the nub of the applicant's case was that an unreasonable and inexcusable delay in the prosecution of the case had resulted in a serious infringement of his rights to a speedy trial as contained in section 35(3)(d) of the Constitution. Although the court found in the applicant's favour that there had been an unreasonable delay and significant social prejudice, after balancing the applicant's right to a speedy trial against society's interest in bringing suspected criminals to book, it dismissed the application. I need to mention that in the *Sanderson* case the applicant was facing several charges under the Sexual Offences Act 23 of 1957.

[43] In both cases, *Zanner v Director of Public Prosecutions* (*supra*) and *Sanderson v Attorney-General, Eastern Cape* (*supra*) it appears that the applications were dismissed on the ground that the applicants could not establish a trial-related prejudice. MAYA AJA (as she then was) in the *Zanner* case described trial-related prejudice as follows on p51A-B:

"The trial-related prejudice refers to prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial. (See *S v Dzukuda and Others*; *S v Tshilo* 2000(2) SACR 443 (CC) 2000(4) SA 1078; 2000(11) BCLR 1252) para [51]."

[4] The judgment in the *Sanderson* case (*supra*) was followed in the case of *Wild and Another v Hoffert NO and Others* 1998 3 SA 695 (CC). In the latter case the application for a stay of prosecution was dismissed mainly on the ground that the applicants did not allege, nor was there any suggestion of trial prejudice. The court held that a claim for a stay of prosecution had to fail unless there were circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay of prosecution nevertheless appropriate. The accused in the case were facing charges under the Drugs and Drug Trafficking Act 40 of 1992.

[45] In the more recent decision in *Bothma v Els and Others* 2010 2 SA 622 (CC) a new factor for consideration was introduced, namely "the nature of the offence". The accused in the case was charged with rape allegedly committed some thirty nine years ago. Although the court dismissed the application for a stay of prosecution it is significant to note the view of the court, per SACHS J at p653H-I where he said:

"Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us, 'Molato ga o bole'

(Setswana) or 'ical' aliboli' (isiZulu) – there are some crimes that do not go away."

Application of law to the facts

- [46] It remains to apply the legal principles I have attempted to enunciate to the facts of this particular case. I have accepted that in all the decided cases referred to above the applicant in each case failed to establish a trial-related prejudice. Furthermore I have accepted that in all the four cases referred to above the accused faced very serious crimes, namely murder (in the case of *Zanner*), sexual offences (in the cases of *Sanderson* and *Bothma*) and drug trafficking offence (in the case of *Wild and Another*).
- [47] Applying the principle laid down by SACHS J in the *Bothma* case that all the relevant factors would have to be weighed on a case-by-case basis, and that the central significance will always be the nature of the offence, one is bound to compare the charge of misconduct faced by the applicant in the present case with the more serious crimes committed by the accused in the aforementioned cases.
- [48] The applicant in the present case did not commit any crime. It can never be a crime for anyone to develop a sexual intimacy with one's client. The applicant's "breach of the law" is in the form of contravening an ethical rule pertaining to her profession. The expectation of society to have such a person brought to book is far less than in the circumstances where the applicant could have committed a

crime. It is against this background that the present case involving the applicant must be distinguished from the decided cases I have referred to above.

[49] The *bona fides* of the applicant should be taken into consideration. It is not as if the applicant wanted to avoid her prosecution at all cost. She intended to plead guilty to counts 1 and 2. However she exercised her constitutional right to defend herself in respect of count 3.

In the event of being found guilty on count 3 the end result can be a suspension from practice or removal of her name from the register. Hence the applicant would need all the evidence and witnesses at her disposal to defend herself at the Professional Conduct Inquiry. The death of a material witness in the name of Mr Hari would be prejudicial to her case if she were to face the trial without such a witness.

Conclusion

[50] The administrative delays on the part of first respondent were unreasonable, avoidable and caused applicant prejudice in defending count 3 of the charge. The evidence overwhelmingly demonstrates that the applicant would suffer irreparable trial-related prejudice due to the delay and that she would therefore not receive a fair trial.

Order

[51] I accordingly grant the following orders:

1. That the decision by the second respondent on 3 June 2009, refusing a stay of prosecution on count 3 of the charge dated 14 November 2008 preferred against applicant at a Professional Conduct Inquiry of the Professional Board for Psychology of first respondent is reviewed and set aside.
2. That the decision by the second respondent on 3 June 2009, refusing a stay of prosecution, is substituted with an order that count 3 of the charge dated 14 November 2008 preferred against applicant at a Professional Conduct Inquiry of the Professional Board for Psychology of first respondent be stayed permanently.
3. The first respondent shall pay the costs of this application, such costs to include the costs for the application for condonation.



E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

73859-2009

HEARD ON: 3 DECEMBER 2010
FOR THE APPLICANT: ADV C H VAN BERGEN
INSTRUCTED BY: DENEYS REITZ c/o MacIntosh Cross & Farquharson
FOR THE 1ST RESPONDENT: ADV A T NCOGWANE
INSTRUCTED BY: MODUKA MORE ATTORNEYS