

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

Case number 76888/2010

DELETE WHICHEVER IS NOT APPLICABLE	
1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE <u>24/12/10</u>	SIGNATURE <u>[Signature]</u>

24/12/2010

In the matter between:

DR F W PEER

Applicant

and

**THE CHAIRPERSON: MEDICAL AND DENTAL
PROFESSIONS BOARD**

First Respondent

**THE CHAIRPERSON: AD HOC APPEAL
COMMITTEE OF THE HEALTH PROFESSIONS
COUNCIL OF SOUTH AFRICA**

Second Respondent

**THE HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

Third Respondent

**THE REGISTRAR: THE HEALTH PROFESSIONS
COUNCIL OF SOUTH AFRICA**

Fourth Respondent

THE MINISTER OF HEALTH

Fifth Respondent

JUDGMENT

BOTHA J:

This is an application by a medical practitioner whose name has been erased from the register of medical practitioners that the penalty imposed upon him be suspended pending the adjudication of an appeal against the penalty.

On 22 October 2007 a professional conduct committee (disciplinary committee) of the Health Professions Council of South Africa (HPCSA) found the applicant guilty of submitting 22 false medical claims. An amount of R 8312, 05 was involved. The applicant had pleaded guilty. He attributed the false claims to bad administration in his practice, for which he accepted full responsibility. The penalty imposed upon him by the committee was an erasure from the register.

He then appealed against the conviction and against the penalty imposed by the committee to an *ad hoc* appeal committee (disciplinary appeal committee) of the HPCSA. The appeal committee dismissed the appeal and upheld the conviction and penalty imposed by the professional conduct committee.

The appellant then appealed, or purported to appeal, against the findings of the appeal committee in terms of section 20 of the Health Professions Act, 1974 (Act 56 of 1974 (the Act)). His notice of appeal was not in order and when he eventually lodged a proper notice of appeal, it was out of time. For the purposes of this application I am prepared to accept that the applicant can regularize his appeal by means of an application for condonation.

The main obstacle to the applicant's application is section 42(1A) of the Act, which reads as follows:

"42(1A) If an appeal is lodged against a penalty of erasure or suspension from practice, such penalty shall remain effective until the appeal is heard. " (my underlining). For that reason, no doubt, the applicant asks in Part B of his notice of motion, that section 42(1A) be declared invalid because of unconstitutionality. In Part A he asks the interim relief to which I have already referred.

Mr Snyman, who appeared for the applicant, tried to surmount the problem posed by section 42(1A) by arguing that the word "shall" in section 42(1A) should be given a directory, and not a peremptory meaning. It is well known that the word "shall", when used in statutes, often has a directory meaning. Thus, if a particular step shall be taken within a certain period, it does not mean that it will be a nullity if it is taken after the expiry of the period. I find it impossible, however, to read the word "shall" in section 42(1A) in such a sense. One cannot substitute "may" or "can" for "shall".

Mr Snyman also referred me to sections 10(4) and 10(5) of the Act. They read as follows:

“(4) A decision of a disciplinary committee, unless appealed against, shall be of force and effect from the date determined by the disciplinary committee.

(5) Where a matter has been considered by a disciplinary appeal committee, the decision of the disciplinary appeal committee, unless appealed against, shall be of force and effect from the date determined by the disciplinary appeal committee.”

I do not think that these provisions can be used in support of an argument that section 42(1A) is not peremptory.

If sections 10(4) and 10(5) are read together with section 42(1A), it is clear that when there is an appeal, whether from a disciplinary committee to an appeal committee, or from an appeal committee to the High Court, there resides no power in the disciplinary committee or the appeal committee, to suspend or postpone the operation of a penalty amounting to a suspension from practice or an erasure from the register. The words **“unless appealed against”** in sections 10(4) and 10(5) make that clear. When there is an appeal, the provisions of section 42(1A) apply, namely that in the case of an erasure or a suspension from practice the decision of the disciplinary committee or the appeal committee shall be of force and effect until the appeal is heard. I may add that it was exactly section 10(5) that gave the

appeal committee the power to order that its decision would take effect within a month. The period of one month was determined in all probability with a view to the fact that the applicant had 30 days within which he could note his appeal.

It seems to me, therefore, that one cannot avoid the issue of the constitutionality of section 42(1A). In the scheme of the notice of motion it has to be considered, because the granting of interim relief presupposes that there will, when Part B is adjudicated, be a finding that section 42(1A) is unconstitutional.

I was referred to an unreported judgment of Bertelsmann J which I found very instructive. It is a judgment in the Transvaal Provincial Division delivered on 16 April 2003 under case number 13598/02 in the case of **Frederik de Beer v Die Raad vir Gesondheidsberoepe van Suid-Afrika**. The judge in that case did grant interim relief of the kind asked in this application, that is permission to remain on the register pending an appeal in spite of a penalty of erasure. The judge considered the constitutionality of section 42(1A). In fact he raised the issue himself. In the end, after argument, he accepted, on the strength of the judgment of the Constitutional Court in **Metcash Trading Ltd v Commissioner, South African Revenue Service and Another 2001(1) SA 1109 (CC), paragraphs 43 and 46** that there was no ouster of the court's right of judicial intervention in section 42(1A).

I beg to differ, with respect, as far as the applicability of the **Metcash case supra** is concerned. The **Metcash** concerned the constitutionality of section 36(1) of the Value Added Tax Act, 1991(Act 89 of 1991) in terms of which a vendor who wishes to appeal against an assessment of the Commissioner, must nevertheless pay the assessment. In paragraph 46 Kriegler J said the following:

“ It is therefore clear that any decision of the Commissioner to make a VAT assessment under s 31 and/or to levy additional tax under s 60, and not only a refusal by the Commissioner to grant relief under the power to do so vested in the office by s 36(1) of the Act ... is subject to judicial intervention in certain circumstances ... Neither the injunction to pay first, regardless of a resort to the Special Court, nor the non-suspension provision is intended or has the effect of prohibiting judicial intervention. Nor is there any hidden or implicit ouster of the jurisdiction of the courts to be found in s 36 as it stands. That section, therefore, cannot be said to bar the access to the courts protected by section 34 of the Constitution.”

It is clear to me that the Constitutional Court relied on the fact that in terms of section 36(1) the Commissioner could grant relief against the harsh regime of “pay first, argue later.” That flows from the fact that section 36(1) provided that **“unless the commissioner so directs”** the obligation to pay an assessment shall not be suspended by a pending appeal. What the judgment says is that the exercise of the Commissioner’s discretion (to

suspend payment), is subject to judicial intervention. That, as I see it, saved section 36(1) from being unconstitutional.

If that approach is applied to section 42(1A) it is clear that the legislator did not grant the court, or the appeal committee, or any official, the power to grant relief from the harsh effect of section 42(1A) if an appeal is noted against an erasure or a suspension.

What is, however instructive from the judgment of Bertelsmann J in the **de Beer case supra**, is that he was of the view that section 42(1A) would not pass constitutional muster if it is not subject to judicial oversight. In my view it is an obvious conclusion. For the reasons already given, I am of the view that section 42(1A) contains no provision authorizing anybody to grant relief against the severity of its provisions. There is therefore no exercise of a discretion that can be judicially reviewed. For that reason I am of the view that there is a reasonable prospect that if Part B of the notion of motion is pursued, appropriate relief may be granted.

For the same reason this court would be entitled to grant interim relief. I do not think it is necessary for this court, sitting on an urgent application, and being concerned with interim relief, to go through all the procedures that would be required at the hearing of Part B of the notice of motion.

The only other issue is whether there is a reasonable prospect that the erasure would be upset on appeal. The *pro forma* prosecutor did not press for

an erasure. The basis of the conviction remains the applicant's version that he had failed to exercise proper control over his staff. It is true that the chairman of the appeal committee was not entirely convinced that the applicant was merely negligent, but it can be argued that the views expressed by him were contentious. The personal circumstances of the applicant were favourable.

For all these reasons I am of the view that relief in terms of Part A of the notice of motion should be granted. I shall also order that the applicant should launch a substantive application for condonation and pursue the relief claimed in Part B of the notice of motion within a reasonable time.

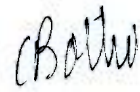
In view of the fact that the relief granted by me is dependent on the relief claimed in Part B, I shall order that the costs of this round of the proceedings be costs in the second round.

The following order is granted:

- 1. An order is granted in terms of prayers 1,2 and 3 of Part A of the notice of motion.**
- 2. The applicant must lodge an application for the late filing of his notice of appeal by not later than 28 January 2011 and pursue it within a reasonable time.**
- 3. The applicant must take all the necessary steps to have Part B of the notice of motion adjudicated within a reasonable time.**
- 4. If the applicant fails to comply with paragraphs 2 and 3 above, the**

relief granted in paragraph 1 above shall lapse.

5. The costs of this application shall be costs in the adjudication of Part B of the notice of motion.

A handwritten signature in black ink, appearing to read 'C Botha', is written above the printed name.

C BOTHA

JUDGE OF THE HIGH COURT