

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

Case No. B2150/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 2 June 2023

In the matter between:

**MEMBER OF THE EXECUTIVE COMMITTEE:
HEALTH - LIMPOPO PROVINCIAL GOVERNMENT**

APPLICANT

And

**HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

FIRST RESPONDENT

DR T PINKOANE N.O

SECOND RESPONDENT

Coram: Millar J

Heard on: 30 May 2023

Delivered: 2 June 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 2 June 2023.

Summary: Application for an interim interdict pending review against the holding of an inquiry into allegations of professional misconduct – attempt to draw distinction between applicants status as MEC for Health and medical

practitioner to obviate jurisdiction of professional body contrived and self-serving – all defences available to applicant may be raised at the inquiry – application dismissed with costs

JUDGMENT

MILLAR J

- [1] On 22 August 2022, the applicant, the MEC for Health in the Limpopo Province, Dr. Phophi Ramathuba, also a medical practitioner, conducted a visit to the Bela Bela Hospital. During the visit, a conversation took place between the applicant and a patient in the hospital. What was said during the conversation has sparked controversy.
- [2] For purposes of the present application neither repetition nor consideration of the contents of the discussion are necessary. It suffices to state that complaints of unprofessional conduct were laid against the applicant in her capacity as a medical practitioner with the first respondent, the statutory body responsible for the regulation of medical practitioners. The complaints are refuted by the applicant, both in her capacity as the MEC for Health and as a medical practitioner.
- [3] When this application was brought, it was brought in two parts – Part A and Part B. The substantive relief sought in Part A is an order that *“The professional misconduct inquiry instituted by the first respondent against the applicant, set down for 25 to 27 July 2023 and/or any other further dates falling within a period prior to the determination Of the application be interdicted, pending the finalizing of Part B of this application.”* and in Part B that for an order *“declaring the decision of the first respondent (“HPCSA”) issued against the applicant on 09 February 2023 as unconstitutional, unlawful and invalid.”* And *“declaring that the*

HPCSA lacks jurisdiction over the conduct of the applicant as a member of the executive arm of government ("the executive") and whilst performing her duties and responsibilities as such."

[4] The present application is for the orders sought in Part A. The applicant seeks to interdict the holding of the inquiry on 25 to 27 July 2023 pending a review which if successful would absolve her of accountability to the HPCSA for anything done by her in her capacity as the MEC.

[5] The HPCSA was established in terms of section 2(1) of the Health Professions Act.¹ Amongst its objects and functions is to:

*"to serve and protect the public in matters involving the rendering of health services by persons practicing a health profession"*²

and

*"to exercise its powers and discharge its responsibilities in the best interests of the public and in accordance with national health policy determined by the minister;"*³

and

*"to be transparent and accountable to the public in achieving its objectives and when performing its functions and when exercising its powers;"*⁴

and

*"to uphold and maintain ethical standards within the health professions;"*⁵

¹ 56 of 1974.

² *Ibid* section 3(j).

³ *Ibid* section 3(k).

⁴ *Ibid* section 3(l).

and

*“to ensure the investigation of complaints concerning persons registered in terms of this Act and to ensure appropriate disciplinary action is taken against such persons in accordance with this Act in order to protect the interests of the public;”*⁶

and

*“to ensure that persons registered in terms of this Act behave towards users of health services in a manner that respects their constitutional rights to human dignity, bodily and psychological integrity and equality, and that disciplinary action is taken against persons who fail to act accordingly;”*⁷

[6] It is not in issue that the applicant has at all material times been registered as a health professional⁸ and remains so. The HPCSA is the *custos morum* of the medical profession and also *“the guardian of the public interest insofar as members of the public are affected by the conduct of members of the profession.”*⁹ A number of complaints were lodged with the HPCSA¹⁰ against the applicant relating to the conversation on 22 August 2022.

[7] The complaints procedure at the HPCSA is a two stage one – first there is a preliminary inquiry. Once a complaint is received it is submitted to the

⁵ *Ibid* section 3(m).

⁶ *Ibid* section 3(n).

⁷ *Ibid* section 3(o).

⁸ A prerequisite to practice as a health professional within the Republic is registration in terms of section 17(3) of the Act. Persons may also voluntarily cancel their registration in terms of section 19(1)(c) of the Act provided that there is no pending professional misconduct or anticipated criminal proceedings against them. This is to be confirmed on oath. The consequence of removal from the register is that the person may not, in terms of section 18(3), practice as a health professional.

⁹ *Veriava and Others v President, SA Medical and Dental Council and Others* 1985 (2) SA 293 (T).

¹⁰ The conduct of inquiries into alleged unprofessional conduct in terms of the Act is governed by regulations published in GN R102 of 2009 (GG 31859 of 6 Feb. 2009).

practitioner for response. Once the response is received, both it and the complaint are submitted to a preliminary committee of inquiry for consideration. The complaint may be resolved at the preliminary inquiry stage.¹¹ If the complaint is not resolved at the preliminary inquiry stage, then it is referred for a formal inquiry.¹²

[8] In the present instance, the complaints were sent to the applicant on 4 November 2022 for her consideration and response. A response was sent on 2 December 2022 and a preliminary committee of inquiry considered them at a meeting held on 23 to 24 January 2023. It was decided at this meeting that although the applicant had made herself guilty of unprofessional conduct, it was only a “*minor transgression.*”

[9] In consequence, the HPCSA in a letter on 9 February 2023 informed the applicant of its finding that:

“In January 2023 the Committee RESOLVED that: -

- (i) *‘There is evidence of unprofessional conduct on Dr Ramathuba in terms Of Regulation 4(9) of regulations relating to conduct of inquiries into alleged unprofessional conduct under the Health Professions Act; and*
- (ii) *Impose as a penalty a caution and reprimand to the practitioner in terms of Section 42(1)A of the Health Professions Act 1974 for unprofessional behaviour and unbecoming of a medical profession to be shouting at a patient's bedside as the patient was vulnerable at the time.’*

[10] This was followed by a further letter on 13 February 2023 in which it was stated:

¹¹ In terms of regulation 4(9).

¹² In terms of regulation 4(8).

“The acceptance of the penalty and the payment of the fine will not constitute a conviction and will not be reflected against your name as a previous conviction. The matter will thus be regarded as a finalised.

If the penalty is rejected or no response is received within 14 days of receipt of this Notice, the penalty so rejected or not responded to may no longer be applied to the matter and the Registrar will arrange for an inquiry into your conduct to be held in terms of the Regulations....”

- [11] Properly construed, the letters of 9 and 13 February 2023 both communicated the decision of the preliminary committee of inquiry and so the 14-day period began to run on 14 February 2023 and expired on 28 February 2023.
- [12] The applicant wrote to the HPCSA on 18 February 2023, challenging the finding on the basis that the HPCSA had no jurisdiction, and that the finding ought never to have been made. At no stage was the finding either accepted or rejected.¹³ On 9 March 2023, the HPCSA responded to the letter and disavowed the contention that it did not have jurisdiction or that the finding had not been properly made. The applicant was informed that the matter would be referred to an inquiry.
- [13] On 29 March 2023, the HPCSA then proceeded to notify the applicant of the holding of a formal inquiry to be held from 25 to 27 July 2023.
- [14] The applicant does not want the inquiry to proceed or to attend it and hence the present application for an interim interdict pending the review of the finding.
- [15] The requirements for the granting of an interim interdict were expressed in in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*¹⁴ as follows:

¹³ *De Beer v Health Professions Council of South Africa* 2005 (1) SA 332 (T).

¹⁴ 1969 (2) SA 256 (C) at 267A-F; see also *Setlogelo v Setlogelo* 1914 AD 221 at 227.

“Briefly these requisites are that the applicant for such temporary relief must show –

- (a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;*
- (b) that, if the right is only prime facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
- (c) that the balance of convenience favours the granting of interim relief; and*
- (d) that the applicant has no other satisfactory remedy.”*

[16] I intend dealing with each of the requirements in turn.

[17] Firstly, what is the right which the applicant seeks to assert? The applicant’s case is that by virtue of the fact that she holds office as MEC, she is not subject to the jurisdiction of the HPCSA. It is her assertion that she conducted the conversation with the patient on 22 August 2022 in her capacity as MEC and not as a medical practitioner and for that reason it is not subject to the HPCSA’s scrutiny.

[18] The applicant also asserts that the finding of the preliminary committee of inquiry infringed her Constitutional¹⁵ rights. The rights affected are said to be her right to equality¹⁶, freedom of expression¹⁷, political right to participate in

¹⁵ The Constitution of the Republic of South Africa 1996.

¹⁶ Ibid section 9.

¹⁷ Ibid section 16.

political activities of the political party of her choice¹⁸, the right to fair administrative action¹⁹ and the right of access to court.²⁰

- [19] Despite asserting the infringement of the rights, no basis was laid for this. The crisp question is this – Is the applicant in her capacity as MEC a separate persona from the applicant as a medical practitioner? The office of the MEC is a political one whereas the applicant’s status as a medical practitioner is a professional one²¹.
- [20] It is not in issue that the applicant was registered as a medical practitioner and subject to the HPCSA before she was appointed to the office of MEC. The holding of the political office and remaining registered as a medical practitioner are not mutually exclusive. The one hallmark of both the political office and the professional standing as a medical practitioner is that in both fields of endeavour the individual concerned accepts that they are, and subject themselves, to being accountable for their actions.
- [21] Insofar as the office of MEC is concerned, when assuming the office, the applicant took an oath in which she undertook to “*obey respect and uphold all other law of the Republic*” and to conduct herself in the office of MEC with “*honour and dignity*”.²²
- [22] The oath of office as MEC stands alongside the Act and with the provisions of section 3(o). It seems to me to be a wholly contrived and self-serving assertion that conduct is to be determined depending upon “which hat a person is wearing at the time”. This is simply not consistent with our Constitutional values or the law. There is to my mind no distinction to be drawn between the different offices a person holds and their conduct.

¹⁸ Ibid section 19.

¹⁹ Ibid section 33.

²⁰ Ibid section 34.

²¹ *Health Professions Council of South Africa and Others v Grieve* (1356/2019) [2021] ZASCA 6 (15 January 2021) at para 17.

²² The oath taken by the applicant as MEC is set out in Schedule 2 Part 5 of the Constitution.

- [23] The applicant simply has no right, let alone a prima facie right²³ to avoid the jurisdiction of the HPCSA in circumstances where she has maintained her registration in terms of the Act. The position would have been different if she had de-registered as she is entitled to do.
- [24] Secondly, is there a well-grounded apprehension of irreparable harm? The applicant's failure to accept the finding of the preliminary committee of inquiry means that the entire matter will serve before a new different committee and be considered afresh. The applicant will have the opportunity to raise whatever challenges she wishes to at the inquiry, and each will be considered on its merits. The finding of the preliminary committee of inquiry is neither binding upon nor does it in any way affect the rights of the applicant. It was in its terms an olive branch which the applicant was free to either accept or not. In the present matter there is simply no apprehension of irreparable harm, well-grounded or otherwise.²⁴
- [25] Thirdly, does the balance of convenience favour the granting of an interdict? In my view, in the present matter it does not. The HPCSA is enjoined²⁵ by the Health Professions Act to investigate complaints. Delaying the matter unnecessarily pending a review, does not serve the interests of any of the parties.²⁶
- [26] Lastly, is there no other satisfactory remedy? The holding of the inquiry is in and of itself where the remedy lies. The applicant can then at the inquiry raise any defence available to her, place in issue and rebut any allegations made against her.

²³ *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at para [25]. The finding of the preliminary committee of inquiry was neither final nor binding upon the applicant and for that reason the review lacks prospects of success.

²⁴ *Free State Gold Areas Ltd v Merriespruit (Orange Free State) GM Co Ltd* 1961 (2) SA 505 (W) at 518

²⁵ *Mapholisa v Phetoe NO and Others* 2023 (3) SA 149 (SCA) at paras [24] – [25].

²⁶ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Another* 1973 (3) SA 685 (A) at 691D-E.

[27] It does not behove the applicant to refuse to accept the finding of the preliminary inquiry committee that she had committed a minor transgression for which there was no sanction beyond a reprimand that would not stain her professional record and to then assert that the *de novo* inquiry at which she would have the opportunity to vindicate herself does not provide her with a satisfactory remedy.

[28] Accordingly, I find that the applicant has failed to make out a case for the granting of the relief sought in Part A of the application. The costs will follow the result.

[29] In the circumstances, I make the following order:

[29.1] The application (Part A) is dismissed with costs.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 30 MAY 2023

JUDGMENT DELIVERED ON: 2 JUNE 2023

COUNSEL FOR THE APPLICANT: ADV. M RAMAILA SC

ADV. D MADIBA

INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA

REFERENCE: 689/23/RA

COUNSEL FOR THE RESPONDENTS: ADV. LUBBE

INSTRUCTED BY: NKOPDIMPFAHLELE INCORPORATED

REFERENCE: MPHAHELE/MUTHAMBI/00031