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

Case No. **007920/2022**

1. REPORTABLE: NO

2. OF INTEREST TO OTHERS JUDGES: NO

3. REVISED

SIGNATURE:

DATE: 13 December 2023

In the matter between:

DR. MARIANA TALJAARD

Applicant

and

**HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

First Respondent

**PROFESSIONAL CONDUCT COMMITTEE OF
THE MEDICAL & DENTAL BOARD OF THE
HPCSA**

Second Respondent

FRANKL WEBER N.O

Third Respondent

ZOLILE GAJANA N.O

Fourth Respondent

This judgment is prepared and authored by the Judge whose name is reflected as

such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 13 December 2023.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The Applicant is a registered psychiatrist who on 14 June 2021 appeared before the Second Respondent, the Professional Conduct Committee of the Medical & Dental Board of the Health Professions Council of South Africa [the Committee].

[2] The Applicant was charged with unprofessional conduct, it being alleged that on or about 7 May 2020 and in respect of her psychiatric patient, Ms E[...] G[...], she acted in a manner which was not in accordance with the norms and standards of her profession in that she negligently failed to attend to her in an emergency situation. Her patient subsequently demised through suicide [the deceased].

[3] On the day the matter served before the Committee, the Third Respondent served as the Chairperson. After the Fourth Respondent, the *pro forma* Complainant had closed its case, the Applicant applied for her discharge in terms of regulation 9, the regulations promulgated in terms of the Health Professions Act 56 of 1974 [the Act].

[4] On 21 July 2021, the Committee stated: “*After the Conduct Committee deliberated, they concluded that the application be dismissed. The inquiry must proceed*” [the decision]. The Third Respondent on behalf of the Committee provided reasons for the decision on 13 December 2021.

[5] The Applicant seeks to review and set aside the Committee's decision in terms of the Promotion of Administrative Justice Act, 3 of 2000 [PAJA]. The Applicant launched her PAJA application on 26 July 2022.

[6] The HPCSA opposes the Applicant's relief contending that it is premature having regard to section 7(2) of PAJA.

BACKGROUND

[7] On 24 May 2019, Dr. Kritzing, a general healthcare practitioner referred the deceased to the Applicant for further psychiatric care for major depression. The Applicant diagnosed that the deceased suffered from, *inter alia*, Bipolar Mood disorder having been through a traumatic childhood. The deceased's main symptoms had been continuous suicidal thoughts and tendencies which she tragically actioned and succumbed to her death by self-harm on 7 May 2020.

[8] At 18h05 on 6 May 2020, the day before the deceased's death she sent an e-mail to the Applicant. The Applicant's secretary, Ms Wellsted, at 09h10 and on the insistence of the Applicant replied, relaying the Applicants. The content of the email commenced with: "*Dokter se antwoord...*". The Applicant alleges that her reply *via* her secretary was and is a general practice. The reply was confined to advice relating to medication only.

[9] The deceased's mother, Mrs W[...], lodged a complaint with the First Respondent [HPCSA] against the Applicant. The nub of her complaint was centred around the manner in which the Applicant dealt with or failed to deal with the deceased's urgent call for help in the email of 6 May 2020, the day prior to her taking her own life.

[10] On 5 June 2020, the Applicant was informed of the lodged complaint and was requested to furnish a written response to the allegations of her unprofessional conduct alternatively of her intention to remain silent, in writing. The Applicant responded to the allegations in writing on 27 July 2020.

[11] Subsequent to receiving the Applicant's reply, the Committee of Preliminary Enquiry [Preliminary Committee] resolved to refer the Applicant for an inquiry in terms of regulation 4(8) of the Regulations.¹ The Preliminary Committee resolved that the Applicant was guilty of unprofessional conduct or conduct with regard to her profession.

[12] Unprofessional conduct is defined in the Act as "*improper or disgraceful or dishonourable or unworthy conduct or conduct which, when regard is had to the profession of a person who is registered in terms of this Act is improper or dishonourable or unworthy*".²

[13] The Applicant was duly charged. The Applicant did not request any further particulars relating to the charge.

[14] The formal inquiry before the Committee commenced on 14 June 2021 which was established in terms of section 15(5)(f) of the Act.

[15] At the commencement of the hearing, the Applicant pleaded not guilty and further exercised her right to remain silent.

[16] The Fourth Respondent only called Mrs W[...] to testify whereafter, it closed its case. The Applicant, prior to leading evidence, applied to be discharged.

[17] The enquiry was postponed by agreement and the application for discharge was heard virtually on 21 July 2021. According to the transcribed record of 14 June 2021, the Applicant's Counsel stated:

"Mr Chair, the respondent had indicated the intention to apply for a discharge in terms of the – if it may be read it into the record to be precise in terms of regulation 9, which is the regulations relating to the conduct of

¹ Regulations relating to the conduct of enquiries into alleged unprofessional conduct dated 6 February 2019 [Regulations].

² Section 1 of the Act.

enquiries for a specific discharge before presenting any evidence.” (own emphasis)

THE DECISION

[18] After the decision the Applicant, through her attorney, and on 23 July 2021, applied for reasons in terms of section 5(1) of PAJA, stating that “*Take note that the reasons are required to be produced to enable the respondent to conduct her defence (own emphasis) in this matter and, in particular to consider whether or not an application for review to the High Court of the aforesaid decision is appropriate.*”

[19] In the Form A request for reasons the Applicant indicated her understanding of the effect of the decision, namely that: the Complainant is entitled to persist with the charge which is prejudicial to and affects the Applicant in that she will have to incur costs in defending the charge against her. Reasons were required to discern whether the decision had been lawfully made.

[20] Subsequently, the Committees’ reasons were reduced to writing and circulated electronically by virtue of an unsigned copy dated 13 December 2021 oddly headed “*Proforma Complaints Heads of Arguments*” instead of reasons. A complaint raised by the Applicant in reply only.

[21] Although the heading is misleading the content conversely does set out the reasons for the decision which spans over approximately 15 pages. The content of which, not unlike a judgment summed up the evidence, weighed up the test by comparing the regulation 9 discharge to a section 174 discharge in terms of the Criminal Procedure Act, 51 of 1977 [CPA] with applicable case law; compared the regulation 9 discharge to absolution from the instance with applicable case law, determined and summed up the test which the Committee applied, considered the question to answer, namely “*What would a diligent specialist psychiatrist in the place of the respondent do to assist his or her patient?*”, considered the interests

of justice, the interests of society, the interests of the Complainant and came to a decision.

[22] From the record, the reason why the Committee dismissed the application for discharge was: *"It is not in the interests of justice to have the respondent seek a discharge, or refuse to testify, simply because she feels that the complainant is not an expert who is thus unable to decide what the norms and standards of her profession of being a specialist psychiatrist are and that the corroboration of the single witness evidence with the emails placed before the Committee during the enquiry and that the dismissal of the respondent's application does not mean that the respondent is guilty or not guilty of what she has been charged, but rather that there is a case and enough evidence before the Committee that needs to be rebutted and the application is accordingly dismissed"*. The court expands and deals with this below.

PAJA RELIEF

[23] The Applicant's undated founding paper unfortunately reads more like heads of argument in which the Applicant appears to confuse and conflate the principles applicable to review applications with that of an appeal. This is because her papers highlight defects in aspects of the evidence tendered during the Fourth Respondent case, citing misdirections and errors made by the Committee to highlight the incorrect conclusion, all of which resulted in the dismissal of the discharge application. In other words, littered with allegations where the Committee went wrong to come to its decision and trying to correct it on the evidence tendered.

[24] The difference between appeal proceedings and review proceedings are trite. The essential nature of a review is simple. It is a means by which those in positions of authority may be compelled to behave lawfully. A review is as stated by the Supreme Court of Appeal in Pretoria Portland Cement Company Limited v Competition Commission:³ *"Review is not directed at correcting a decision on the*

³ 2003 (2) SA 385 (SCA) at par [35].

merits. It is aimed at the maintenance of legality, at the administration of ‘the law which has been passed by the Legislature...’

[25] However, in certain circumstance when a Court is asked to determine whether an outcome of a decision is rationally justifiable, going into the ‘merits’ may have to be considered in some way but not in order to substitute the order which it deems to be correct.

[26] The Applicant relies on section 6(2)(d),(e)(vi), (f)(dd) and (i) of PAJA. Before dealing with the PAJA grounds this Court intends to deal with the Applicant’s condonation relief in terms of section 9 of PAJA [condonation relief]. At this juncture it must be noted that the Applicants papers including Counsels heads of argument were disjointed and difficult to follow vis a vis the specific grounds to the specific sets of facts relied on.

The Applicant’s request for condonation in terms of section 9(1)(b) and 9(2) of PAJA

[27] It is common cause that the Applicant received the reasons for the decision on the 13 December 2021 and launched her application on 26 July 2022. It is apparent from the papers that the Applicant relies on section 5 of PAJA and as such, the trigger date is 13 December 2021.

[28] In terms of section 7(1) of PAJA, review proceedings must be instituted without unreasonable delay and no later than 180 days after, in this case, the Applicant became aware or might reasonably have been expected to become aware, of the action and the reasons.

[29] Applying the provisions to the common cause facts, the Applicant should have launched her application by approximately 13 June 2022 and in consequence, must seek condonation from this Court.

[30] The Applicant's condonation relief in terms of section 9(1)(b), extension of time, becomes apparent. The Applicant sought an extension till 31 July 2022.

[31] The provisions of section 9(2) of PAJA state that: "*The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.*"

[32] The Applicant nor the First Respondent deal with the basis nor factors upon which this Court could exercise its discretion as prayed for.

[33] Notwithstanding, having regard to the Applicant's grounds of review, in particular the allegation that the decision infringes upon the Applicant's constitutional right to remain silent, to be presumed innocent and to a fair hearing, discretion is neutralised and this Court is enjoined to consider the matter. As a consequence the interests of justice dictate that condonation be granted.

Does PAJA apply and on the grounds relied on?

[34] Section 1 of PAJA states that an administrative action means a decision which adversely affects the rights of any person and which has a direct, external legal effect.

[35] The decision by the Committee at this stage of the enquiry is not a final determination of the merits giving rise to final legal effect, but the Applicant in argument contends that the decision to dismiss her application to be discharged adversely affects her right to a fair hearing, the consequence of which forces her to answer the *prima facie* case in circumstances when she wishes to remain silent.

[36] The First Respondent correctly acknowledges that the Applicant has a right not to give self-incriminating evidence by remaining silent and that there is no intention to procure such evidence from the Applicant. The weight of the alleged intention in so far as the Committee or the Chairman is concerned is unknown as no papers were filed by them.

[37] The decision itself simply states that the application is dismissed and the inquiry must proceed. No other prescripts are dictated. However, regard must be had to reasoning.

[38] To unpack the complaint. Having regard to the Act,⁴ although the procedure is germane before the Committee, the prescripts in section 3 and the penal consequences, such is akin to criminal procedures of the Criminal Procedure Act 51 of 1977 [CPA]. In consequence, having regard to what is meant in terms of section 35 of the Constitution is helpful. The right to a fair trial embodies the right to be presumed innocent, remain silent and not testify during the trial. This right is applicable in different stages, in the investigative and adjudicative stage.

[39] Concerning the adjudicative stage and after the Fourth Respondent closed its case a closer look at the determination of a *prima facie* case is required. A *prima facie* proof is evidence calling for an answer.⁵ Whenever there is evidence in which a court might or could, applying its mind reasonably, find for the State at that moment, a *prima facie* case has been established. In practice, where the State has failed to make a *prima facie* case against the accused, the court normally discharges the accused in terms of section 174 of the CPA. If the court does not discharge the accused, the accused has a choice. Firstly, the accused can choose not to testify and refuse to call any witnesses, or the accused may decide to lead evidence in response to the State's case. The choice is not based on a question of fact, but on a point of law. Where the State has shown a *prima facie* case of the commission of an offence the accused carries an evidentiary burden to rebut the State's case. The first feature of that evidentiary burden is an *onus* on the person to lead evidence refuting the opponent's *prima facie* case. The second feature is the party's duty to begin and lead evidence to escape certain procedural consequences.⁶

⁴ Section 3(j),(m),(m),(o) of the Act.

⁵ See *Ex parte The Minister of Justice: In re: Rex v Jacobson & Levy* 1931 AD 466 at 478.

⁶ David Theodor Zeffert, James Grant and A Paizes 2nd Ed, "Essential Evidence" (Durban: Lexis Nexis 2020 at 37238).

[40] As is evident from the two key features mentioned above, the accused's right to remain silent weakens and diminishes as soon as the State has presented a *prima facie* case against them. The Constitutional Court [CC] in Boesak vs The State matter reiterated that the right to remain silent has a different application within the different stages of a criminal trial⁷. The courts have further held that an accused's right to choose whether to testify or not is not a violation of the right of silence. Legal practitioners must advise clients who insist on remaining silent despite the overwhelming evidence of the risks inherent in exercising the right to remain silent as the fact that a client elects not to lead evidence where there is a *prima facie* case may have unintended consequences.

[41] The fact that there are consequences reminded the CC⁸, is consistent with the remarks of Madala J, writing for the court, in Osman and Another v Attorney-General, Transvaal, when he stated the following:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond a reasonable doubt. An accused, however, always runs a risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of a right of silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of an adversarial system of criminal justice.”

[42] Applying the reasoning, the consequences of electing to remain silent flows from the accused's choice and logically is not an automatic infringement of rights flowing from a decision not to discharge a person.

[43] In consequence and in so far as the Applicant's complaint of an infringement constitutional right to remain silent which is based on her own

⁷ [2000] ZACC 25; 2001(1)BCLR 36 (CC); 2001 (1) SA 912 (CC) at para [24].

⁸ Supra.

election to remain silent (relying on section 6(2)(i)) of PAJA) must fail when applying section 1 of PAJA.

[44] Before the Applicant received the Committees' reasons, the record demonstrates that she intended to conduct a defence.⁹ However after the reasons and as a result of the reasoning, as I understand the argument, the Applicant contends that her right to remain silent has been infringed.

[45] To expand the argument and considering section 6(2)(f)(dd), the Committee in its reasons, contrary to what the First Applicant states is the intention, stated: "*It is not in the interests of justice to have the respondent seek a discharge, or refuse to testify, (own emphasis) simply because she feels that the complainant is not an expert who is thus unable to decide what the norms and standards of her profession of being a specialist psychiatrist are and that the corroboration of the single witness evidence with the emails placed before the Committee during the enquiry and that the dismissal of the respondent's application does not mean that the respondent is guilty or not guilty of what she has been charged, but rather that there is a case and enough evidence before the Committee that needs to be rebutted and the application is accordingly dismissed."* (own emphasis)

[46] Without any further explanation it appears that the Committee, relying on the interests of justice reasoned under the mistaken belief that to refuse the application is to ensure that the Applicant testifies in her rebuttal.

[47] Acting on a mistaken premise can never validate the rationality of the reasons premised thereon. In so far as reliance is made on this point, the Applicant must succeed on this ground.

[48] The Applicant expanded the rationality ground even further, suggesting that absent an expert witness at this stage of the inquiry, who can testify as to the applicable norms and standards constituting professional conduct of a psychiatrist, too stands to fail.

⁹ See paragraphs [17-19] hereof.

[49] In amplification, it is common cause that Applicant is a registered health practitioner with the Council in terms of that Act as too the definition of . Unprofessional conduct.¹⁰

[50] In addition, the functions of professional bodies include the maintenance and enhancement of the health profession and integrity of persons practising in such profession, guiding the relevant health professions and protection of members of the public.

[51] The Council is therefore not merely a medical malpractice watchdog; it is also the primary guardian of morals of the health profession. As the Supreme Court of Appeal held in Preddy and Another v Health Professions Council of South Africa¹¹: *"It's been said of the various predecessors of the Council that each was the repository of power to make findings about what is ethical and unethical in the medical practice and the body par excellence has set the standard of honour to which its members should conform"*. The Council assesses a *custos morum* responsibility.

[52] In this case the allegations were that unprofessional conduct occurred within a doctor-patient relationship. The Council as the administrative body charged with the function of defining the norms and standards, and monitoring adherence to the ethical prescripts of the medical profession, was the primary repository of disciplinary power in relation to unethical conduct by its registered members. Codes of Conduct to apply traversing a basis for acceptable conduct in emergency situations and duty in respect of patients.

[53] Reliance by the Applicant on this point frankly bears little weight at this stage of the inquiry to bolster section 6(2)(f)(i) or (ii) of PAJA and conversely may assist the Applicant should she wish to tender evidence other than her own testimony.

¹⁰ See footnote 2.

¹¹ (54/2007) ZASCA 25 (31 March 2008).

Was the Committee's decision materially influenced by an error of law? (Section 6(2)(d) of PAJA)

[54] The Applicant's counsel argues:

"It is submitted that in a disciplinary enquiry where a respondent is faced with a charge, possible conviction and the imposition of a penalty/punishment the second respondent ought to have been correctly guided by our Court's previous interpretation and application of section 174 of the Criminal Procedure Act, 51 of 1977 as amended (CPA)."

[55] Although having made the submission and relying on the application of the CPA, Applicant's Counsel confusingly refers the Court to civil matters in relation to an application for absolution of the instance in the matter of Claude Neon Lights SA Limited v Danie!¹² and then the test applied after a final finding was made in the matter of De La Rouviere v SA Medical and Dental Council,¹³ the relevance vis-à-vis the test at the discharge stage having regard to the reasons by the Committee is unclear.

[56] Furthermore, the expanded argument relating to the inference of negligence under the maximum *res ipsa loquitur* test to establish a *prima facie* case too, is of no moment for want of relevance, at this stage and because the authorities relied appear not to assist with the contention of an error of law. To illustrate the point, in Sadie and Others v Standard Bank and General Insurance Company¹⁴ the *res ipsa loquitur* principle remarked that although it is not often utilised, it is permissible if upon all the facts it appears to be justified.¹⁵

[57] Having regard to the argument the Applicant stands to fail on this ground.

Was the decision taken arbitrarily? (Section 6(2)(e)(vi))

¹² 1976 (4) SA 403 (A) at 409G-H.

¹³ 1977 (1) SA 85 (N) at 97D-G.

¹⁴ 1997 (3) SA 776 (A) at 780B-H, as well as reliance on *Goliath v Member of Executive Council for Health, Eastern Cape* 2005 (2) SA 97 (SCA).

¹⁵ Zeffert and Paizes "The South African Law of Evidence", 2nd Ed at 219.

[58] According to the founding papers the Applicant relies on section 6(2)(e)(vi) as a ground which provides that the Court has the power to review “...an administrative action if...the action was taken...(iv) arbitrarily or capriciously...”.

[59] A decision is taken arbitrarily if there was “no reason or justifiable reason for it”.¹⁶ There were clearly reasons concisely set out although unfortunately headed as heads of argument for the decision. The content of the reason demonstrated even on the face of it, as alleged by the Applicant, being the favoured argument of the Fourth Respondent, it was taken with regard to the facts before the Committee. It did demonstrate deliberation and consideration of facts, interests, submissions, and case law which was favoured by the Committee and considered. The reliance of arbitrariness must then fail.

[60] Whether these reasons are correct is of no moment as the evaluation on review is not to decide whether the reasons were indeed right or wrong, but to ensure that there were reasons provided at the request by the Applicant, which is common cause.

[61] The Applicant must fail on this ground.

Was the review proceedings premature in terms of section 7 of PAJA ?

[62] The First Respondent argues that the review proceedings are premature in that the Applicant did not exhaust all the internal remedies. In this regard regulation 11 which deals with appeals of the findings or penalty of the Committee to the appeals committee.

[63] In context, regulation 20 states that at the conclusion of the hearing the Committee makes a finding. A finding, a determination of the merits of the matter. Conversely regulation 9 dealing with an application for discharge refers to a decision by the Committee. Rather a procedural ruling.

¹⁶ *Minister of Constitutional Development v SARIPA* 2018 (5) SA 349 (CC).

[64] The First Respondent's Counsel in argument conceded the point that the internal remedy catered for in regulation 11 relates to a finding on penalty on the merits. In consequence not the position the Applicant found herself in at this stage.

[65] In any event this Court cant find any reason why the Applicant at this juncture during the proceedings would be forced to proceed with internal procedures to finality in circumstances where an unfair procedures is alleged.

[66] This First Respondent's reliance of sect 7 of PAJA, as pleaded must fail resulting in the necessity of this Court to determine the Applicant's section 7(2)(c) PAJA relief unnecessary.

Costs

[67] There is no reason why the costs should not follow the result. Regard is had to the fact that only the First Respondent opposed the application.

The following order is made:

1. The Applicant's failure to launch the review within the time periods provided for in section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 is condoned.
2. The Second Respondent's decision of the 21 July 2021 to dismiss the Applicant's application for discharge in terms of Regulation 9 of the Regulations relating to the conduct of inquiries into alleged unprofessional Conduct [the decision] is set aside.
3. The decision is remitted back to the Second Respondent for reconsideration and reasons.
4. The First Respondent to pay the Applicant's costs on a party and party scale.



L.A. RETIEF
Judge of the High Court
Gauteng Division

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Matter heard:	20 October 2023
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