



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

CASE NO: 87745/2019

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 15 DECEMBER 2022

SIGNATURE

In the matter between:

HIELKE HEIDEMA

Applicant

and

**THE PROFESSIONAL CONDUCT COMMITTEE
FOR OPTOMETRY AND DISPENSING OPTICIANS
OF THE HEALTH PROFESSIONS CONCIL
OF SOUTH AFRICA**

First Respondent

**THE PROFESSIONAL BOARD FOR OPTOMETRY
AND DISPENSING OPTICIANS OF THE HEALTH
PROFESSIONS COUNCIL OF SOUTH AFRICA**

Second Respondent

**THE HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

Third Respondent

Summary: Disciplinary inquiry by professional body regulating optometry and dispensing opticians – undue delay in finalising matter? Despite

admitted “systemic inertia” delay not so undue or prejudicial to practitioner that he would not be able to have a fair hearing – review application of a refusal of a permanent stay dismissed, with costs.

ORDER

The application is dismissed, with costs.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The applicant is a registered optometrist. On 1 November 2019 he was charged at a disciplinary inquiry before the Professional Conduct Committee for Optometry and Dispensing Opticians (the Committee) of the Health Professions Council of South Africa (HPCSA) of having operated a mobile clinic in July 2011 without the necessary authorization from the HPCSA to do so. The applicant sought a permanent stay of prosecution based on an undue delay, which he raised as a point *in limine* at an inquiry held in terms of Regulation 5 of the Regulations.¹

¹ The Regulations Relating to the Conduct of Enquiries into Alleged Unprofessional Conduct under the Health Professions Act, 1974 published as GN R102 of 2009, in Government Gazette No31859 on 6 February 2009.

The committee refused this point and the applicant now seeks to have that refusal reviewed and set aside and the disciplinary inquiry permanently stayed.

Chronology

[2] In a matter where the determination of success centres around an allegation of undue or inordinate delay to prosecute a disciplinary inquiry, the chronology of events is crucial. The details of the chronology appear from the record and the affidavits of the parties as summarized below.

[3] The chain of events started with the alleged rendering of optometric services by the applicant to employees of RKF Assemblies (Pty) Ltd (RKF) at their place of employment on 22 July 2011.

[4] In the applicant's affidavits, the applicant does not expressly deny the rendering of the services and is vague about the issue, claiming that records need only be kept for five years and that the event happened too long ago for him to remember clearly. He also complains that the allegation in the charge sheet of the offending conduct having occurred "during July 2011" is too vague. The details of the services that the applicant rendered on 22 July 2011 were however captured in an invoice rendered by him (or his practice) to RKF, which invoice he never seriously disputed. The date of July 2011 is in any event, according to the applicant himself, the starting point of the calculation of the "delay period".

[5] It appears that on 27 July 2011 a senior forensic investigator employed by Discovery Holdings was tasked to investigate whether the applicant had supplied services to members of the Discovery Health Medical Scheme (Discovery Health) without authorization the HPCSA.

[6] A certain Ms Klavier deposed to an affidavit on 13 February 2013 that RKF received either a telephone call or an email from the applicant's practice offering

free on-site optometric testing of employees. A male person arrived who tested about 30 employees. Of these, some were Discovery Health members and some not. The “optometrist” subsequently advised that 11 of the employees tested required prescription spectacles and invoiced RKF R9 192.00. It was only after viewing a television programme regarding mobile optometrist practices on 27 July 2012 that Ms Klavier forwarded an e-mail to the applicant, cancelling “the entire deal”.

[7] The record also contains an affidavit from a Mr Mpofu, who was employed by RKF in July 2011. Mr Mpofu was a member of Discovery Health at the time. He was tested by an optometrist at RKF’s factory in July 2011, told that he had “bad eyes” and asked to select a spectacle frame from a selection contained in a briefcase, which he did. He was handed a form containing “codes” which the optometrist said “they” would be claiming. After the event, Mr Mpofu became dissatisfied and telephoned the optometrist’s office. He was told by a lady who answered the telephone that he had already been “billed at Discovery” but that his money would be returned. After having furnished his banking details, this is what happened a few days later.

[8] On 13 September 2013 Discovery Health sent a letter to the Registrar of the HPCSA. The letter simply read “*We investigated certain allegations against the following practice: [the applicant’s details were then furnished]. As a result of the outcome of our investigations, we wish to report the following issues to his regulatory body: 1. Services not rendered. Please feel free to contact me directly if you need any further information or evidence to support the outcome of our findings*”.

[9] On 15 October 2013 the HPCSA sent a letter by registered mail to the applicant, enclosing the letter of complaint and a copy of the Regulations. In

terms of Regulation 4(1)(b), the applicant was requested to respond to the complaint by 10 December 2013.

[10] When no response was forthcoming from the applicant, the HPCSA on 25 February 2014, insisted on a response by 20 March 2014. When the HPCSA still had not received a response by 22 July 2014, it advised the applicant that a failure to respond to correspondences “by Council” amounts to unprofessional conduct. A response was expected by August 2014.

[11] By this time, the applicant’s attorneys complained that they had already “come on record” and bemoaned the fact that the applicant was contacted directly by the HPCSA. Apparently, according to the applicant “some correspondences” were exchanged between the parties, the details of which is not clear. The next important date is, however 30 July 2015 on which date the HSPCSA apologized for having contacted the applicant directly and advised his attorneys that the matter had been placed on the agenda of a meeting of the Committee of Preliminary Inquiry scheduled for 6 August 2015 as the HSPCA has not yet received a response from the applicant. He was given a last opportunity to furnish a response by 3 August 2015.

[12] On 3 August 2015 the applicant’s attorneys referred to previous correspondence in which it had apparently been stated that the complaint was vague and lacked sufficient details to respond thereto. Extensive “further particulars” were also requested, including the identity of Ms Klavier, in what capacity she was employed at RKF, what the gender was of the person who offered the free testing, details of the employees tested how the amount of R9 192.00 had been made up, an explanation how Ms Klavier could “cancel” services rendered in 2011, in 2012 and the like. This request for particulars indicates that the applicant either had sight or knowledge of the affidavits of Ms Klavier and Mr Mpofu.

[13] The HPCSA considered the letter and deferred the matter to a next meeting, still requesting an explanation from the applicant, this time by 9 October 2015. The applicant's attorneys then threatened that, should the requested particulars not be furnished by 14 October 2015, an application to compel would be launched (presumably to a court, but this was not clarified).

[14] The HPCSA respondent with concern. It relied on the provisions of the Regulations (which were again annexed) in their response dated 13 October 2015. It pointed out that the proceedings were at a Preliminary Inquiry stage only and that a response from a practitioner was needed. It was reiterated that the failure to provide such a response attracted its own sanction. A further date to provide a response was set for 26 October 2015.

[15] When no response from the applicant was forthcoming, the relevant committee of the HPCSA resolved on 4 December 2015 that a formal inquiry would be held. It then also provided the applicant's attorney with the documents described in paragraph 3 – 6 above as well as claims processing documents from Discovery Health.

[16] The formal inquiry was subsequently set down for 26 and 27 May 2016. In terms of the Regulations, this had to be preceded by a mandatory Pre-Hearing Conference. For purposes hereof, the applicant's attorneys submitted a formal request for particulars on 7 April 2016. Neither the furnishing of the particulars nor the scheduling of the Pre-Hearing Conference could timeously take place, resulting in the rescheduling of the inquiry.

[17] A Pre-Hearing Conference thereafter took place at the applicants attorneys' offices on 27 June 2016, whereafter such further particulars as in the possession of the HPCSA had been furnished.

[18] The inquiry was subsequently scheduled to take place on 1 November 2019. At this time the applicant's attorneys took the point (amongst others) that there was an undue delay in the prosecution of the inquiry.

[19] The Committee dismissed this point. This is the decision which the applicant has now taken on review.

The decision

[20] The decision of the Committee was subsequently reduced to writing. The decision followed, as is apparent from the transcribed record, after the hearing of extensive oral argument, supported by written submissions on behalf of the applicant and reference to a vast array of case law. The decision, in the form of a ruling, spanning 20 pages, referred to all of this as well as the chronology of the matter. The decision, very correctly, summed up that factors which the committee, not unlike courts of law, would have regard to, would be (i) the length of the delay; (ii) the reasons furnished to justify the delay; (iii) the right to a speedy trial; (iv) prejudice of the medical practitioner; (v) the nature of the charge; (vi) the interests of society and (vii) the fact that the process is one of a peer review and not solely punitive but also aiming at correcting the conduct of those registered with the HPCSA.

[21] In evaluating the facts relating to the applicant and the possibility of prejudice, the Committee proceeded as follows “... *the Committee considered the fact that the Respondent [the applicant in this matter] has all along been in possession of the letter of complaint and invoices relating to the charge. He has also been in possession of witness statements. It is worth noting that the said invoices were issued by his practice, the logical conclusion is therefore that records are available to him. The argument that he will not and cannot remember some facts to be in a position to properly present his case, cannot hold water*

especially if regard is had to the numerous communications [with] the HPCSA (which both parties have mentioned in their submissions) in respect of the matter. Both parties have put on record that a pre-trial has been held and that there has been an exchange of documentation”.

[22] After considering case law and considering the delay in the furnishing of further particulars, the Committee opined that it “... *finds it mindboggling that [the applicant] would destroy practice records of a matter which he knew was the subject matter of an ongoing complaint. This Committee would have expected [the applicant] to maintain his practice records or to at least establish the status of the matter before destroying these records. The Committee is unable to accept that a reasonable health practitioner in the position of [the applicant] would destroy the records in the normal course of 5 years”.*

[23] The conclusions of the Committee were: “*After considering all of the above factors (including prejudice to the [applicant] and the interests of justice and the society) and balancing these factors, this Committee is not persuaded that the application should succeed. The HPCSA’s conduct in investigating and setting down the matter, while there are shortcomings, is not such to outweigh the absence of significant prejudice to [the applicant], both trial related and otherwise ... This Committee therefore after meticulous consideration of the submissions and legal position, dismisses the application. The interests of justice and public interest dictate that this matter should be proceeded with”.*

[24] In his supplementary affidavit, delivered after receipt of the record and wherein extensive references to the record was made, the applicant submitted that the Committee’s decision was “arbitrary, irrational and unreasonable”. This is

the basis of the applicant's review application. This attack was made without reference to PAJA² or specific sections thereof.

Evaluation

[25] The applicant appears to confuse and conflate the principles applicable to a review application and an appeal. I say this because in the concluding paragraph of the heads of argument delivered on behalf of the applicant after extensive references to the chronology of the matter and the complaints about the "further particulars-issue", the following submission is made: *"It is submitted that the [Committee] ... erred in having come to its decision, on the facts before it, to dismiss the applicant's point in limine. The applicant prays for the orders as per the notice of motion"*.

[26] The differences between appeal proceedings and review proceedings are trite. An appeal is directed at the result of a trial, while a review is aimed at *"the method whereby that result was obtained"*.³ In the present matter, there is no appeal before this court and the applicant, having launched review proceedings in terms of Rule 53, is restricted to the principles applicable to a judicial review of an administrative act. These principles are those codified in PAJA. The grounds relied on are those set out in paragraph 24 above.

[27] Was the Committee's decision arbitrary? Section 6(2)(e)(iv) of PAJA provides that a court has the power to review *"... administrative action if ... the action was taken ... (iv) arbitrarily or capriciously ..."*.

[28] Action is arbitrary if there was "no reason or justifiable reason" for it.⁴ Clearly there were "reasons" for the decision. It was not taken on a whim or

² Promotion of Administration Justice Act 3 of 2000.

³ Joubert (ed), LAWSA, vol4, Third Edition, para 456 with reference to *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA).

⁴ *Minister of Constitutional Development v SARIPA* 2018 (5) SA 349 (CC).

without regard to the facts. It was a decision taken after deliberation and consideration of numerous facts, interests, submissions and case law. The reliance on arbitrariness must fail.

[29] Whether there were “justifiable reasons” for the decision, does not entail an evaluation of whether the decision was right or wrong,⁵ it simply means an evaluation of whether there existed reasons at the time which could justify a decision maker’s conclusion or not. It is, in this sense related to the issues of rationality and reasonableness itself.

[30] Counsel for the Committee, appropriately in my view, referred to the following dictum in this regard: *“In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review ...”*.

[31] The applicant made much of the fact that 8 years have elapsed since the alleged offending conduct and the eventual hearing in November 2019. Based on this, not only was the time difference labelled a delay, but it was characterized as being an “undue” or “inordinate” delay, rendering any finding to the opposite to be “irrational” or “unreasonable” (or without reasonable justification). The time that has elapsed should however not be viewed in an oversimplified manner. There are three principal time periods: firstly, the two-year period from July 2011 to Ms Klavier’s complaint in 2013, secondly, the three year period since Discovery Health’s consequential complaint in 2013 to the first hearing date in

⁵ Baxter, Administrative Law, 1984 at 486.

2016 and, thirdly, the time period of three years between the second and third hearing dates.

[32] The first period was clearly not of the making of the HPCSA and cannot constitute any delay on its part. The second period was characterized by communication between the parties and the applicant's insistence on the furnishing of further particulars which, in terms of the Regulations, need not have been furnished at a preliminary investigating stage and his refusal to furnish a response in the absence of these particulars. Even a response of a bare denial from the applicant (if that was his case) would have sufficed. The HPCSA accused the applicant of being recalcitrant in this regard but, either way, this period cannot constitute either a delay or one which is "undue". The third period is the one in respect of which the most criticism can be directed at the HPCSA. In response, both before the Committee and before this court, the HPCSA referred to a huge backlog of thousands of matters which it seeks to contend with. Numerous logistical hurdles contribute to what the HPCSA apologetically referred to as "systemic inertia". Its deponent put it as follows: "*At the hearing of this matter on the 1st of November 2019, when asked by the legal assessor why there was a three-year delay, the pro forma complainant explained as follows:*

79.1 That the legal department ... was faced with internal capacity issues;

79.2 There was a backlog of cases and cases which must still be dealt with which needed attending to;

79.3 The pro-forma complainant at that time struggled to get experts to assist as the fees to be paid to these experts were not in line with market related fees".

[33] The applicant, in contending that these explanations were insufficient to dispel the notion of undue delay, relied heavily on the decision in *Stokwe v MEC: Department of Education, Eastern Case and Others (Stokwe)*⁶ where the institution of disciplinary proceedings had been held to have been unduly delayed. The applicant argued that the standard applied in respect of the delay in the *Stokwe* case (of slightly more than a year), being a “civil” standard, is more appropriate than the standard applied in respect of criminal matters, being the subject matter of the cases relied on by the HPCSA.⁷

[34] *Stokwe*’s matter is to be distinguished from the present matter. It is a labour matter wherein the prescriptions regarding prompt disciplinary action contained in the Labour Relations Act⁸ were largely decisive. The issue of what was a fair labour practice also played a role. There was also no explanation tendered for the delay. When the matter was eventually concluded, no reasons were given for Mrs Stokwe’s dismissal.

[35] Even in *Stokwe*, the Constitutional Court held that what constituted an unfair delay had to be decided on a case by case basis, dealing with all the factors of a specific matter.

[36] The nature and role of the HPCSA is also different from that of an employer (as was the case in *Stokwe*). The HPCSA’s objects and functions are defined in the Health Professions Act as being “*to serve and protect the public in matters involving the rendering of health services by persons practicing a health profession ... to uphold and maintain professional and ethical standards within the health professions ... to ensure the investigation of complaints concerning any person registered in terms of this Act and to ensure that appropriate*

⁶ 2019 (4) BCLR 506 (CC).

⁷ Such as *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

⁸ 66 of 1995.

*disciplinary action is taken against such persons in accordance with this Act in order to protect the interests of the public ...”.*⁹

[37] The objects of the professional boards established under the Health Professions Act are “*to maintain and enhance dignity of the relevant health profession and the integrity of the persons practicing such profession and to protect the public*”.¹⁰ The second respondent is such a board. The HPCSA’s deponent also explained that, irrespective of the contents of Discovery Health’s complaint, what the applicant was ultimately charged with, was having operated a mobile practice. The deponent stated that this was no a “trivial matter” and that guidelines had been published “to protect the public and to guide the profession”.

[38] It is clear from the decision and the reasons furnished for it, that the Committee had legitimately taken these aspects regarding public interest into account when coming to a conclusion that these considerations outweigh what little (if any) prejudice the applicant might suffer. It accordingly determined that the inquiry should proceed.

[39] On the facts of this case, as set out above, I find that the Committee had acted reasonably in having taken all relevant considerations into account, having weighed and balanced them and in thereafter coming to its conclusion in a reasoned manner. It therefore acted neither irrationally nor unreasonably.

[40] It must follow that the review must fail. Having reached this conclusion, I need not deal with all the peripheral issues raised by the parties regarding the so-called “enrollment decision” to proceed with the inquiry, the timing of the review application or other technical points. Once the review application is unsuccessful,

⁹ Sections 3(j); (m) and (n).

¹⁰ Section 15A.

it must follow that the applicant is not entitled to a stay of proceedings, as claimed by him.

[41] I find no reason why the customary rule relating to costs should not apply and why costs should not follow the event.

Order

[42] The following order is made:

The application is dismissed, with costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 8 November 2022

Judgment delivered: 15 December 2022

APPEARANCES:

For the Applicant:	Adv J Schoeman
Attorney for the Applicant:	Schoeman Borman Inc, Pretoria
For the Respondents:	Adv W Lusenga
Attorney for the Respondents:	Modukwa Attorneys, Pretoria