

**IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

Case No 9723/03

In the matter between:

RIAAN SIMON

Applicant

and

SOUTH AFRICAN PHARMACY COUNCIL

First Respondent

MARIAN CASSIMJEE

Second Respondent

ADVOCATE D COETZEE

Third Respondent

JUDGMENT: 7 APRIL 2006

LE GRANGE AJ

Introduction

This is an appeal in terms of section 45(3) of the Pharmacy Act, No 53 of 1974 (the Act) against the decision of an appeal committee of First Respondent, the South African Pharmacy Council (the Council), which was chaired by Third Respondent on 22 September 2003.

Background

The Applicant, a pharmacist, is registered in terms of the provisions of the Act and was previously the co-owner of a pharmacy in Vasco, Cape Town. The Applicant, over a period of two years, was party to a number of transactions in which at the request of a customer, an invoice was made out containing a false description of the goods and products supplied to that customer. The purpose of this was to enable the customer to lodge a claim for such goods and services with his or her medical aid scheme.

The Applicant was convicted in the Magistrate's Court on 45 charges of fraud and sentenced to 18 months imprisonment, suspended for a period of 5 years on certain conditions.

Pursuant to the conviction and sentence in the Magistrate's Court the Council instituted disciplinary proceedings under Section 39 of the Pharmacy Act, against the Applicant.

The Applicant was found guilty of misconduct on 14 November 2001 by a disciplinary committee of First Respondent which was chaired by the Second Respondent and the sanction imposed was that he be struck from the Register of Pharmacists and pay R 3 840,11 towards the costs of the formal disciplinary inquiry.

The Applicant lodged an appeal against the sanction imposed by the disciplinary committee and the appeal committee, which was chaired by Third Respondent dismissed the appeal.

The Applicant now appeals to this Court in terms of section 45(3) of the Act, the decision of the appeal committee of First Respondent.

In argument before me, counsel for Applicant submitted that the first Respondent's sanction unreasonably limits Appellant's participation in his chosen trade, profession or occupation and the decision, being in the nature of administrative action, was arbitrary, capricious or irrational and the sanction is inconsistent as regards sanctions imposed for similar offences. He also contended that an appeal in terms of Act 45(3) of the Act is a rehearing on the merits and that it is not confined to the more narrow grounds upon which a matter is traditionally brought on review. Counsel for the Applicant also referred to the *Pharmacia*, which is an official publication of First Respondent where various cases of misconduct and the sanctions imposed are published, to illustrate the inconsistency of the sanction imposed on the Applicant.

Counsel for the First Respondent, submitted that the application is indeed an appeal in the full sense of the word and that the rehearing of the matter is limited to the evidence on which the decision under appeal was given. He also contended that as far as sanctions or penalties imposed by professional tribunals, such as the Council is concerned, the power of the Court to interfere in the exercise of a discretion by a tribunal is very limited. (**Thuketana v Health Professions Council of South Africa 2003(2) SA 628 (T) at 642G**).

It was also contended on behalf of First Respondent that no reference was made to the cases which Applicant referred to in the *Pharmacia*, at either the disciplinary proceedings or on appeal to the appeal committee, and that it can therefore not be raised for the first time on appeal as the appeal is limited to the evidence on which the decision under appeal was given.

The Principles Applicable to the Appeal

The principles applicable to an appeal under section 45(3) of the Pharmacy Act are well settled in our law. It has already been held in a series of decisions that the nature of an appeal to the Court under section 45(3) of the Pharmacy Act is not limited to the narrower grounds of a review which means that the Court's power to interfere is not limited to cases in which irregularities have occurred. It is, indeed, an appeal in the full sense of the word which means a re-hearing of the matter on the merits but one which is limited to the evidence on which the decision under appeal was given.

(Simaan v South African Pharmacy Board 1980 (1) SA 764 (T) at 768F-G and Rosenberg v South African Pharmacy Board 1981 (1) SA 22 (A) at 29E-F)

The merits of the appeal

The Applicant at the time of the misconduct enquiry, elected not to appear before the disciplinary committee, but through his attorneys furnished the committee with written representations in which he pleaded guilty to the charges of unprofessional conduct against him. Included in the written representations were also all the

Applicant's mitigating factors which were placed before the committee to consider, before pronouncing on the sanction.

The Applicant in his founding affidavit also referred to the following personal circumstances:

- He is employed by a Medical Aid Scheme and his employment involves *inter alia* duties as a pharmacist, and if he is struck from the Register of Pharmacists this would, in all probability, result in his employer terminating his employment. He also supplements his income by doing locum work at a local Pharmacy and if he is struck from the register, he would be precluded from working as pharmacist on a locum or part-time basis.
- He owns no assets or investments which could be utilised to provide for his financial needs and is therefore dependant on earning a monthly income. The demise of the Pharmacy in Vasco, which he co-owned, and the subsequent criminal proceedings, had the effect of wiping him out financially.
- He is divorced and has one minor child who is dependant on him.
- He does not have the experience or qualifications to take up any alternative employment, if precluded from working as a pharmacist. The only other type of employment which may be open to someone with his experience is that of sales representative with a pharmaceutical company. These positions are, however, highly sought after and pharmaceutical companies normally give preference to persons with sales experience and to persons younger than himself.
- As regards positions wholly unrelated to the pharmaceutical industry, the

possibility is for him to attempt to secure some junior position not requiring any particular skills with a large commercial entity. The opportunity of securing such a position is remote having regard to his age and the affirmative action policies implemented by large scale commercial entities.

Counsel for the Applicant submitted that while it is open to any trade or profession to regulate the conduct of those practicing that trade or profession, and to prescribe that in certain circumstances a person will be excluded from that profession, such regulations and prescriptions and the manner in which they are applied, should not unreasonably limit participating in that trade, profession or occupation. It was contended that First Respondent's sanction is unreasonable, having regard to the facts of this matter, and limits Applicant's participation in his chosen trade, profession or occupation and constitutes a constitutionally unsustainable infringement of his rights in terms of section 22 of the Constitution. It was also contended by Applicant's counsel that in exercising its powers to regulate the pharmacy profession and visit certain forms of misconduct with particular sanctions, the Council should also comply with the administrative justice requirements found in Section 33 of the Constitution, and in Section 6 of the Promotion of Administrative Justice Act, no 3 of 2000 (PAJA). Section 6(2) of PAJA sets out a number of grounds on which a court can interfere with an administrative action, *inter alia* if the action was taken arbitrarily or capriciously, or was not rationally connected to the purpose for which it was taken, or to the reasons given by the administrator. Section 6(2)(h) creates an additional ground on which administrative action can be set aside, namely, that such action "*is so unreasonable that no reasonable person could have exercised the power or*

performed the function”.

Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law. The Applicant has in fact exercised his right under section 22 of the Constitution to freely choose his occupation and profession. However, every right has an obligation and every right in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In determining whether the sanction of First Respondent was unreasonable or not, it is important to have regard to the Applicant's personal circumstances, the seriousness of the offence he committed and the objects of the Council, which had been entrusted to it by section 3 of the Act, which provides *inter alia* to uphold and safeguard the right of the general public to universally accepted standards of pharmacy practice; to maintain and develop acceptable standards in the profession; to promote, transparency to the profession and the general public in achieving its objects and to maintain and enhance the dignity of the pharmacy profession.

I am in agreement with the dictum of Mynhardt J in the Thuketana matter (*supra*) that the power of this Court to interfere in the exercise of a discretion by a tribunal, in this instance the Council, is very limited. It is my view that a Court of appeal will only interfere if it is shown, that the tribunal, in imposing a sanction, misdirected itself in such a nature, degree or seriousness that it shows, directly or by inference that the

tribunal did not exercise its discretion at all or exercised it improperly or unreasonably.

The Second Respondent, in her answering affidavit before the appeals committee, stated the following at page 82 of the record:

'I and the Committee did in fact exercise our discretion reasonably and properly and we took all the relevant facts and circumstances into account and made a balanced assessment thereof. We took into account the fact that the appellant pleaded guilty, his personal circumstances, as well as the fact that he had already been found guilty by a criminal court of law and had a criminal record, which was a punishment in itself. We also took into account the degrading effect of the whole procedure in terms of the Criminal Procedure Act and the anguish which the proceedings must have had on the appellant. However, the gravity of the offence and the factors enumerated in the preceding paragraph above unfortunately outweighed the mitigating factors and personal circumstances of the appellant. After much deliberation and consideration the Disciplinary Committee came to the conclusion that the appropriate penalty should be the erasure of the appellant from the relevant register.'

The Third Respondent, as chairperson of the appeal's committee, in coming to its finding made the following remarks at page 223 –224 of the record:

'This Committee has considered the following aspects in coming to its conclusion. In the first instance, the facts as they appear from the appeal record that served in front of the Disciplinary Committee. It must be said that the contents of the appeal record, in particular the facts before the Disciplinary Committee, was discussed by the

members of this Committee.

Secondly, this committee considered the arguments raised by the representatives of the respective parties for which the committee is thankful.

In the third instance this committee considered the authorities to which it was referred by the respective representatives.

In coming to its conclusion the Committee, this Appeal Committee that is, found one aspect to be important, but by extenuating this aspect the impression should not be created that this Committee did not consider all the relevant facts. The outstanding issue is the fact that the appellant had pleaded guilty to 45 charges of fraud. The element of dishonesty is one which, in the opinion of this committee, justified the finding, or sentence rather imposed by the Disciplinary Committee. It therefore follows that the appeal is dismissed.'

I cannot find, having regard to both decisions of the disciplinary and appeals committee of First Respondent, that they exercised their discretion in an arbitrary, capricious or irrational manner.

Conclusion

The applicant, although a first offender, committed 45 counts of fraud over a period of 29 months. Civil society expects a professional person in the position of the Applicant to perform his duties and to submit medical aid claim funds with honesty and integrity. The Applicant, by his conduct, brought the honor of his chosen profession into disrepute.

Having regard to the Applicants personal circumstances, the seriousness of the offence and the objectives of the Council entrusted to it by law, I cannot find that the appeals committee of First Respondent misdirected itself at all or exercised its discretion improperly or unreasonably.

Much emphasis was placed on the different sanctions that the Council imposed on offenders committing similar offences as published in the *Pharmacia*. Mere reference to this publication is insufficient as it is not known what the circumstances were that obtained before the committee arrived at the sanction they did. The extracts are of little help as they do not contain a proper summary of the reasons for the sanctions imposed and therefore reference to it serves no useful purpose.

It follows that the appeal of the Applicant cannot succeed.

In the result the appeal is dismissed with costs, including costs of two counsels.

LE GRANGE AJ

