



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

Case No: A2023/050722

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: NO	
OF INTEREST TO OTHER JUDGES: NO	
REVISED	
7May 2024	_____
DATE	SIGNATURE

IN THE MATTER BETWEEN:

**HEALTH PROFESSIONS
COUNCIL OF SOUTH AFRICA
(HPCSA)**

APPELLANT

AND

**SANDRINA VALERIE PHYLLIS
LUDWIG HAECK**

RESPONDENT

JUDGMENT

Siwendu J (Windell ADJP and Unterhalter J concurring):

Introduction

[1] The issue before us turns on the scope of the right to appeal in section 20 (1) and (2) of the Health Professions Act No 56 of 1974 (the Act), read with Regulation 4 of the Act. The main question is whether an appeal lies to the High

Court against a decision of a Preliminary Investigating Committee (PIC) to refer a charge of misconduct to the Professional Conduct Committee (PCC) for an inquiry under the section.

[2] The appellant, the Health Professions Council of South Africa (the HPCSA), is the health professions regulator, established in terms of the Act. The HPCSA keeps a register of regulated health professionals. The respondent, Dr Sandrina Valerie Phyllis Ludwig Haeck (Dr Haeck), is a clinical psychologist and therapist practicing under the name and style of Haeck House Family Wellness Centre.

[3] The HPCSA has established constituent Professional Boards for each regulated health profession.¹ The Professional Board for Psychology is the relevant constituent Professional Board.² It must ensure that appropriate disciplinary action is taken in accordance with the Act to protect the public interest.³ It is mandatory to register with the HPCSA to practice as a psychologist. Dr Haeck is duly registered. As a constituent Professional Board falling under the HPCSA, the Professional Board for Psychology oversees the conduct of her trade.

[4] The appeal stems from a complaint lodged against Dr Haeck by her erstwhile clients, Mr A J Little and Ms D L Little (the Littles). The background to the complaint can be summarised briefly. Dr Haeck and Mr Richard Wands, an attorney, incorporated a private company called the ‘Divorce Diplomats (Pty) Ltd’ to provide a non-therapeutic service to couples contemplating divorce to avoid litigation and help them divorce amicably. Dr Haeck counselled the Littles in her capacity as a psychotherapist in November 2016.

¹ See Section 15

² The Professional Board for Psychology is established in terms of Regulation No. R 1249 dated 28 November 2008

³ See Section 3 (a) and (n)

[5] In July 2017, she recommended the couple enters the Divorce Diplomat programme. Although the Littles reconciled after participating in the programme, they accused Dr Haeck of unprofessional conduct, alleging that she took an upfront payment for both the marriage counselling services and the Divorce Diplomats program, but refused to refund them the balance of the amount for hours not used or required. They alleged that she acted both as a marriage counsellor and divorce counsellor, and operated outside of the ethical rules of conduct of the HPSCA.

[6] A PCI investigated the complaint and concluded that Dr Haeck was “guilty of unprofessional conduct.” It resolved to refer the complaint to a PCC for an inquiry in terms of the Regulations for the conduct of inquiries into allegations of unprofessional conduct, published in GN R102 of 6 February 2009 (the Regulations).⁴

[7] Dr Haeck approached the High Court for relief to set aside the finding of misconduct and the resolution to refer the complaint to the PCC. The chief complaint was that the PCI found her guilty without affording her *audi alteram partem* and the failure infringed her constitutional right to a fair hearing. She alleged that the PCI referred the complaint to an expert, and thus abdicated its responsibility by deferring it to an expert who failed to afford her *audi alteram partem* while preparing the report.

[8] Her further grievance was that the PCI amended the complaint. The referral to the PCC extended the ambit of the inquiry to wrongs which were not the subject of the original complaint by the Littles, with no option for her to pay an admission of guilt fine.

⁴ The Regulations were subsequently amended by GN 53 in GG 42980 of 31 January 2020 and GN R3564 in GG 48838 of 23 June 2023.

[9] The court *a quo* accepted that an appeal lies in terms of section 20 of the Act. It decided Dr Haeck was deprived of *audi alteram partem* in forming a *prima facie* view in breach of section 41A (8) (b)(i) and (iii) of the Act. It held that the referral to the expert went “beyond a mere fact finding mission.” The PCI did not decide the matter independently but had “outsourced” the complaint to the expert, who did not merely establish additional facts, in violation of the Act. Dr Haeck was entitled to *audi* and due process at every step of the proceedings and not only during the PCC inquiry. The court *a quo* ruled that the process adopted by the PCI was unfair and unjust. Dr Haeck could not be expected to be “satisfied with an unjust trial and a fair appeal.”

[10] The court *a quo* set aside the preliminary finding as well as the resolution referring the matter to the PCI for an inquiry. It also set aside the misconduct complaint which was the genesis of the investigation and the referral. Aggrieved by the decision, the HPCSA appealed to the Full Court with the leave of the court *a quo*.

The Appeal

[11] The position of the HPCSA on appeal is that the PCI simply investigated and verified whether there was merit in the complaint. It made a *prima facie* finding, akin to a decision to prosecute after an investigative process. Mr Vimbi (for the HPCSA) contended that since the misconduct was referred to the PCC, there has been no final finding of guilt. The referral decision by the PCI was not appealable to the high court.

[12] Ms Andrews (for Dr Haeck) disagreed and contended that the PCI pronounced itself on the question of guilt and tied the hands of the PCC by referring the complaint without an option to pay a fine. It failed to afford Dr Haeck her *audi* rights on two fronts. First, it arrived at the decision without hearing all the evidence. The papers before the court *a quo*, made much of the

virtual meeting and the quality of her engagement with the PCI in October 2020 to buttress this complaint.

[13] The second claim to *audi* is in respect of the report furnished by the expert. Ms Andrews sought to persuade us that Dr Haeck had a right to be heard by the expert before the resolution taken by the PCI. She submitted that the obligation arose because the expert expanded the scope of the inquiry into matters which were not the substance of the initial complaint by the Littles. The additional matters were not canvassed with Dr Haeck. It was intimated that the PCI may have concluded differently had it granted Dr Haeck the right to *audi*. For these reasons, the PCI acted *ultra vires*.

Issues on Appeal

[14] The appeal raises intersecting issues.

- i. The first issue concerns the scope of the right of appeal conferred by section 20.
- ii. A second issue involves the nature of the functions performed by the PCI in respect of the complaint against Dr Haeck, and whether its decision to refer the complaint is appealable under the section.
- iii. The ultimate issue is whether on a proper interpretation of the section, the court *a quo* was correct in setting aside the resolution and the referral of the misconduct.

[15] The HPCSA's conduct and those structures falling under it is constrained by the Act. It was evident during the hearing that the Act creates several disciplinary structures, with overlapping functions and powers. It is necessary to deal with the statutory arrangements and how the HPCSA dealt with the complaint in some detail, before dealing with the merits of the appeal.

Framework for investigating Complaints.

[16] As the statutory Council, the HPCSA has its own committees constituted in terms of section 10 of the Act. Notwithstanding, the Act devolves the function and power to investigate a complaint, and if there is reason, to institute an inquiry into a complaint or charge to the relevant Professional Board, in this case, the Professional Board for Psychology.⁵

[17] The Professional Board has the power to consult and seek advice from any person if in doubt whether to hold an Inquiry.⁶ Section 15(5)(f) and (fA) of the Act enjoins the Minister to pass regulations to establish committees deemed necessary within a specific Professional Board.⁷

[18] The Regulations classifies two committees, responsible for assessing and dealing with misconduct complaints, namely (a) the PCI (PCI) and (b) the PCC (PCC). Both committees thus give effect to section 15(5) of the Act. The two committees are constituted as committees of the Professional Board for Psychology.

[19] Although the power to investigate and institute disciplinary proceeding devolves to the Professional Boards, referred to above, complaints against health professionals must be directed to the Registrar.⁸ The Registrar has wide powers to assess a complaint or appoint (a) an officer of the professional board as an investigating officer and or (b) any person other than a member of the professional board, who is not in the full-time employment of the professional board to establish more facts, investigate the complaint and report the outcome to the Registrar.⁹

⁵41(1) A professional board shall have power to institute an inquiry into any complaint, charge or allegation of unprofessional conduct against any person registered under this Act, and, on finding such person guilty of such conduct, to impose any of the penalties prescribed in section 42 (1).

⁶ Section 41 (2) A professional board may, whenever it is in doubt as to whether an inquiry should be held, in connection with the complaint, charge or allegation in question consult with or seek information from any person, including the person against whom the complaint, charge or allegation has been lodged.

⁷ See Section 15 (5) (f) and (fA)

⁸ See Section 12

⁹ Section 41A (1) and (2) states that the registrar may, where necessary to establish more facts, appoint an officer of the professional board as an investigating officer for the purposes of this section.

[20] Regulation 4 deals with the receipt of a complaint, the notification of the health professional, and the right to call for further information within prescribed periods. Regulation 4 (1) (c) and (d) affords the Registrar an election to refer the complaint directly to the PCI or to the chairperson of the committee for direction. In the present matter, the Registrar referred the complaint to the PCI, a committee of the Professional Board for Psychology.

[21] Although nothing turns on this on the merits of this appeal, the complaint at issue is dated September 2017. It appears that Dr Haeck was unaware of it until 20 May 2019, when the investigator assigned to the matter invited her to make written representations. Nevertheless, consistent with the preliminary investigation procedure in Regulation 4 (1)(b)(i), Dr Haeck was invited to respond to the allegations. She did so through her attorney on 22 July 2019, and denied wrongdoing, relying on the contract signed by the Littles.

[22] Her answer was furnished to the Littles who in reply informed the HPCSA that when they joined Divorce Diplomats, they signed documents which reflected the HPCSA registration number. They had relied on Dr Haeck being governed by the HPCSA's ethics code. They alleged that she failed to advise them that the program was sold on a non-refundable basis and the amount paid would be forfeited. They claimed that Dr Haeck had failed to issue them with Tax Invoices, and the amount paid to her cannot be recovered from medical aid. In sum, they stated that Dr Haeck operated outside of the professional and ethical conduct rules of the HPCSA that were binding upon them.

[23] In December 2019, the PCI invited Dr Haeck to a meeting which did not materialise because she was travelling overseas. The matter lay dormant until 20 October 2020 when Dr Haeck was invited to a meeting by the PCI for the second time. Convening this meeting proved difficult. Dr Haeck had given birth six weeks prior to the meeting. The PCI refused to reschedule the meeting, but instead gave her an election, to either attend or not attend and accept the

consequences of not attending. All this is consistent with Regulation 4 (2) and (3)¹⁰ which the PCI invoked after receiving further information from Dr Haeck and the Littles. Dr Haeck ultimately attended the meeting virtually.

[24] On 2 November 2020, the investigator informed Dr Haeck that:

“In October 2020, the Committee RESOLVED to defer and refer the matter for an expert opinion to consider the bridging of ethical rules i.e. sharing of rooms, informed consent and performing of psychological act in an enterprise not registered as a psychology practice.”

[25] It is common cause that the expert, Dr M Kganya delivered her report in December 2020. The PCI formed the view that an inquiry was warranted. Acting in terms of Regulation 4(8), the PCI resolved to refer the matter to a PCC Regulation 4(8) which states that:

“If a preliminary committee of inquiry decides, after due consideration of the complaint, any further information which may have been obtained in terms of sub regulation (1) (a) and the respondent's explanation of the subject matter of the complaint or the lack of such explanation, that there are grounds for a professional conduct inquiry into the conduct of the respondent, it must direct that an inquiry be held and that the registrar communicate its decision in writing to the complainant and the respondent and arrange for the holding of such inquiry, or it may allow the respondent to pay an admission of guilt fine in terms of section 42 (8) and (9) of the Act.”

[26] The resolution referring the matter to a PCC for an inquiry reads:

“.... the Committee RESOLVED that the practitioner is guilty of unprofessional conduct the matter be referred to Professional conduct inquiry in terms of Reg 4(8) of Regulations relating to Conduct Inquiries into alleged unprofessional conduct with no option to pay admission of guilty fine.”

[27] It framed the ambit of the inquiry as follows:

“Sharing of rooms with an entity not registered in terms of the Act.

¹⁰Regulation 4(2) states that on receipt by the registrar of the further information and written response referred to in sub regulation (1) (a) and (b). he or she must submit the complaint, such further information and the written response to the preliminary committee of inquiry, and if no further information or written response is received, the registrar must record this fact and report it to the preliminary committee of inquiry.

Entering into potential conflicting roles with the client, by acting as a clinical psychologist and a life coach under the divorce diplomat program company.

Referring clients to the company in which the practitioner has financial interest.

Charging fees for services not rendered.”

[28] The PCC had scheduled the inquiry for 12 and 13 May 2021. Dr Haeck launched the application to the High Court in March 2021.

The ambit of the right to Appeal in section 20.

[29] Dr Haeck sourced the right of appeal to the court *a quo* from section 20 which provides that:

“(1) Any person who is aggrieved by any decision of the council, a professional board or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision.

(2) Notice of appeal must be given within one month from the date on which such decision was given.” [own emphasis]

[30] On the plain reading of the section, the right to appeal to the High Court is confined to decisions of: (a) the council, (b) a professional board or (c) a disciplinary appeal committee. The section does not provide for an appeal from a decision of the PCI.

[31] Ms Andrews’ point of departure is that section 20 confers Dr Haeck a broad right of appeal to “any decision” of the council, professional board, or a disciplinary committee. She submitted that since the PCI is a structure of a Professional Board, its decision is by implication, appealable. She contended that the referral to the PCC, without the option to pay a fine before the merits were fully ventilated rendered the decision of the PCI final in this respect. The suggestion is that the reference to “any decision” in the section must be construed to mean a decision to refer a complaint to the PCC.

[32] The submission disregards the decision maker whose decision is the subject of appeal. That would widen the scope of the appeal and contradicts the

decision of the Supreme Court of Appeal in *Emergency Medical Supplies and Training CC t/a EMS V Health Professions Council of South Africa*.¹¹ There the Court determined that an appeal under the section is one in the ordinary sense, and involves “a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether the decision was right or wrong.”

[33] Since an appeal under the section involves the rehearing of the merits, an appealable decision must mean a final decision on the issue determined by the designated structure in the Act. In the present case, the Registrar referred the complaint to the PCI under Regulation 4(c), to investigate the complaint to establish whether it has merit and to determine what steps to take. This investigative function of the PCI was confirmed by the Supreme Court of Appeal in *Roux v Health Professions Council of SA (Roux)*¹² where the Court observed that the PCI fulfils a “sifting” function to ensure that only sustainable complaints proceed to a disciplinary inquiry.

[34] It is so that the PCI may decide that a complaint lacks sufficient gravity and constitutes a minor transgression, in which event, the PCI is empowered to make a final decision as contemplated in section 42 (1)¹³ read with Regulation 4(9).¹⁴ Those adjudicative functions are limited to “minor transgressions.” The PCI did not reach this conclusion and did not impose a penalty in this instance.

¹¹ [2013] 4 All SA 1 (SCA); see also *Health Professions Council of SA v De Bruin* [2004] 4 All SA 392 (SCA) at paragraph 23.

¹² [2012] 1 All SA 49 (SCA) paras 20 and 21.

¹³ Section 42 (1) states that: “Any person registered under this Act who, after a determination made by a preliminary committee of inquiry on minor transgressions or an inquiry held by a professional conduct committee, is found guilty of improper or disgraceful conduct, or conduct which, when regard is had to such person’s profession, is improper or disgraceful, shall be liable to one or more of the following penalties ...”

¹⁴ Regulation 4(9) states that: “if a preliminary committee of inquiry decides, after due consideration of the complaint, any further information which may have been obtained in terms of sub regulation (1) (a) and the respondent’s explanation of the subject matter of the complaint, that the respondent acted unprofessionally, but the conduct in question is found to constitute only a minor transgression, it must determine, as a suitable penalty to be imposed, one or more of the penalties provided for in section 42 (1) (a) and (d) of the Act...”

[35] Although the resolution referring the complaint expresses itself in a definitive way, it must be read purposefully and holistically, having regard to the context¹⁵, and the powers enjoyed by the PCI. The substance of the referral makes it clear there was still a further action to be taken on the matter. The referral of the misconduct connotes there was no finality or a definitive finding on the issue regardless of the forceful way it is expressed. The PCI performed an investigative function in relation to the complaint. An investigation is not a finding of guilt but may result in a referral before an adjudicative body that is empowered to determine the question of whether misconduct has taken place, and its consequence.¹⁶ The PCI did not reach a final decision because it referred the matter to the PCC to do so.

[36] The contention that “*any decision*” includes an investigative decision cannot be supported. It would lead to an untenable result where all decisions, including interlocutory decisions to investigate a complaint are subject to appeal directly to the High Court even before the merits have been disposed of. No appeal can lie from the decision of the PCI because it is ultimately a decision to refer, it is not a final decision, and a referral decision is not appealable.

[37] To the complaint that there was a failure to grant Dr Haeck the right to *audi*, Ms Andrews agreed that if we find as we have that the PCI performed a purely investigative function, then there would be no right of *audi* enjoyed by her. The concession is well made and applies with equal force to the submission that Dr Haeck was entitled to *audi* by the expert engaged by the PCI to advise on the complaint. The expert did no more than provide an internal opinion which the PCI was free to accept or reject. That the resolution was based on the report of the expert does not change the effect of the PCI’s resolution. In particular, Dr

¹⁵ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] JOL 50742 (SCA)

¹⁶ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricorn Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) at para 38.

Haeck is afforded *audi* under Regulation 8 and 9 at the inquiry before the PCC. The procedure to be followed affords her pre-trial rights including the exchange of documents to be relied on.

[38] Equally, the criticism that the PCI impermissibly reformulated and expanded the complaint is without merit. The PCI merely decided there were grounds to charge Dr Haeck for professional misconduct, consistent with its investigative function. It formulated a charge based on all the information before it, including the expert report. As the Court in *Roux* emphasised, the PCI "... are best suited to decide whether there are grounds on which to conduct an inquiry into unprofessional conduct. It is that committee's function to *specify the conduct* the subject of inquiry." As the body entrusted with the investigation, the PCI formulated the charges which were the subject of the investigation, by specifying the ambit of the inquiry to be referred to the PCC. As the Court in *Roux* tells us, it was in the remit of the PCI to do so. [own emphasis].

[39] The decision by the PCI to refer a complaint to the PCC is not appealable to the High Court under section 20. The rationale is evident. Only the decision makers mentioned in the sections are the final arbiters on any disciplinary matter before the HPCSA or the Professional Board of Psychology is appealable to the High Court.

[40] Significantly, Regulation 11(1)¹⁷ first directs an appeal against a finding or penalty of a PCC to the *ad hoc* appeal committee of the Council.¹⁸ Had Dr Haeck abided with the inquiry process, she would have been obliged to exhaust internal remedies, and appeal that decision to the *ad hoc* appeal committee of the Council before approaching the High Court.

¹⁷The respondent or the pro forma complainant may appeal to the appeal committee against the findings or penalty of the professional conduct committee or both such finding and such penalty."

¹⁸ See section 10.

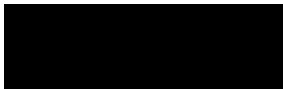
[41] In conclusion, it does not appear that the judgments of the Supreme Court of Appeal were brought to the attention of the court *a quo*. Its reasoning and conclusion cannot be sustained. In setting aside, the PCI's resolution and dismissing the misconduct complaint, the court *a quo* erred. It exercised wide appeal powers not conferred by the Act. There was no evidence before it as the merits of the charge had not yet been ventilated. The matter was still pending before the PCC.

[42] Accordingly, the resolution to refer the misconduct to the Professional Conduct Committee for an inquiry in terms of Regulation 4(8) of Regulations is reinstated together with the charges formulated therein.

[43] In the result, I propose the following order:

- a. The appeal is upheld.
- b. The order of the court *a quo* is set aside and substituted with the following order:
“The appeal is dismissed with costs.”
- c. The respondent is ordered to pay the costs of the appeal.


NTY SIWENDU J


L WINDELL J pp


DN UNTERHALTER J pp

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and release to SAFLII. The date of the handing down is deemed to be 7 May 2024.

Date of appearance: 20 March 2024

Date Judgment delivered: 7 May 2024.

Appearances:

For the Appellant: Advocate Vimbi

Instructed by: Z and Z Ngogodo Attorneys

For the Respondent: Advocate R Andrews

Instructed by: HJW Attorneys.