

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

18 June 2024

Case No:130502/2023

In the matter between:

DR JOHAN (LETS) PRETORIUS

Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

First Respondent

MINISTER OF HEALTH, NATIONAL GOVERNMENT

Second Respondent

JUDGMENT

SK HASSIM J

Introduction

[1] The applicant is a medical practitioner registered under the Health Professions Act, Act No 56 of 1974 (“the HPA”). He applied on a semi-urgent basis, for an interdict against the Health Professions Council (“the HPCSA”) from proceeding with a professional conduct inquiry (“Disciplinary Inquiry”) into alleged unprofessional conduct pending the finalisation of a review application under the Promotion of

Administrative Justice Act, Act No 3 of 2000 (“PAJA”) launched by him on 26 October 2023 (“the review application”).

[2] The applicant claimed an interim interdict in the following terms –

- “2. First respondent is prohibited from proceeding with the disciplinary proceedings against the applicant, pending the final resolution and determination of the relief sought in the main application instituted by the applicant against the respondents under case no 2023/111240.
3. First respondent shall pay the costs of this application on an attorney and client scale including the costs of two counsel.”

[3] The application came before me in the urgent court. Only the first respondent, the HPCSA opposed it. Ms Manganye who appeared for the HPCSA moved for the application to be struck from the roll with costs for want of urgency, failing which for it to be dismissed with costs.

[4] The application was issued in early December 2023. The respondents were afforded five (5) days to deliver a notice of intention to oppose the application and ten (10) days to deliver an answering affidavit. The customary three sets of affidavits were delivered, as well as heads of argument. The interim interdict was directed at restraining a disciplinary inquiry by a professional conduct committee (“a disciplinary committee”) from proceeding ¹ before the review application is finalised.

[5] The urgent court was the only route to legal redress with the current case load in this division. If the application for an interim interdict was not heard before the Disciplinary Inquiry commenced, it would have become academic. The application was accordingly sufficiently pressing to warrant attention in the urgent court.

[6] I was not persuaded that the applicant would be afforded substantial redress at a hearing in due course. The application was argued. I issued an order dismissing it. This judgment constitutes the reasons for the order.

[7] A patent error in the order has been brought to my attention. Instead of ordering the applicant to pay the costs of the application, I inadvertently ordered the respondent to do so. The order therefore stands to be varied to read:

¹ The Disciplinary Inquiry was scheduled to start on Thursday, 18 April 2024.

- “1. The application is dismissed.
2. The applicant is to pay the costs of the application.”

[8] The disciplinary proceedings stem from a complaint to the HPCSA that the applicant was guilty of unprofessional conduct in that he was serving a sentence of imprisonment.

[9] Mr Du Plessis SC, who appeared for the applicant, correctly characterised the HPCSA’s disciplinary process as a multi-staged decision-making process. The issue in this application as I saw it, was a narrow one; do the impugned decisions constitute “administrative action” as defined in PAJA, thereby rendering it (them) susceptible to review thereunder. The application was however not opposed on this basis, and neither party addressed whether a prelim committee’s determination on the appropriate manner of dealing with a complaint ² constitutes administrative action as defined in PAJA.

The incorporation of the papers in the review application

[10] Even though this is procedurally a self-standing application, for reasons that will emerge, the review application is an integral part of this application. Consequently, something must be said about the formulation of the papers in this application, and the review application. This will explain why the affidavits in the review application appear to have assumed greater importance than the affidavits in this application.

[11] The applicant did not identify in the founding affidavit in this application the grounds upon which he seeks to review and set aside the impugned decisions. Instead, he imported into the founding affidavit the whole of the review founding affidavit. Moreover, he did so without identifying the specific averments which he relied upon for the interim interdict. In his papers the applicant requested that the averments in the founding affidavit in the review application be regarded as if “they have all been incorporated into [the] founding affidavit [in this application]”.

² Cf. definition of “preliminary inquiry” in regulation 1 of the Regulations relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the R102 dated 6 February 2009 and published in *Government Gazette* 31859.

[12] However, the founding affidavit in the review application is beset with its own problems. The review grounds are discussed superficially; the applicant lists and then adopts the various review grounds listed in PAJA as reasons for challenging the HPCSA's decisions. I trudged through the review application, and this application, to identify the review grounds and then to locate the supporting facts, if any, in either the review founding affidavit or the founding and replying affidavits in this application. Save for the *audi* complaint, the applicant scarcely revealed facts to support his claims that the decisions were impeachable on the grounds contended by him.

[13] The HPCSA, probably taking the lead from the applicant, stated in the answering affidavit that for its opposition it relied on the averments in its review answering affidavit.

[14] I had reservations whether it is appropriate, or proper, for a litigant to rely on averments in affidavits in other proceedings, related or unrelated, without at least identifying the evidence on which it relied. Regardless, the applicant and the respondent were *ad idem* that their respective affidavits in the review application must be read by the court and considered when deciding the application. Despite my reservations, I decided the application as if the averments in the affidavits in the review application are contained in the affidavits in this application, as requested by the parties in their affidavits. The applicant's failure to deliver a replying affidavit in the review application has consequences; the averments in the answering affidavit in the review application stand unchallenged.

Relevant provisions of the Regulations relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the HPA

[15] Professional conduct inquiries ("disciplinary inquiries") are governed by the Regulations relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the R102 dated 6 February 2009 and published in *Government Gazette* 31859 ("the Regulations"). A disciplinary inquiry under the HPA is preceded by a preliminary inquiry.³ The preliminary committee of inquiry ("prelim committee") considers

³ Regulation 4 of the Regulations, esp. sub-regulation 4(8) of the Regulations.

whether there are grounds for a professional conduct inquiry into the conduct of a medical practitioner. If it finds such grounds, then it must direct the holding of a disciplinary inquiry.⁴

[16] Regulation 4 deals with the role and powers of a prelim committee, Regulations 5 and 6 deal with the steps to be taken in arranging the disciplinary inquiry and giving effect to the direction from the prelim committee under sub-regulation 4(8). Regulation 8 deals with the holding of a pre-inquiry conference and regulation 9 deals with the procedure at the disciplinary inquiry. The relevant parts of Regulations 4, 5, 6 and 8 are set out below:

4. Preliminary inquiry —

- (1) The registrar—
 - (a) may, after receiving a complaint, call for further information or an affidavit confirming the allegations by the complainant;
 - (b) must, subject to paragraph (a), after receiving a complaint, register the complaint and notify the respondent of the complaint by forwarding a copy of the complaint, together with copies of any further information or affidavits referred to in paragraph (a), to him or her—
 - (i) requesting a written response from him or her within 40 working days from the date of receipt of the notification by the respondent, or within such further period as the registrar may reasonably allow, failing which the complaint, together with any further information or affidavit referred to in paragraph (a), must be submitted to the preliminary committee of inquiry without the respondent's written response;
 - (ii) advising him or her that failure to respond to the notification or the complaint as contemplated in subparagraph (i) will constitute contempt of council, and that a response may consist of a written communication by the respondent that he or she invokes his or her right to remain silent; and
 - (iii) warning him or her that the written response referred to in subparagraph (i) may be used as or in evidence against him or her:
- Provided that a notification referred to in this paragraph will be deemed to have been received—
- (aa) on the day such notification is hand-delivered, to the registered address of the respondent, or
 - (bb) if such notification is sent by registered post, on the seventh day following the date on which it was so posted;
- (c) ...;
 - (d) ...
- (2) On receipt by the registrar of the further information and written response referred to in subregulation (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.
 - (3) The preliminary committee of inquiry may, after due consideration of the matter

⁴ Sub-regulation 4(8) of the Regulations.

referred to it in terms of subregulation (2), direct the registrar to issue a notice in writing to the respondent, to be delivered in the manner contemplated in the proviso to subregulation (1)(b), instructing him or her to appear in person with his or her legal representative, if any, before the preliminary committee of inquiry at its next meeting to inquire why he or she did not respond to the council correspondence and to give his or her response to the complaint or exercise his or her right to remain silent.

- (4) If the preliminary committee of inquiry decides, after due consideration of the explanation by the respondent for his or her failure to respond to the council correspondence, that the respondent is in contempt of council, it must—
 - (a) make a finding of guilty of contempt of council and impose one or more of the penalties provided for in section 42(1)(a) and (d) of the Act;
 - (b) order the respondent to submit, within such period as may be determined by the committee, his or her written response to the complaint or a written communication to indicate his or her exercising his or her right to remain silent; and
 - (c) direct the registrar to confirm its decision in writing to the respondent stating the reason(s) for the decision.
- (5) If the respondent fails to attend the meeting of the preliminary committee of inquiry after having been duly notified in writing to appear before the committee, the committee may—
 - (a) make a finding of guilty of contempt of council and impose one or more of the penalties provided for in section 42 (1) (a) and (d) of the Act;
 - (b) order the respondent to submit, within such period as may be determined by the committee, his or her written response to the complaint or a written communication to indicate his or her exercising his or her right to remain silent; and
 - (c) direct the registrar to confirm its decision in writing to the respondent stating the reason(s) for the decision.
- (6)
- (7) ...
- (8) If a preliminary committee of inquiry decides, after due consideration of the complaint, any further information which may have been obtained in terms of subregulation (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.
- (9) ...

5. Arranging an inquiry. —

- (1) After receipt of a directive referred to in regulation 4 (8) or a notice of rejection of the penalty or if no response is received by the due date as contemplated in regulation 4(9)(b), the registrar must issue a notice, essentially in the form of Annexure A to these regulations, addressed to the respondent, stating the date and time when and the place where the inquiry will be held and enclosing a charge sheet as formulated by the *pro forma* complainant.
- (2) The notice and the charge sheet referred to in sub-regulation (1) must be served on the respondent ..., at least 60 days prior to the date of the inquiry, and a copy of the notice and charge sheet must be served or posted to the respondent's legal representative, if appointed at the time of service or posting to the respondent.

6. Constitution of the professional conduct committee. —

- (1) The chairperson of the professional board must, at the request of the registrar,

appoint a professional conduct committee at least seven days before the inquiry....

...

7 Request for further particulars...

8. Pre-inquiry conference. —

- (1) In order to determine the issues in dispute, the *pro forma* complainant must arrange a pre-inquiry conference, which must be attended by both parties or their legal representatives, if any, on any date at least seven days before the date of the inquiry at a mutually convenient time and venue,..."

Context to the application: The impugned decisions and the relief sought in the review application.

[17] The review application is brought on the basis that the HPCSA is a statutory body established under the HPA, is an organ of state, and its decisions constitute “administrative decisions”⁵ which are subject to PAJA.

[18] Two acts are impugned in the review application.

[19] On 18 March 2016, in terms of sub-regulation 4(8) of the Regulations, the Committee of Preliminary Inquiry (“the Prelim Committee”) directed that a disciplinary committee must hold a Disciplinary Inquiry into the applicant’s alleged unprofessional conduct. This decision will be referred to as “the first decision”. The applicant seems to have been under the impression that the first decision was taken in 2015. This is not supported by the papers. However, the HPCSA’s averment that the decision was taken on 18 March 2016, is.

[20] Due to the applicant’s incarceration, the HPCSA was unable to secure his attendance at a disciplinary hearing. Resultantly, the Disciplinary Inquiry could not get off the ground. The applicant was released on parole on 29 June 2020. Steps to hold the Disciplinary Inquiry resumed thereafter.

[21] The applicant has concluded from an e-mail sent to his wife’s e-mail address on 21 November 2022, that a decision had been taken in 2022 to continue the disciplinary proceedings. In paragraph 4 of Part B⁶ of the notice of motion in the review application (“the review notice of motion”), he refers to this as “the decision of first respondent to

⁵ Described as such in the applicant’s founding affidavit.

⁶ para 26 below.

continue with the disciplinary proceedings against the applicant of 2022”.⁷ I refer to this as ‘the second ‘decision’” and deal with the e-mail in paragraph [38] below.

[22] I have found no evidence of a second ‘decision’ in the papers. What I have though come across is a document dated 21 January 2023 seemingly signed by the Chairperson (“the Chairperson”) of the Medical and Dental Professions Board (“the Board”). It reads –

“ 21 January 2023

TO: THE CHAIRPERSON
MEDICAL AND DENTAL PROFESSIONS BOARD

APPOINTMENT OF PROFESSIONAL CONDUCT COMMITTEE

The Committee of Preliminary Inquiry has resolved that a professional conduct hearing into the conduct of:
Dr J Pretorius
should be held.

In terms of a resolution taken at a Board meeting, it was RESOLVED that the power to constitute a Professional Conduct Committee be delegated to the Chairperson of the Board.

The inquiry is set down for 02 February 2023. The pro forma complainant in this matter will be Mr Z Gajana.

The following names are proposed for the constitution of the Professional Conduct Committee for your consideration and approval:

.....

APPROVED

Sgd
**CHAIRPERSON: MEDICAL AND
DENTAL PROFESSIONS BOARD**

2023/01/21
DATE

Kindly sign this document and return to us at your earliest convenience, as an indication of your approval of the Committee

Yours faithfully

Coordinator: Professional Conduct”

[23] It is not clear whether the Chairperson’s act of constituting a Disciplinary Committee on or about 21 January 2023 to hear the matter on 2 February 2023 is connected to the second ‘decision’ (i.e., the 2022 decision referred to in paragraph 4 of Part B of the review notice of motion), or whether this act on or about 21 January 2023 is being challenged.

[24] The inconsistencies regarding the date of the first decision and the second ‘decision’ are ultimately of no moment. There is no ambiguity that the applicant is challenging a decision by the Prelim Committee, whenever it may have been taken, for an inquiry to be held into his alleged unprofessional conduct. Nor is there an ambiguity that he is challenging what he asserted is a ‘decision’ which led to the Disciplinary

⁷ para 26 below.

Inquiry being convened for 2 February 2023. To my mind, it is irrelevant whether the first decision was taken in 2015 or 2016, and the second ‘decision’ in November 2022 or on or about 21 January 2023.

[25] The first decision and the second ‘decision’ are collectively referred to as “the two decisions”.

[26] In part A of the review notice of motion the applicant applied for an interim interdict pending the finalisation of the relief in Part B in which an order is sought amongst others to review and set aside the two decisions. The relief is framed thus:

“PART A

- “1. First respondent is prohibited from proceeding with the disciplinary proceedings against the applicant, pending the final resolution and determination of the relief sought in part B hereunder.

PART B

2. Condonation is granted to the applicant in terms of section 9(1)(b) of the Promotion of Administrative Justice Act, No 3 of 2000, pertaining to the 180-day period referred to in section 7(1) thereof.
3. The decision of the first respondent of 2015 to institute disciplinary proceedings against applicant is reviewed and set aside.
4. The decision of the first respondent to continue with disciplinary proceedings against the applicant of 2022, is reviewed and set aside.
5. The first respondent is prohibited from further pursuing any disciplinary proceedings against the applicant based on the applicant’s criminal record.”

[27] Before an answering affidavit was delivered in the review application (“the review answering affidavit”) this application was issued on 8 December 2023. The review answering affidavit was deposed to on 14 December 2023. It was not disputed during argument that a replying affidavit has not been delivered.

[28] Ms Manganye argued, amongst others, that the dispute was *lis pendens* because the relief claimed in this application is also claimed in Part A of the notice of motion in the review application. In view of my decision on the application, it was not necessary for me to consider the issue.

[29] One of the applicant’s grievances is that the HPCSA has unreasonably delayed the Disciplinary Inquiry. He asserted that the unreasonable delay was evidence of vexatiousness and an ulterior motive to the Disciplinary Inquiry. Due to this, I recount the events between July 2015, when the complaint was sent to the applicant, and 27

November 2023 when the proceedings were postponed to 18 April 2024. Amongst others, there was a grievance that the applicant had been deprived *audi alteram partem* (“*audi*”) before the two decisions were taken, and that he had not received timely and proper notice of the Disciplinary Inquiry scheduled for 2 February 2023.

Factual background

[30] During 2013, the applicant was found guilty of treason and sentenced to 30 (thirty) years’ imprisonment, a portion of which was conditionally suspended. He was incarcerated at the Zonderwater Correctional Centre in Cullinan (“the Correctional Centre”). Having served a sentence of direct imprisonment from around 29 November 2013 he was released on parole on 29 June 2020.

[31] Around 28 May 2015, Ms Venter the Manager: Records at the HPCSA, learnt of the applicant’s conviction and sentence. On 17 June 2015, whilst the applicant was incarcerated, she lodged a complaint (“the complaint”) with the General Manager: Legal Department at the HPCSA on the basis that the applicant had been found guilty of attempting to overthrow the government and was serving a sentence of imprisonment for twenty-five (25) years.⁸ She expressed that the applicant’s incarceration constituted unprofessional conduct.

[32] In the founding affidavit in the review application (“the review founding affidavit”) the applicant denied receiving the complaint. However, it appears from annexure “A-2” to that affidavit that the complaint was sent to the applicant under cover of a letter dated 27 July 2015 despatched to the address in the HPCSA’s records, being a post office box in Sinoville (“the Sinoville address”). He was notified that the complaint would serve before the HPCSA’s Prelim Committee for consideration and that the Regulations required him to provide an explanation before the complaint was placed before the Prelim Committee, and he had to do so by 25 September 2015.

⁸ This is not accurate. But nothing turns on it. A sentence of 30 years imprisonment of which 10 years were conditionally suspended for five (5) years was imposed.

[33] Mr Madube, an investigator at the HPCSA, handed the letter dated 27 July 2015 to the applicant personally at the Correctional Centre. At Mr Madube's request, and in his presence, the applicant signed "at the bottom of [the] letter" as proof of personal receipt. Mr Madube's confirmatory affidavit is attached to the HPCSA's review answering affidavit. A copy of the letter which Mr Madube handed to the applicant is attached to the review answering affidavit marked "AA4". Two signatures appear thereon –

- (i) The one, appears on the second half of the page (described in the affidavit as "the bottom of the page"). The date "31/7/2015" appears in manuscript above the signature which the HPCSA asserts was placed by the applicant in Mr Madube's presence.
- (ii) The other signature appears on the first half of the page within the imprint of a rubberstamp of the Head: Correctional Centre, Cullinan, Correctional Services, Zonderwater. Within the imprint, appears an imprint of a rubber stamp with the date "31 July 2015", and in manuscript the time "12h15".

[34] The rubber stamp imprint, and the signature within the imprint, in my view signify receipt of the letter at the Correctional Centre. I am therefore satisfied that on the probabilities, the applicant received the letter dated 27 July 2015 from Mr Madube at the Correctional Centre. My finding finds support in the applicant's failure to deliver a replying affidavit in the review application disputing that the letter was handed to him.

[35] In the answering affidavit in this application the HPCSA averred that the applicant did not respond to correspondence sent to him. In this regard, it referred to the letters and e-mails attached marked "AA2" to the answering affidavit in the review application. One of these letters is dated 6 October 2015. It was sent to the Sinoville address and also transmitted by e-mail.⁹ The applicant was alerted that a response had not been received to the letter dated 27 July 2015. Another letter is dated 21 January 2016, also sent to the Sinoville address. The applicant was notified that the complaint

⁹ The e-mail address to which it was transmitted is reflected as pretori@absamail.co.za.

had been placed on the Prelim Committee's agenda for its meeting on 17 and 18 March 2016. In the replying affidavit in this application, the applicant denied receiving any correspondence from the HPCSA. However, the averments in the review answering affidavit remain undisputed.

[36] On 18 March 2016, the Prelim Committee decided in terms of sub-regulation 4(8) of the Regulations that a disciplinary committee should hold a Disciplinary Inquiry. A letter dated 18 March 2016 was sent to the Sinoville address informing the applicant that the Prelim Committee had resolved in terms of sub-regulation 4(8) of the Regulations that a disciplinary committee should hold a Disciplinary Inquiry.¹⁰

[37] In the review answering affidavit, the HPCSA also discussed its unsuccessful attempt at holding a Disciplinary Inquiry at the Correctional Centre on 17 and 18 July 2019. The inquiry did not take place due to a lack of co-operation from officials at the Correctional Centre.

[38] On 21 January 2023, the Chairperson of the Board constituted the Disciplinary Committee to hold an inquiry into the complaint on 2 February 2023.¹¹ I am satisfied that notice of the date of the hearing was given to the applicant and came to his attention. The applicant's actions and those of his attorney bear this out. In the review founding affidavit, the applicant averred that a notice and a charge sheet were sent to his wife's e-mail address "dated 21 November 2022". In support, he referred to documents that were attached to the founding affidavit marked A5'.¹² The applicant does not disclose when the e-mail and the documents attached thereto came to his attention. However, on 27 January 2023, the applicant delivered to the HPCSA a document captioned "Points in limine" (annexure A6 to the review answering affidavit). Its delivery days

¹⁰ This appears in the review answering affidavit.

¹¹ para 22 *supra*.

¹² A charge sheet is not one of the three separate documents that form Annexure A5. The "Appointment Certificate" appointing a *pro forma* complainant signed by the Registrar of the HPCSA on 19 June 2019 which is one of the documents is the only document that pre-dates 21 November 2022. The remaining two documents are dated 21 January 2023. The one on the face of it is the cover page of an agenda for the meeting of the Professional Conduct Committee scheduled for 2 February 2023 at 10h00 issued by the Registrar on 21 January 2023. The other is the document signed by the Chairperson on 21 January 2023 appointing the Professional Conduct Committee. The last two documents could not have been attached to an e-mail sent to the applicant's wife's e-mail address on 21 November 2022.

before the inquiry was to commence, strongly suggests that the applicant was aware of the Disciplinary Inquiry and intended for the document to serve as an objection at the impending hearing. Additionally, the applicant's attorney stated in a letter to the *pro forma* complainant dated 16 February 2023 that the document captioned "Points in limine" set out the problems with "trial readiness". I infer from this that the applicant and his attorney had been aware of the date for the hearing but believed that the matter was not ripe for hearing on that day. Significantly the applicant's attorney did not complain that the applicant had not been given timeous notice of the Disciplinary Inquiry. On 21 February 2023, the *pro forma* complainant sent an e-mail to the applicant's attorney recording that the applicant was informed during November 2022 that the Disciplinary Inquiry would take place on 2 February 2023. The applicant's attorney responded to the e-mail on the same day. He did not dispute the assertion. On the probabilities, the e-mail sent to the applicant's wife's e-mail address was notification of the hearing scheduled for 2 February 2023, and on the probabilities that e-mail came to the applicant's attention on 21 November 2022, or soon thereafter. I am consequently satisfied that the applicant was notified in November 2022 that the Disciplinary Inquiry would take place on 2 February 2023.

[39] The applicant did not appear at the Disciplinary Inquiry on 2 February 2023. As such the Disciplinary Inquiry was postponed to 27 February 2023 to allow him an opportunity to do so.

[40] It is evident from the papers in the review application that the applicant's attorneys protested to the holding of a Disciplinary Inquiry. The record of the first decision and of the second 'decision', as well as reasons for both were requested. Some documents were provided, but not reasons. The Disciplinary Inquiry convened several times in 2023 but was postponed at the instance of the applicant for the HPCSA to provide documents for him to institute review proceedings.

[41] On 27 February 2023, the applicant's counsel applied for a postponement of the proceedings on the grounds that the applicant intended bringing a review application and was waiting on documents from the HPCSA to do so. The proceedings resumed

on 22 June 2023 on which day they were postponed to 17 August 2023. On 17 August 2023, they were postponed to 23 November 2023.

[42] The review application was served on the HPCSA on 6 November 2023. On 23 November 2023, the applicant's legal representative applied for the postponement of the Disciplinary Inquiry. The application was refused because the inquiry had not been interdicted. Even though the Disciplinary Committee had refused the applicant's application for a postponement of the proceedings, after the applicant and his legal representatives left the hearing, the proceedings were postponed to 18 April 2024 "unless there [was] an interdict or a court order interdicting the hearing of the matter".

Interim interdicts pending a review application

[43] The requirements for an interim interdict are well-established:

- (i) a *prima facie* right, albeit open to some doubt;
- (ii) a reasonable apprehension of irreparable harm, and imminent harm, to the right if the interdict is not granted;
- (iii) the balance of convenience favouring the grant of an interdict; and
- (iv) an alternative remedy not being available to the applicant.

[44] These requirements were reaffirmed in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*¹³ ("OUTA") as well as in *SA Informal Traders Forum v City of Johannesburg*¹⁴ where Moseneke DCJ reiterated the requirements for an interim interdict and the threshold that an applicant must overcome to establish a *prima facie* right. He pointed out –

"Interim interdict

[24]...Foremost is whether the applicant has shown a *prima facie* right that is likely to lead to the relief sought in the main dispute. This requirement is weighed up along with the irreparable and imminent

¹³ 2012 (6) SA 223 (CC) at para 41.

¹⁴ 2014 (4) SA 371 (CC) para 25.

harm to the right if an interdict is not granted and whether the balance of convenience favours the granting of the interdict. Lastly, the applicant must have no other effective remedy.

A prima facie right?

[25] A *prima facie* right may be established by demonstrating prospects of success in the review..."

[Foot notes in text excluded. Underlining inserted for emphasis]

[45] An applicant who applies for an interim interdict pending a review application has to satisfy the court that there are good prospects of success in the application. This can be shown by demonstrating that the review is based on strong grounds which are likely to succeed.¹⁵ However, the applicant seeks to restrain the HPCSA from exercising a statutory power and discharging its statutory obligation to inquire into unprofessional conduct pending a review application. In such cases interdicts are granted only in exceptional circumstances in which a strong case for that relief is made out.¹⁶ For an applicant to succeed in an interim interdict it must on a *prima facie* basis prove facts that establish that the impugned decisions are unlawful and therefore subject to being reviewed and set aside, and additionally that the respondent's unlawful conduct¹⁷ threatens a right which if not protected by an interim interdict will result in irreparable harm to the right.¹⁸

(a) The threatened rights

[46] The applicant contends that (i) his right to review and set aside the two decisions; (ii) his right of access to courts in section 34 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and a fair trial in terms of section 35 are threatened and they need the protection of an interim interdict *pendente lite* which restrains the HPCSA from holding a Disciplinary Inquiry into his conduct. There is also a faint

¹⁵ Cf. *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC) para [42].

¹⁶ *OUTA supra* fn 13 at para [43] and [44]. *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 689B-C See also *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A) at 676B-C.

¹⁷ Cf. *Pikoli v President of the Republic of South Africa* 2010 (1) SA 400 (T) at 404D-E.

¹⁸ *OUTA supra* fn 13 at para [50] at 237I to 238B. Cf. para [53].

complaint that his right to choose and/or practice his profession under section 22 of the Constitution, and his right to dignity under section 10, are also threatened.

(b) The right to review the impugned decisions

[47] The *prima facie* right which the applicant must establish is not merely the right to approach a court to review the impugned decisions. He must establish a right, which if not protected by an interim interdict, will result in irreparable harm.¹⁹ The applicant's right to review the impugned decisions is not threatened by a disciplinary hearing and it will not result in irreparable harm to the right. The right to review does not require any preservation *pendente lite*.²⁰

(c) The audi complaint: The nature of the impugned acts

[48] The target of the review application is two alleged acts by the Prelim Committee. The applicant's burden is thus to prove on a *prima facie* basis that the failure to afford him *audi alteram partem* was unlawful²¹ and therefore subject to being reviewed and set aside.

[49] The role and powers of the prelim committee, as well as the applicant's rights when the prelim committee exercises its powers, are governed by Regulation 4 of the Regulations. The powers of the prelim committee and a medical practitioner's rights determine the lawfulness of the Prelim Committee's actions, as well as the applicant's *prima facie* right.

[50] A prelim committee does no more than consider complaints to determine the appropriate manner of dealing with them. This emerges from the definition of "preliminary committee of inquiry"²² and "preliminary inquiry"²³ in the Regulations.

¹⁹ *Outa supra* fn 13 at para [50] at 237I - 238B.

²⁰ *Outa supra* fn 13 at para 50 at 238B.

²¹ fn. 14 and para [45] *supra*.

²² "preliminary committee of inquiry" means the committee established by a professional board "for the preliminary investigation of complaints to make a determination thereon."

²³ "preliminary inquiry" means "an inquiry held in terms of the [Regulations] by a preliminary committee of inquiry to consider a complaint against a person registered in the register of the professional board concerned in order to make a determination on the appropriate manner of dealing with such a complaint."

A prelim committee considers whether there are grounds for a professional conduct inquiry into the conduct of a medical practitioner.²⁴ If it decides that there are grounds for a professional conduct inquiry, it must direct that an inquiry is held by a professional conduct committee into the complaint.²⁵ The function described in sub-regulation 4(8) is what the Supreme Court of Appeal in *Roux v the Health Professions Council of South Africa* referred to as a “sifting function” to ensure that only sustainable complaints are proceeded with.²⁶

[51] The function of a prelim committee of inquiry under the “Regulations Relating to the Conduct of Inquiries held in terms of section 41(1) of Act 56 of 1974”²⁷ (“the 1976 Regulations”) was discussed in *Tucker v SA Medical and Dental Council*²⁸ and in *Veriava v President, South African Medical and Dental Council*²⁹ where it was found that the only function of the committee of preliminary inquiry was to conduct a preliminary investigation to determine whether the evidence furnished in support of the complaint disclosed *prima facie* evidence of improper or disgraceful conduct in respect of the practice of the profession.³⁰ It merely assisted the Council by holding a preliminary inquiry into disciplinary complaints³¹ and did not embark on “an inquiry proper” into the charges and complaints.³² Its role and function, and the nature of its decisions were summed up in *Veriava* thus –

“The inquiry committee merely does preliminary investigation, the type of work for which it was appointed. If the preliminary investigation shows that the evidence furnished in support of the complaint discloses *prima facie* evidence of improper or disgraceful conduct in respect of the practitioner’s profession, then there is a complaint to be inquired into by ... the disciplinary committee. It should be noted that the very concept of *prima facie* evidence involves an opportunity of controverting....the only function of the inquiry committee is to conduct a preliminary investigation to determine whether the evidence furnished in support of the

²⁴ Sub-regulation 4(8) of the Regulations.

²⁵ Sub-regulation 4(8) of the Regulations.

²⁶ [2012] 1 All SA 49 (SCA) at para [20].

²⁷ Published in *Government Notice* R2268 of 3 December 1976.

²⁸ 1980 (2) SA 207 (T).

²⁹ 1985 (2) SA 293 (T).

³⁰ *Veriava supra* fn 29 at 309J - 310A.

³¹ Cf. *Veriava supra* fn 29 at 308 F-G.

³² *Veriava supra* fn 29 at 311H-I.

complaint discloses *prima facie* evidence of improper or disgraceful conduct in respect of the profession of the practitioner”³³

And,

“...the only function of the [committee of preliminary inquiry] is to conduct a preliminary investigation to determine whether the evidence furnished in support of the complaint discloses *prima facie* evidence of improper or disgraceful conduct in respect of the profession of the practitioner.... The ultimate decision as to the inadequacy or baselessness of a complaint remains with the Council. No provision exists conferring any discretion on either the [committee of preliminary inquiry] or the Council in this regard. It should be stressed that up to that stage ... the [committee of preliminary inquiry does not hear or consider] evidence under oath ...to determine whether the evidence available in fact substantiates the complaint or whether such evidence as is available is in fact evidence of improper or disgraceful conduct. Those decisions are made by either the council or the disciplinary committee after a proper inquiry, that is to say trial, when evidence under oath ...and arguments by both the *pro forma* complainant and the accused practitioners have been heard. If there is evidence to support the complaint and it discloses *prima facie* evidence of improper disgraceful conduct, then the council or the disciplinary committee, as the case may be, enters into the inquiry into the complaint. All this seems to indicate that the inquiry committee merely investigates the factual position relating to the complaint and that no discretion is exercised by ...the [committee of preliminary inquiry] ... at that stage.”³⁴

[52] Under the 1976 Regulations, the prelim committee had to decide “whether the evidence furnished in support of the complaint discloses *prima facie* evidence of improper or disgraceful conduct” whereas under the current Regulations the prelim committee has to decide whether “there are grounds for a professional conduct inquiry into the conduct of a [practitioner]”.

[53] Notwithstanding amendments to the HPA and the Regulations, the establishment of the HPCSA and professional boards in whom the power to hold inquiries now vests, the role and functions of the committee of preliminary inquiry, its powers, and the nature of its decisions have not changed from what they were under the 1976 Regulations. It still undertakes only a preliminary investigation of complaints against a practitioner and determines whether there are grounds for a disciplinary inquiry.

[54] The prelim committee’s function is to investigate and decide whether there is cause for holding a disciplinary hearing. To this end it merely investigates the factual position relating to the complaint and no discretion is exercised by it.³⁵ It neither

³³ *Veriava supra* fn 29 at 309E-F.

³⁴ *Veriava supra* fn 29 at 309J-310F.

³⁵ Cf. *Veriava supra* fn 29 at 310F and 312B.

investigates, nor determines, the culpability of a medical practitioner.³⁶ It does not embark on a proper inquiry into the charges and complaints³⁷ and is concerned only with the question whether there ought to be an inquiry at all³⁸ and not a decision whether the charge will be proven actually.³⁹ This is the disciplinary committee's function.⁴⁰ If the prelim committee finds grounds for a professional conduct inquiry, then it must direct a disciplinary inquiry by a professional conduct committee.⁴¹ The complaint triggers an investigation which may eventually lead to a direction from the prelim committee for the holding of a disciplinary inquiry by a disciplinary committee. The prelim committee process is a preliminary step in the multi – stage decision making process which does not affect the applicant's rights. The principles of administrative justice will be observed at the hearing before the Disciplinary Committee.⁴²

[55] Neither the 1976 Regulations nor the Regulations applicable in this case authorise the prelim committee to determine whether the charge against the medical practitioner has been proven, or not. That competence vested, and now vests, in the disciplinary committee after a proper inquiry. A prelim committee simply decides whether a disciplinary inquiry should be held, or not.

[56] The applicant conflates a medical practitioner's right when a prelim committee decides whether a medical practitioner is in contempt of council with the medical practitioner's rights at the stage when the prelim committee decides whether there are grounds for a professional conduct inquiry. And has superimposed the right of a medical practitioner to a hearing when a disciplinary committee investigates and decides whether the medical practitioner is guilty of unprofessional conduct,⁴³ onto the

³⁶ Cf. *Veriava supra* fn 29 at 310D-E.

³⁷ Cf. *Veriava supra* fn 29 at 310D-E

³⁸ *Tucker supra* fn 28 at 212 F-G.

³⁹ *Tucker supra* fn 28 at 212F-G.

⁴⁰ Cf. *Veriava supra* fn 29 at 310D-E.

⁴¹ Subreg 4(8). Cf. *Veriava supra* fn 29 at 309C and 311G-H.

⁴² Cf. Amongst others, *Competition Commission v Yara (SA) (Pty) Ltd* 2013 (6) SA 404 (SCA) para 24.

⁴³ Regulation 9.

process when the prelim committee determines whether there are grounds for a disciplinary inquiry into the conduct of the medical practitioner.

[57] A medical practitioner is entitled to be heard when the prelim committee considers whether the practitioner is in contempt of council ⁴⁴ and not when it considers whether there are grounds for a disciplinary inquiry. In the former, the Regulations expressly confer the right. ⁴⁵ There is no similar provision when the prelim committee determines whether there are grounds for a disciplinary inquiry into the conduct of the medical practitioner. On the application of the *maxim expressio unius est exclusio alterius* a right to a hearing at this stage is not contemplated. The prelim committee is concerned with the availability of evidence to support the charge and complaint. ⁴⁶ That is its role; it determines nothing more than a question of fact. ⁴⁷ The applicant did not have a right to a hearing before the Prelim Committee because of the of the prelim committee's role and function, the nature of the proceedings before it and the determination it makes. ⁴⁸

[58] For the reasons that follow, I am not satisfied that the applicant has established a *prima facie* right that is likely to lead to the impugned decisions being reviewed and set aside. ⁴⁹

(d) Audi complaint: First decision

[59] The applicant's core grievance against the first decision is that he was not informed of the complaint and could not respond thereto before the Prelim Committee considered it on 18 March 2016. He argues that this led to his right to *audi* being infringed.

[60] There is no merit to the complaint that the applicant was not informed of the complaint. Mr Madube delivered the complaint to the applicant personally, and the

⁴⁴ Sub-regulation 4(4), 4(5) read with 4(3).

⁴⁵ Sub-regulation 4(5) read with sub-regulation (4(3) and 4(4).

⁴⁶ Cf. *Veriava supra* fn 29 at 317F.

⁴⁷ *Veriava supra* fn 29 at 312B.

⁴⁸ Cf. *Tucker supra* fn 28 at 212F-H and 213G-H.

⁴⁹ Cf. *SA Informal Traders Forum supra* fn 14 para [44] *supra*.

applicant acknowledged receipt of it. Furthermore, the applicant has not demonstrated on a *prima facie* basis that the Regulations conferred upon him the right to *audi* before the Prelim Committee considered the complaint.⁵⁰ The Prelim Committee undertook a preliminary inquiry “in order to make a determination on the appropriate manner of dealing with ... a complaint”.⁵¹ It did not decide whether the applicant is guilty of unprofessional conduct, it has left that for the Disciplinary Committee to decide. The multi-stage decision-making process governing the investigation and determination of complaints of unprofessional conduct does not confer upon the medical practitioner a right to be heard at the stage when the prelim committee considers whether there are grounds for a professional conduct inquiry.

(e) The *audi* complaint: Second ‘decision’

[61] The applicant’s argument for a right to be heard before a disciplinary inquiry can commence, or continue, or a date allocated for a hearing, would have the consequence that the prelim committee itself, or some other person or body, can decide that in spite of the Prelim Committee having determined on 18 March 2016 that there are grounds for a disciplinary inquiry, and therefore being enjoined by the Regulations to direct that an inquiry is held, did so, the decision and direction can be revisited, and overturned. To find that the applicant had a right to be heard I have to find the empowering provision which stipulates that (i) notwithstanding, and in addition to, the Prelim Committee’s decision that there are grounds for a professional conduct inquiry, the commencement or continuation thereof must be authorised by some person or body or the Prelim Committee itself; and (ii) before the disciplinary inquiry directed by the prelim committee can commence, or continue, or a date for a hearing allocated, the applicant had a right to be heard, and on what. The applicant has not identified such empowering provisions and I have found none. The Regulations do not support the right contended for.

⁵⁰ Cf. *Tucker supra* fn 28 at 212G – H. Cf. 213 G – H.

⁵¹ Cf. definition of “preliminary inquiry” in regulation 1 of the Regulations.

[62] No person or body other than the prelim committee has the power to decide whether there are grounds for a disciplinary inquiry, or not. I was not referred to, nor have I found a provision in the HPA or the Regulations which empowers any person or body, including a prelim committee itself, to revisit the finding that there are grounds for a professional conduct inquiry, or to interfere with that finding. I have also not found any provision which authorises the prelim committee, the Board or the HPCSA to decide whether to continue or discontinue a disciplinary inquiry which the prelim committee was obliged to direct must be held because it had found grounds for a disciplinary inquiry. Nor for that matter have I found a provision which requires a separate decision by the prelim committee or another body or person, for the appointment of a disciplinary committee, the appointment of a date for a disciplinary inquiry, or for the continuation of a disciplinary inquiry which the prelim committee directed must be held under its obligation under sub-regulation 4(8). Such decisions would effectively overturn the Prelim Committee's finding on 18 March 2016 without the authority to do so and breach the statutory obligation to hold a professional conduct inquiry where grounds to hold such an inquiry have been found.

[63] The Prelim Committee found that there were grounds for a professional conduct inquiry. It was therefore obliged under sub-regulation 4(8) to direct that a disciplinary inquiry is held, and that the Registrar arrange it. The Registrar was obliged to implement the Prelim Committee's decision of 18 March 2016. This entailed, amongst others, appointing a date, time and place for the disciplinary inquiry, and requesting the Board to appoint a Disciplinary Committee. The appointment of the date for, and time of, the inquiry, the Registrar's request to the Chairperson to appoint a disciplinary committee and the appointment of the Disciplinary Committee by the Chairperson on 23 January 2013 were steps in implementing the Prelim Committee's decision of 18 March 2016. The Prelim Committee's decision that grounds exist "for a professional conduct inquiry" was the only decision taken.

[64] The applicant has not established on a *prima facie* basis, that a decision had been taken to continue the Disciplinary Inquiry. In any event, even if this was established,

the applicant has not made out a *prima facie* case for a right to *audi* when the second ‘decision’, if any, was taken.

(f) Non-compliance with sub-regulations 4(3), 4(7) and 4(8)

[65] There is also no merit to the complaint that the HPCSA failed to comply with sub-regulations 4(3), 4(7) and 4(8).⁵² While both sub-regulations 4(3) and 4(7), refer to an investigation, they apply to different investigations.

[66] Sub-regulation 4(3) applies to the inquiry and finding contemplated in sub-regulation 4(4) whether the medical practitioner is in contempt of council due to the failure to respond to correspondence from the HPCSA. A medical practitioner has a right to be heard when the prelim committee enquires into and considers this question; not the question in sub-regulation 4(8) whether there are grounds for a professional conduct inquiry.

[67] Sub-regulation 4(7) deals with a prelim committee’s obligations when it finds that there are no grounds for taking further action in respect of a complaint of unprofessional conduct. The circumstances contemplated in this sub-regulation do not exist in the applicant’s case. In any event a prelim committee’s decision under sub-regulation 4(7) is favourable to a medical practitioner, not prejudicial to him/her. It is not clear to me why sub-regulation 4(3) or 4(7) constitutes a basis for invalidating one or both impugned decisions.

[68] The inquiry, and decision, by a prelim committee contemplated in regulation 4(8) involves the prelim committee considering the written complaint, the information received in response to the HPCSA’s call for information, and the medical practitioner’s explanation (or lack thereof) to determine whether grounds exist for a professional conduct inquiry. If it finds such grounds, then the prelim committee must direct that such an inquiry is held. The Prelim Committee’s decision of 18 March 2016 concerned the question whether there were grounds for a professional conduct inquiry. The

⁵² Para 4.9 of the replying affidavit.

absence of a response from the practitioner did not preclude the Prelim Committee from considering the issue.

[69] Sub-regulation 4(3) does not apply to the decision which the Prelim Committee makes under sub-regulation 4(8).

**(g) Failure to comply with mandatory and material procedure:
Regulation 4**

[70] Regulation 4 deals with the role, and the powers, of the prelim committee. The applicant's case is that the provisions of the Regulation are peremptory, and in the absence of compliance therewith, a mandatory and material procedure or condition had not been complied with, thereby rendering the first decision invalid.

[71] The applicant did not identify which of the sub-regulations of Regulation 4 constitute mandatory and material procedure or conditions. It can however be inferred from the papers that the applicant is contending that sub-regulations 4(3), 4(7) and 4(8) were "material and mandatory provisions or conditions". No other sub-regulations in regulation 4 are identified. I was also not addressed on why the provisions are submitted to be mandatory (or peremptory).

[72] I agree with Plasket J in *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape and Another* that assessing whether non-compliance with a procedure or condition renders a decision a nullity "is not a mechanical process"⁵³ and the words "shall" and "may" in themselves do not determine the validity of actions.⁵⁴ Plasket J propounded a "four-point rule-of-thumb approach" which had been adopted in *Sutter v Scheepers*⁵⁵ as a guide to the process of interpreting the relevant provision. Plasket J described the approach in the following terms:

"(1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate..."

⁵³ *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape and Another* 2007 (6) SA 442 (Ck) at para 27.

⁵⁴ *Intertrade supra* fn 53 at para 27.

⁵⁵ 1932 AD 165 at 173-174.

- (2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
...
- (3) If, when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
- (4) The history of the legislation will also afford a clue in some cases.”

[73] In the context of the 1976 Regulations the medical practitioner in *Tucker*⁵⁶ contended that regulations 2, 3 and 4 had not been complied with. The court found that the 1976 Regulations,⁵⁷ in so far as they related to the way in which the Council (whose functions were later carried out by the professional boards) initially dealt with complaints against medical practitioners at the prelim committee stage were of administrative nature only. They were only a framework of the administrative machinery to deal with complaints and merely indicated how the Council functions before it prosecutes a practitioner. The court consequently concluded that the 1976 regulations in so far as they related to the way in which the complaint was initially to be dealt with, were directory and of administrative nature. The prelim committee only determined whether a *prima facie* case existed against the practitioner concerned.⁵⁸ It was only after the prelim committee decided that there was *prima facie* evidence of improper or disgraceful conduct and that a disciplinary inquiry should be held, that a medical practitioner had enforceable rights,⁵⁹ and a right to be heard.⁶⁰

[74] In my view, notwithstanding the decision preceding the constitutional era, the position articulated in *Tucker* prevails under the Regulations and it remains sound considering the role of the prelim committee, the nature of the proceedings before it and the determination it makes.

⁵⁶ *Supra* fn 28 at 213E-H. Regulation 4 is similar to the Conduct Regulations, 1976 in material respects, save that the latter did not require the decision of the prelim committee to be communicated to the complainant and medical practitioner. Regardless, the *dictum* is sound on the description of what the prelim committee of inquiry’s functions and powers are, and its role in the disciplinary process under the HPA.

⁵⁷ The first seven regulations.

⁵⁸ Under sub-regulation 7(1) of the 1976 Regulations the prelim committee had to be satisfied that the evidence given in support the complaint disclosed *prima facie* evidence of improper or disgraceful conduct whereas under sub-regulation 4(8) of the 2009 Regulations the prelim committee decides whether there are grounds for a professional conduct inquiry into the conduct of the medical practitioner.

⁵⁹ *Tucker supra* fn 28 at 213H.

⁶⁰ *Tucker supra* fn 28 at 212G-H. See also para [54] *supra*.

[75] I have found that sub-regulations 4(3) and 4(7) do not apply when the prelim committee considers whether there are grounds for a disciplinary inquiry. As far as sub-regulation 4(8) is concerned, it serves to guide the professional board and its committees on how to initially deal with complaints.⁶¹ On the “four-point rule-of-thumb approach” referred to by Plasket J, sub-regulation 4(8) has the hallmarks of a directory, not a mandatory provision.⁶² It is couched in positive language and no sanction is imposed for non-compliance with its requisites. There is no explicit statement that the prelim committee’s process, or what follows upon it, would be void if the provisions were not complied with. Considering that the history of the legislation could afford a clue in some cases, I find the decision in *Tucker* instructive.

(h) Non-compliance with mandatory and material procedure in regulation 5:

[76] Sub-regulations 5(1) and 5(2) oblige the Registrar to notify the applicant at least 60 days prior to the holding of the disciplinary inquiry of the date and time of the inquiry and the place where the inquiry would be held. The applicant claims that he was not given proper notice of the disciplinary inquiry. However, the applicant was notified on or about 21 November 2022 that the disciplinary hearing would take place on 2 February 2023. This was more than 60 days’ notice. In the document captioned “Points in limine”⁶³ (annexure A6 to the review answering affidavit) and attached to the review founding affidavit, the applicant had protested that the notice of the inquiry did not indicate the venue at which the Disciplinary Inquiry would be held. However, this was not raised in the affidavits in this application, nor in the review founding affidavit. I was also not addressed on how the lack of proper notice for the Disciplinary Inquiry on 2 February 2023 tainted decisions which had been taken in the past or why the failure to indicate the venue of the hearing less than 60 days before the date for the hearing renders the process invalid.

⁶¹ Cf. *Tucker supra* fn 28 at 213 F-H. Professional conduct inquiries were at the time governed by the Conduct Regulations of 1976. They did not contain a provision that required the decision of the prelim committee to be communicated to the complainant and medical practitioner.

⁶² Para [72] *supra*.

⁶³ Para [38] *supra*.

(i) Non-compliance with regulation 8

[77] Regulation 8 regulates pre-inquiry procedure. The *pro forma* complainant is required to arrange a pre-inquiry conference with the medical practitioner at least seven (7) days before the date of the inquiry. I was not addressed on how the failure to hold a pre-inquiry conference seven (7) days before the date of the hearing taints decisions taken in the past. In any event, on 21 February 2023 the *pro forma* complainant informed the applicant's attorney that he wanted to hold a pre-inquiry conference and conveyed that he was readily available at the applicant's attorney's convenience. The applicant's attorney's response was that a pre-inquiry conference was premature at that stage. That attitude would not have changed even if the request was made earlier. The response to the request for a pre-inquiry conference was –

“As to a pre-trial, we will make an arrangement for a pre-trial upon receipt of the documentation requested. We can only prepare for a pre-trial and trial upon receipt thereof and to hold a pre-trial without the requested info and documents would be nonsensical.”

(j) Arbitrariness, capriciousness, ulterior motive, irrationality and unreasonableness

[78] The applicant contends that the second ‘decision’ was arbitrary and capricious, as well as irrational and unreasonable, taken for an ulterior purpose or motive and constituted an abuse of the disciplinary process because of the seven (7) year delay (that is between 2015 when the complaint was lodged and 2022). And therefore, it falls to be reviewed and set aside. The HPCSA was not supine in that time. Letters were sent to the applicant's Sinoville address, the complaint was hand delivered to the applicant at the Correctional Centre and efforts were made to hold the Disciplinary Inquiry at the Correctional Centre.

[79] Whether a delay is unreasonable is dictated by the circumstances leading to the delay. The applicant had been incarcerated for, five of the seven years. During this time the HPCSA unsuccessfully attempted to convene an inquiry. The five-year delay was not of the HPCSA's making and does not constitute an unreasonable or unjustifiable delay. On the applicant's own version, the HPCSA started arranging the Disciplinary Inquiry in November 2022. At worst, there was a delay from June 2020

when the applicant was released on parole and November 2022. This is a far cry from the seven (7) years' delay contended for by the applicant. The applicant asserts that the delay has been prejudicial to him, but he has not disclosed how. As I see it, the applicant has benefitted from the delay. He has continued practising as a medical practitioner and earning an income.

[80] The factual foundation for the averments that the delay indicates that the second 'decision' was arbitrary, capricious, irrational, unreasonable, taken in bad faith and for an ulterior purpose or motive is missing.

[81] The decision to continue the inquiry is further contended to be unreasonable and irrational because the offences committed by the applicant were not related to his ability and fitness to practice as a medical practitioner and the conviction, sentence and incarceration had nothing to do with any unprofessional conduct as contemplated in section 4(1) of the HPA. It was contended additionally that the decision was irrational because the purpose of disciplinary proceedings is to regulate unprofessional conduct of medical practitioners in respect of their profession. I am not satisfied that the review application is likely to succeed on this basis. This flies in the face of section 45(1) of the HPA. If a person registered under the HPA has been convicted of "**any**" offence by a court of law, section 45(1) authorises the relevant professional board to hold an inquiry if it is of the opinion that the offence constitutes unprofessional conduct. Aside from this, the supervision of the conduct of registered medical practitioners has been entrusted to the professional boards. The inquiry whether a medical practitioner has acted unprofessionally, is a matter resting in the exclusive function of the relevant professional board ⁶⁴ and it is the final arbiter on what is proper for a medical practitioner. ⁶⁵ In *Meyer* the court refused to interdict a disciplinary hearing pending the outcome of an action because it found that the South African Medical and Dental Council was the sole repository of the power to determine whether a medical practitioner was guilty of unprofessional conduct. ⁶⁶

⁶⁴ *Meyer v South African Medical and Dental Council* 1982(4) SA 450(T) at 456A-B.

⁶⁵ *Nel v SA Geneeskundige & Tandheelkundige Raad* 1996 (4) SA 1120 (T) at 1128H.

⁶⁶ *Meyer supra* fn 64 at 455H

[82] More recently in the *Health Professions Council of South Africa v Grieve*,⁶⁷ the Supreme Court of Appeal found –

“[12] The [HPCSA] is... not merely a medical malpractice watchdog; It is also the primary guardian of morals of the health profession. As this court held in *Preddy and Another v Health Professions Council of South Africa* [2008 (4) SA 434 (SCA) paragraph 4]:

‘It has 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* to set the standard of honour to which its members should conform’.”

[83] It lies in the province of the HPCSA and the Board to determine whether the applicant’s conviction constitutes unprofessional conduct. This is not justiciable in a court of law.⁶⁸

(k) The section 34 and 35 rights

[84] The rights afforded by section 35 of the Constitution attach to arrested, detained, and accused persons. The applicant is none of these. He has not explained how he comes to enjoy the rights in section 35, nor how those rights are threatened by a disciplinary inquiry.

[85] Section 34 guarantees the right to have a dispute decided in a fair hearing before a court or where appropriate another independent and impartial tribunal or forum. The applicant’s case is not that he will not receive a fair hearing before the disciplinary committee, save for the averment that the chairperson has exhibited bias, which I will return to. I have not understood the applicant’s case to be that section 34 of the Constitution applies to the prelim committee’s process. After all the prelim committee does not determine a dispute, a disciplinary committee does. The prelim committee undertakes a preliminary investigation of complaints.

[86] The applicant can exercise the rights guaranteed under section 34 before the Disciplinary Committee which is the body that will hear the evidence and argument and thereafter decide whether the evidence supports the complaint and whether the

⁶⁷ (1356/2019) [2021] ZASCA 06 (15 January 2021) para 12.

⁶⁸ *Meyer supra* fn 64 at 457H-458A.

applicant's conduct fell short of the standard of honour to which medical practitioners must conform.

[87] Section 42(2) of the HPA preserves the applicant's rights under section 34 of the Constitution. He has the right to answer the charge against him and be heard in his defence. Regulation 9 of the Regulations regulates the procedure at a disciplinary inquiry. The applicant has, amongst others, the right to be represented by a legal representative⁶⁹, he has the right to cross examine the *pro-forma* complainant's witnesses,⁷⁰ to apply for his discharge after the *pro forma* complainant has closed its case,⁷¹ to address the disciplinary committee⁷², lead witnesses in support of his case,⁷³ re-examine his witnesses after cross examination by the *pro forma* complainant,⁷⁴ and after all the evidence has been adduced, he has the right to address the disciplinary committee on the evidence and the legal position.⁷⁵ Moreover, sub-regulation 10(1) confers a right to appeal the disciplinary committee's findings to an appeal committee. The applicant has not identified which of these rights are threatened, and in what manner. The applicant has the right and will have the opportunity to challenge the complaint before the disciplinary committee. The applicant's right under section 34 of the Constitution is not threatened and does not have to be protected pending the review application.

(I) Bias

[88] The charge of bias rests in a remark by the Disciplinary Committee's chairperson at the Disciplinary Inquiry on 17 August 2023 that notwithstanding a review application the Disciplinary Inquiry will continue. The remark does not establish a case for bias, not even on a *prima facie* basis. Disciplinary proceedings are not suspended by a pending review application. Moreover, the HPCSA has the statutory obligation to hold

⁶⁹ Sub-regulation 9(1).

⁷⁰ Sub-regulation 9(6).

⁷¹ Sub-regulation 9(7).

⁷² Sub-regulation 9(10).

⁷³ *Supra* fn 72.

⁷⁴ *Supra* fn 72.

⁷⁵ Sub-regulation 9 (14).

an inquiry into unprofessional conduct by medical practitioners registered under the HPCSA. In the circumstances, the chairperson's remark is an expression of the Disciplinary Committee's understanding of the law and of its obligation to implement the Prelim Committee's direction of 18 March 2016.

(m) Right to dignity: section 10

[89] It was argued that the continuation of the disciplinary proceedings in the face of the irregularities preceding the Disciplinary Inquiry would infringe and irreparably harm the applicant's right to dignity in terms of section 10 of the Constitution. However, the applicant has not disclosed in what manner his right to dignity will be infringed. The applicant is registered as a medical practitioner under the HPA. He must adhere to the professional and ethical standards of the medical profession and is subject to the HPCSA's disciplinary processes. The HPCSA is not acting unlawfully by inquiring into a charge of unprofessional conduct against the applicant. To the contrary, the HPCSA is discharging its statutory obligation to uphold and maintain the professional and ethical standards within the health professions,⁷⁶ to ensure the investigation of complaints concerning a person registered in terms of the HPA and to ensure that appropriate disciplinary action is taken against such a person in accordance with the HPA to protect the interests of the public.⁷⁷ I cannot find that the exercise of a statutory obligation, constitutes an unlawful infringement of the applicant's right to dignity.

[90] The applicant wants to be protected from being suspended from practice or having his name struck from the roll of medical practitioners if found guilty of unprofessional conduct. However, the Disciplinary Inquiry which is the act the applicant wishes to interdict is not unlawful. Nor is the imposition of a penalty if he is found guilty of unprofessional conduct. If the applicant is found guilty of unprofessional conduct, the Disciplinary Committee is enjoined to impose one of six

⁷⁶ s3(m) of the HPA.

⁷⁷ s3(n) of the HPA.

penalties contemplated in section 42(1)(a) to (f) of the HPA. The applicant is not entitled in law to protection from lawful conduct.

(n) Right to practice profession: section 22

[91] The health professions are regulated by the HPA. The applicant is therefore subject to the supervision of the HPCSA “a statutory *custos morum* of the medical profession, the guardian of the prestige, status and dignity of the profession”⁷⁸ and to its disciplinary and penal powers. Because the right in section 22 of the Constitution may be regulated by law, the right to practice a profession is not absolute. Whilst the applicant’s right to practice as a medical practitioner may be withdrawn, it is sanctioned by section 42(1)(c) of the HPA and the limitation of his right to practice as a medical practitioner or the withdrawal of that right is not unlawful and therefore the right does not need protection.

[92] The applicant also claims that his right to earn an income is under threat. The applicant’s right to earn an income is not threatened by the Disciplinary Inquiry. If the applicant’s name is removed from the register of medical practitioners, he will not be able to earn an income practising as a medical doctor, but he will not be precluded from earning an income from other activities.

Has a case for an interim interdict been made out?

[93] The applicant has not on a *prima facie* basis proven facts which establish that the HPCSA’s conduct is unlawful and therefore subject to being reviewed and set aside.⁷⁹ I am not satisfied that the applicant has shown prospects of success on review on any of the grounds raised by him, let alone a strong case for review.

[94] I cannot find that the review is based on strong grounds which are likely to succeed. This thus detracts from the requirement of a *prima facie* right and there is no

⁷⁸ *Veriava supra* fn 29 at 307B.

⁷⁹ *Cf. Pikoli supra* fn 17 at 404E.

basis upon which the HPCSA can be required to endure the strictures of an interim order, pending the final determination of the review application.⁸⁰

[95] The applicant failed in establishing a strong case for an interdict to temporarily restrain the HPCSA from exercising its statutory power, nor has he established exceptional circumstances. This conclusion renders it unnecessary for me to consider the other requisites for an interim interdict. Nonetheless I add that apart from not having established a *prima facie* right though open to some doubt, the applicant has failed to establish a reasonable apprehension of irreparable harm and imminent harm to his right to review the impugned decisions, his rights to a fair hearing and a fair trial under sections 34 and 35 of the Constitution, his right to dignity under section 10 and his right to earn an income and practice his profession under section 22, if the Disciplinary Inquiry is not interdicted pending the review application.

[96] For all the above reasons, the applicant failed to make out a case for an interim interdict. Accordingly, the application was dismissed. As indicated earlier I intended for the applicant to bear the costs, but inadvertently ordered the HPCSA to bear the costs. To that extent the order falls to be varied

[97] The order as varied is as follows:

- (a) The application is dismissed.
- (b) The applicant is to pay the respondent's costs of the application.



S K HASSIM

Judge: Gauteng Division, Pretoria
(electronic signature appended)

Applicant's Counsel:	Adv R du Plessis SC
Respondent's Counsel	Adv SM Manganye
Hearing:	28 February 2024
Order:	15 April 2024
Reasons:	18 June 2024

⁸⁰ *Eskom v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) para 66 and para 272.

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 June 2024.