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

CASE NO: 2024-131188

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE:

DATE: 22/11/2024

In the matter between:

DR ELZETTE HENN

Applicant

and

**THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

First Respondent

MR L D MAMETJA

Second Respondent

MR PVH MAOKA

Third Respondent

JUDGMENT

LABUSCHAGNE AJ

[1] The applicant is a female Obstetrician & Gynaecologist who is facing charges before the Health Professions Council. The hearing is scheduled for 3 to 6 December 2024.

[2] On 14 November 2024 the applicant launched an urgent application against the HPCSA as first respondent, the Acting Registrar of the HPCSA as second respondent and the designated *pro forma* complaint, who is conducting the professional conduct inquiry against her, as third respondent.

[3] The application is brought as an urgent application, and she applies for the following relief:

“2. That the amended charge sheet received by the applicant on 24 October 2024 be set aside as being ultra vires the powers of the third respondent in terms of the referred 2020 Regulations as contemplated by section 6(1)(2)(a)(i) and section 6(2)(c) of the Promotion of Administrative Justice Act, 3 of 2000.

3. *That it be directed that:*

3.1 *The de novo enquiry proceedings against the applicant are to continue based on the charge sheet dated 14 August 2023;*

3.2 *The regulations that apply to the de novo enquiry are the regulations published in Government Notice R102 in Government Gazette 31859 of 6 February 2009 (amended by GN53, GG42980 published on 31 January 2020 and GN187, GG43035 and published on 21 February 2020) (“the February 2020 Regulations”);*

3.3 *The de novo enquiry due to commence on 3 December 2024 and/or on a date subsequently agreed between the parties, are to be conducted in person in Cape Town, until finalised;*

3.4 *The costs of this application are to be borne by any respondent who opposes the application, jointly and severally, the one paying the other to be absolved.”*

[4] This application arises from unusual circumstances. The inquiry commenced and was conducted over four days from 14 to 15 November 2023 (the first session) and 11 to 12 December 2023 (the second session). However, two of the panel members have since passed away and the panel is not quorate, with the result that the hearing has to commence *de novo*. These proceedings relate to the *de novo* hearing scheduled for 3 December 2024.

[5] The applicant contends that, until 11 November 2024 it was common cause between the parties that the February 2020 Regulations applied and that the original charges were the charges on which the *de novo* hearing would proceed.

[6] On 11 November 2024 the applicant was notified in a letter that an amended charge sheet that was sent and received on 24 October 2024 would apply and that the 2023 Regulations (i.e. the Regulations as amended by amendments published in 2023) would apply. The complaint predates those amendments in 2023

[7] The original charges dated 14 August 2023 read as follows:

“You are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that on or about 1 August 2022 in respect of M[...] E[...] (hereinafter referred to as “your patient”), you provided your patient with substandard care in that you:

(i) Did not abandon the removal of the Mirena after the second failed attempt and opted for hysteroscopy;

(ii) Exposed your patient to danger and harm for inserting a second Mirena, when the first one had not been removed.”

[8] Prior to the first hearing in the original enquiry the parties were at loggerheads as to whether the 2020 regulations or the 2023 regulations would apply. But by the time the hearing commenced on 14 November 2023, it was recorded in the proceedings that there was consensus that the Regulations as they stand before 23 June 2023 are applicable. The original charges were put to the applicant, she pleaded not guilty, and those proceedings commenced on the dates indicated above. The evidence of the pro-forma complainant was presented, and he closed his case. The applicant had completed her evidence in chief and the hearing adjourned. Thereafter two panel members passed away before the hearing could resume.

[9] The new charges pertaining to the *de novo* hearing were received on 24 October 2024 and were amended to read as follows:

“Count 1:

That you are guilty of unprofessional conduct or conduct which when regard is had to your profession, is unprofessional in that on or about 1 August 2022 in respect of Ms M[...] E[...] (“your patient”), you provided your patient with substantive care in the management of the patient, in that you did not abandon the removal of the Mirena (hormonal intrauterine device (IUD)) after the second failed attempt, and failed to establish the cause of the failure for the removal of the said Mirena, or conduct further investigations to address the problem.”

[10] The applicant contends that the amendments in the last three lines to the charge sheet are not cosmetic but introduce new substantive issues on which expert evidence would need to be presented. The applicant contends that, prior to the amendment, the issues were factual and did not require expert opinion on the issue now introduced. It is therefore an amendment that has added a substantive component to the charges on which further expert evidence is required.

[11] The respondents contends that the application’s urgency is not such that they should have been placed under the truncated time period imposed upon the respondents. This is particularly so as the amended charge sheet was received on

24 October 2024. The adherence to the 2023 regulations was conveyed on 11 November 2024. The respondents contend that this application could be heard next week as there is enough time before the hearing date. The respondents' postulate envisages an urgent application in the week of 26 November and does not avoid an urgent application. As the test for urgency is whether the applicant will obtain substantial redress in due course, and as it is apparent that the applicant would not get such substantial redress on the facts of this matter, the matter is urgent. The degree of urgency was informed by the change of heart of the third respondent as far as the application of the Regulations are concerned. As the fact that the proceedings would commence *de novo* on new charges and with application of the amended Regulations (the February 2023 Regulations) only became apparent on 11 November 2024, the truncated time periods are condoned.

[12] The applicant points out two changes in the 2023 Regulations which the applicant contends prejudice her. The first is that under the 2023 Regulations, there is no provision for a request for further particulars to the charges. She is therefore precluded from requesting such particulars on the amended charge sheet. Secondly, whereas hearings under the 2020 Regulations were primarily in person hearings, that default position was changed. In terms of the February 2023 Regulations the default position is that virtual hearings would take place.

[13] In the original hearing, when a witness had to testify virtually (at the applicant's request) connectivity problems derailed such evidence being presented. It was an era in which loadshedding also had an impact on connectivity. The virtual hearing was therefore unsatisfactory.

[14] The applicant contends that she is entitled to a hearing with witnesses testifying in person as that was the default position under the 2020 Regulations. She has expressed a need for such proceedings to be conducted in person.

DEFERENCE

[15] The following considerations arise from the facts of this matter. Firstly, the issue of deference. The HPCS is by statute empowered to investigate professional

misconduct of medical practitioners. As a specialist body, the court should not indulge in judicial overreach by directing the HPCSA how to conduct its inquiries (**Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism and Others** 2004 (4) SA 490 (CC) at paras [47] to [48]).

[16] The issue of deference is however not a matter of courtesy but applying the law to the limits of judicial power.

[17] The applicant is not approaching the court in *res medias*. She is approaching the court in advance of a *de novo* hearing in the face of disputes which she contends affect her fundamental right to fair administrative action.

[18] The HPCSA contends that all the concerns that the applicant has may be raised at the inquiry. This include the applicability of the 2020 or the 2023 Regulations and whether the new charges can be proffered or not. In support of the aforesaid the HPCSA relies on an unreported judgment of Millar J in **MEC Health, Limpopo v HPCSA** [2023] ZAGPPHC 2179 (2 June 2023). In that matter the MEC, who was a registered medical practitioner as well, was facing disciplinary proceedings which she sought to avert. The court held that all the concerns that the MEC had could be raised at the hearing of the HPCSA.

[19] The applicant, however, responds to this proposition by distinguishing between purely procedural matters and matters where substantive rights are affected. In **Roux v Health Professions Council of South Africa and Another** [2012] 1 All SA 49 (SCA) the *pro forma* complainant had added a charge to a charge sheet which the applicant contended had not served before the preliminary committee. Although it was also based on an expert opinion, that opinion did not serve before the preliminary committee. The SCA confirmed the principle that the formulation of charges by the *pro forma* complainant in proceedings before the HPCSA constitutes administrative action (par [29]). The SCA set aside the additional charges as lacking legality and stated the following at par [33]:

“[33] It is necessary briefly to consider the respondents’ submission that the matter was not ripe for review as the inquiry had not been held. This

contention cannot be sustained. A person is not prevented from applying to court for relief where his very complaint is the illegality or fundamental irregularity in respect of the decision he seeks to challenge or impugn. There is no reason why a person such as the appellant should first subject herself to an unauthorised inquiry which would entail costs and wasted time before challenging its legality. This is not the kind of case where the question of ripeness arises as the challenge relates to the source of power and the principle of legality. The appellant was entitled to a declaratory order in that regard.”

[20] In this instance the HPCSA contends that the addition to the charge is covered by the same points of inquiry that served before the preliminary committee. If this were the position, in the absence of a *de novo* hearing, then the addition to the charge would fall within the powers of the *pro forma* complainant. However, in this instance the applicant is facing disciplinary proceedings before the HPCSA for the second time, for reasons beyond her control. The nature of the proceedings that she is facing is akin to a criminal prosecution.

[21] In **Holden v Assmang Limited** 2021 (6) SA 345 (SCA) it was held that there is no discernible distinction between pending criminal proceedings and proceedings before statutorily created professional tribunals such as the HPCSA. The cause of action applies to both civil and criminal proceedings, not only the latter. The decision of an important tribunal like the HPCSA could have far-reaching consequences for someone like the applicant who could lose her license to practice. At paras [10] to [11] the SCA stress the fact that the tribunals of such as those of the HPCSA “employ procedures that bore all the hallmarks of a criminal prosecution and imposed sanctions that were punitive in nature. These proceedings distinguished such proceedings from disciplinary proceedings before a voluntary association or even a City Council such as in Gregory’s case.”

[22] The 2020 Regulations govern all substantive and procedural rights of the medical practitioner concerned. While the default position in terms of the 2020 Regulations is that hearings are conducted in person, the February 2020 Regulations do not provide the applicant in this matter with the right to a hearing in

person. Those rights were subject to whichever processes the committee decides would apply. In this instance, the committee has expressed its preference for a virtual hearing. To my mind, the utilisation of a virtual hearing in the first round for an expert witness was an instance of pragmatism, which demonstrates that the default position is not fixed. If pragmatism requires a virtual hearing in this matter, then that is a matter for the committee to determine. The applicant can however raise her objections to the virtual hearing at the hearing on 3 December 2024.

[23] Where the HPCSA receives a complaint and, upon consideration of the complaint by the preliminary committee, charges are formulated by the *pro forma* complaint, then the *pro forma* complainant is bound by the charges as formulated, particularly where the respondent has pleaded to those charges.

[24] In **Law Society of the Cape of Good Hope v Nel** 2012 (4) SA 274 (SCA) the following is stated at par [8]:

“[8] It is self-evident that a charge against a legal practitioner in a disciplinary enquiry must be formulated with adequate particularity to enable that legal practitioner to answer the charge, and the enquiry must be restricted thereto. It also follows that a council which initiates a disciplinary enquiry is bound by the charge/s which it prefers against a legal practitioner.”

[25] See also **Incorporated Law Society of the Orange Free State v H** 1953 (2) SA 263 (O) at 264 H – 265 A. This approach, applied to the HPCSA, was approved in **Govender v Health Professions Council of South Africa** 2016 JDR 1583 (WCC) at par [39].

[26] I agree with counsel for the applicant that the amended charge sheet does introduce the need for expert opinion on a new issue which was not required in respect of the previous charge.

[27] In **Nkabinde and Another v Judicial Service Commission and Others** 2015 (1) SA 279 (GJ) a full court had to hear an application by constitutional court judges. They brought an application to review and set aside a decision of the JSC to

establish a judicial conduct committee, appointing a prosecutor of the National Prosecuting Authority in terms of section 24(1) as evidence leader for the tribunal. The applicants argued that the JSC had impermissibly applied new procedures envisaged by an amended JSC Act retrospectively, which were not applicable when the complaint was lodged. It was contended that this breached the principle of legality. At par [121] the full court (Majat J, Claassen J and Kgomo J concurring), found as follows:

“[121] In these circumstances, the implementation or enforcement of new procedural provisions of the Amended JSC Act does not affect any substantive rights of the applicants or any other party. Similarly, the decisions of the Commission taken in April 2012 and October 2012 in terms of the Amended JSC Act do not impair the substantive rights of any party, which may have accrued prior to 1 June 2010. As such, the application to set aside any averred impermissible retrospective application of the Amended JSC Act, on the basis of these decisions, must fail.”

[28] From the aforesaid it is apparent that, when applied to the facts of this matter, the applicability of the 2023 Amended Regulations or the Regulations as they stood prior to the amendment in 2023 was informed by the question whether substantive rights were affected by the 2023 Regulations or not.

[29] I cannot find that the 2023 Regulations have adversely affected substantive rights of the applicant which had accrued prior to the amendment. The right to further particulars is a procedural matter, as is the form of the proceedings. However, those procedural matters can trigger substantive issues and affect substantive rights. This is a matter to be determined on a case by case basis.

[30] The applicant is entitled to fair administrative action and a fair hearing in respect of the *de novo* hearing. At a minimum, this implies that she cannot be prejudiced by virtue of having to undergo a hearing *de novo*. As she had already pleaded to charges in the first round, and as the parties had agreed that the Regulations as they stood before the 2023 amendments would be applicable, these fundamental components of a fair trial had become entrenched.

[31] Having pleaded to the original charges, the *de novo* hearing cannot be *de novo* if the charges are not the same. If the applicant had been facing criminal charges, she would be entitled to a verdict of the charges on which she had pleaded (section 106(4) of the Criminal Procedure Act). Adding to the charges would be impermissible.

[32] The applicant's rights under sec 34 of the Constitution entitle her to a fair hearing before the HPCSA. There is substance to the applicant's complaint that the change of heart communicated to her on 11 November 2024 affects the fairness of the *de novo* hearing. As the applicant and the third respondent had agreed on the applicability of the February 2020 Regulations, those Regulations would govern the proceedings of the *de novo* hearing as well. In a civil context, agreements reached at a pretrial conference are binding on the parties.

[33] Fairness of a *de novo* hearing after pleading to specific charges, as envisaged from a Constitutional perspective, dictates that the *de novo* hearing cannot be a hearing on terms which are more prejudicial to the applicant than the previous proceedings. This is so regardless of whether the amended charges covered the same points of inquiry as those that served before the preliminary committee. That is a competence issue which the applicant raises in the notice of motion and the pro-forma complainant answers. The fundamental issue is however the fairness of the *de novo* hearing.

[34] In **SA Breweries (Pty) Ltd v Louw** (2018) 39 ILJ 189 (LAC) the principle was enunciated as follows at par [8] :

“[8] The relationship between the pleadings that the pre-trial conference minute has been the subject of several judicial pronouncements. In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with leave of the court. The case pleaded cannot be changed or expanded by the terms of the minute; if it does, it is necessary that that change go hand in hand with a necessary

amendment. ... Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of the minute.”

[35] I am fully aware that the aforesaid relates to civil trials, whereas the proceedings before the HPCSA are more akin to criminal proceedings. However, where the parties have agreed on the terms on which the disciplinary proceedings would commence, that agreement is binding. In this instance, the *de novo* hearing has to be on the same charges as those faced previously and on the application of the February 2020 Regulations.

[36] Returning to the relief sought in the notice of motion, Prayer 2 is aimed at setting aside the amended charge sheet as being *ultra vires* the powers of the third respondent in terms of the February 2020 Regulations. The applicant is entitled to the relief for a different reason. The *pro forma* complainant proffered the charges to which the applicant had pleaded, and he confirmed the application of the 2020 Regulations. The *pro forma* complainant is not permitted to unilaterally resile from the charges already put in such circumstances. A *de novo* hearing cannot be fair if it is conducted on different or more onerous terms than those that prevailed during the first hearing. The amended charge sheet represents charges that are more onerous to face, than those to which she had already pleaded. That makes the *de novo* hearing unfair. It infringes rights under sec 33 and 34 of the constitution. It is consequently based on the principles of fair administrative action and fair hearing rights as applied to disciplinary proceedings that the amended charges lack legality. To unilaterally resile from the position that applied during the first hearing is irrational. The third respondent had, in my opinion, failed to take into account that the ground rules for the hearing had been established by the time the applicant pleaded. He may not unilaterally resile from such ground rules by imposing a more onerous charge upon the applicant on new procedural rules.

[37] As far as the accrual of substantive rights under the 2020 Regulations are concerned, those rights remain unaffected. The ambit of the enquiry and the charges faced by the applicant had been fixed and her right to be tried under those

circumstances cannot be disturbed without breaching the applicant's right to a fair hearing.

[38] Having stated the above, this does not mean that the applicant has acquired a right to a hearing in person, conducted in terms of the default position (a hearing conducted in person) by virtue of the aforesaid. Even under the 2020 Regulations, considerations of practicality and pragmatism determine whether the hearing was in person or virtual. The decision in this regard is that of the committee. I therefore decline to grant the relief sought in paragraph 3.3 of the notice of motion.

[39] As far as the issue of costs is concerned, the change in tack by the third respondent as expressed in the letter of 11 November 2024 was the cause of these proceedings. The third respondent did not discern that he may not unilaterally resile from the ground rules that had already been set for the hearing and which form the bedrock of the *de novo* hearing. The applicant was entitled to approach the court in this regard, as it affected the legality of the proceedings.

[40] In the premises I make the following order:

1. The matter is heard as one of urgency in terms of Rule 6(12) and the forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with.

2. The amended charge sheet received by the applicant on 24 October 2024 is set aside.

3. It is directed that:

- 3.1 The *de novo* enquiry proceedings against the applicant are continued based on the charge sheet dated 14 August 2023;

- 3.2 The regulations that apply to the *de novo* hearing are the 2020 Regulations, i.e. Regulations published in Government Notice R102 in Government Gazette 31859 of 6 February 2009 (amended by GN53,

GG42980 published on 31 January 2020 and GN187, GG43035 and published on 21 February 2020);

3.3 The costs of this application are payable by the respondents jointly and severally, the one paying the other to be absolved on a party and party scale, Scale C.

LABUSCHAGNE AJ