



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-051303

In the matter between:

**TONI ELIZABETH RAPHAEL**

Applicant

and

**THE HEALTH PROFESSIONS COUNCIL  
OF SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON OF THE PROFESSIONAL CONDUCT  
COMMITTEE OF THE HEALTH PROFESSIONS COUNCIL  
OF SOUTH AFRICA**

Second

Respondent

**Coram: NUKU J**  
**Heard on: 8 May 2025**  
**Delivered on: 9 May 2025**

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**JUDGMENT**

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## NUKU, J

[1] Applicant seeks urgent interim interdictory relief to stay the Inquiry before second respondent ('the PCC'), pending the determination of an application ('the review application') in which she seeks to review and set aside the decision of the PCC dismissing the application for a discharge she had brought in terms of regulation 9(7) of the Regulations relating to the conduct of inquiries into alleged unprofessional conduct (Inquiry Regulations) made in terms of section 61 of the Health Professions Act, 56 of 1974 (Health Professions Act).

[2] First respondent opposes both the application to stay the Inquiry and the review application. As to the application to stay the Inquiry, the first respondent's grounds of opposition are that the applicant has failed (a) to make out a case for urgency, and (b) to satisfy the threshold requirements for an interim interdict. As to the review application, the first respondent's grounds of opposition are that the applicant (a) has failed to exhaust internal remedies as provided for in the Inquiry Regulations and (b) the review application is impermissibly brought in *medias res*, and the applicant has failed to set out any exceptional circumstances to justify the court's intervention before the conclusion of the Inquiry.

[3] The facts that gave rise to this application are largely uncontentious and can be summarised as follows: the applicant is a clinical psychologist and is registered with the Health Professions Council of South Africa, the first respondent, in terms of the Health Professions Act.

[4] The first respondent received two complaints relating to the applicant's professional conduct. The first complaint, from the applicant's client, alleged that the applicant had, in a report that she had prepared for court proceedings relating to the well-being of the client's minor child, claimed that she had interviewed people when in fact she had not done so. The second complaint was from one of the persons who the applicant had claimed to have consulted when she had not done so.

[5] The complaints were put to the applicant for her response. Having received the applicant's response, the complaints and the applicant's response were referred to a committee which decided to refer the complaints to an inquiry in terms of Regulation 4(8) of the Inquiry Regulations.

[6] Two charges were preferred against the applicant, namely:

***“Count 1:***

*That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional conduct in that on or about or during the period October 2023, or portions thereof, as a registered practitioner with the Health Professions Council of South Africa (“HPCSA”), you acted in a manner that is not in accordance with the norms and standards of your profession in that, you committed an unprofessional conduct of fraud, by writing a report for the High Court of South Africa, Western Cape Division sitting in Cape Town, wherein you stated that you have interviewed Professor Mark Swilling for collateral information in accordance with Court’s Order dated the 11 May 2023, whereas in truth and in fact, when you wrote the report and stated that you interviewed Professor Mark Willing, you knew that you did not interview Professor Mark Willing, thereby misleading the High Court of the Western Cape Division, Cape Town.*

***Count 2:***

*That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional conduct in that on or about or during the period October 2023, or portions thereof, as a registered practitioner with the Health Professions Council of South Africa (“HPCSA”), you acted in a manner that is not in accordance with the norms and standards of your profession in that, you committed an unprofessional conduct of fraud, by writing a report for the High Court of South Africa, Western Cape Division sitting in Cape Town, On behalf of the mother of a minor child who was a subject of Care and Custody between his parents, wherein you stated that you have interviewed Ms. Cawood, Professor M Swilling, Ms. R Abel, Ms. B Von Willing, and other individuals for*

*collateral information in accordance with Court's Order dated the 11 May 2023, whereas in truth and in fact, when you wrote the report and stated that you interviewed Professor Mark Willing, you knew that you did not interview Ms. Cawood, Professor M Swilling, Ms. R Abel, Ms. B Von Willing, and other individuals, thereby misleading the High Court of the Western Cape Division, Cape Town."*

[7] The applicant made some admissions prior to the commencement of the Inquiry. These included the fact she had written in her report that she had interviewed Professor Mark Swilling when she had in fact not done so.

[8] Two witnesses testified at the Inquiry after which the applicant applied for a discharge in terms of regulation 9 (7) of the Inquiry Regulations. The application for a discharge was refused on 11 December 2024 without providing reasons, whereupon the applicant intimated that she intended to review the decision and requested reasons.

[9] The reasons for refusing the discharge were provided on 24 January 2025. Having received the reasons, the applicant requested the postponement of the Inquiry pending the outcome of the review application that she intended to launch. The pro forma complainant did not accede to the applicant's request, and on 20 February 2025, the applicant brought a formal application before the PCC for the postponement of the Inquiry pending the determination of the review application that the applicant intended to launch in this Court.

[10] The application for a postponement of the Inquiry was refused on 10 March 2025 and on 11 April 2025, the applicant launched the present application for hearing on Monday, 5 May 2025. Any respondent who intended to oppose the application was given until Wednesday, 23 April 2025 to deliver both the notice of opposition as well as an answering affidavit.

[11] The application was served on the respondents on 17 April 2025 with Friday, 18 April and Monday, 21 April being public holidays which meant that the first respondent was afforded only (1) court day to deal with the application. The first respondent was

unable to meet this deadline and was only able to have its answering affidavit finalised on Friday, 2 May 2025. The applicant delivered her replying affidavit on Monday, 5 May 2025 being the date by which the application was set down for hearing. In any event, the application was postponed for argument on Thursday, 8 May 2025.

[12] The applicant did not deal with urgency in the founding papers, a fact that was pointed out in the first respondent's answering papers. In her reply, the applicant simply blamed the pro forma complainant for opposing the application to have the Inquiry postponed pending the determination of the review application which the applicant intended to launch. This should really be the end of the matter because the applicant:

- 12.1 gave herself a period of about a month to prepare the papers (from 10 March 2025 until 11 April 2025 when the application was launched) and only afforded the applicant One (1) court day to deliver its opposing papers, and
- 12.2 failed to set out explicitly in her founding affidavit, as required in terms of Rule 6 (12) (b) of the Uniform Rules of Court, the circumstances which is averred render the matter urgent and the reasons why she claims that she could not be afforded substantial redress at a hearing in due course.

[13] Despite the applicant's failure to deal with the urgency, I heard the merits of the Application which I deal with next.

[14] Aware that an applicant for an interim interdict has to establish a *prima facie* right that requires protection, the applicant relies on her right to a fair administrative action. In this regard, she contends that the refusal of the discharge has violated that right. The violation, she claims arises from (a) the PCC's misdirection in respect of the test applicable when considering an application for a discharge, (b) the PCC's failure to consider the evidence, and (c) the fact that the PCC took irrelevant considerations into account.

[15] The first respondent contends that the applicant's prospects of success in the review application are poor because the intervention of a court in unconcluded

proceedings is not permissible in the absence of exceptional circumstances. The first respondent's argument is that the applicant has not pleaded any exceptional circumstances. This is because a misdirection as to the applicable test, the failure to consider evidence as well as taking irrelevant factors into account are all ordinary grounds of review that do not amount to exceptional circumstances.

[16] The applicant accepts that the intervention of a court in unconcluded proceedings is only permissible in exceptional circumstances. It was contended on behalf of the applicant that this is one of those cases where grave injustice might otherwise result or where justice might not be obtained by other means and as such warrants this Court's intervention before the conclusion of the proceedings. This is because putting her into her defence is a gross violation of her right to an administrative action that is lawful, reasonable and procedurally fair. This argument was based on the decision of the SCA in *S v Lubaxa*<sup>1</sup> where Nugent JA stated that:

'I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the state case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.'<sup>2</sup>

[17] It was submitted on behalf of the first respondent that the authority relied upon by the applicant is distinguishable in that an accused person has a right not to be compelled to give self-incriminating evidence in criminal proceedings whereas a person who is subject of an enquiry enjoys no such right.

[18] There is merit in the first respondent's submission because section 35(3)(j) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides, in express

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<sup>1</sup> 2001 (2) SCAR 703 (SCA)

<sup>2</sup> *Sv Lubaxa*, para [18]

terms that “*Every accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence.*” To require an accused person to testify in circumstances where there is no evidence upon which he or she could be convicted unless he or she gives self-incriminating evidence would be a violation of that right enshrined in section 35(3)(j) of the Constitution. There is, however, no such equivalent provision in respect of proceedings before administrative tribunals.

[19] There is a further distinguishing factor. Nugent JA posited two scenarios in **Lubaxa**. The first was where the court is of the opinion that there is evidence upon which it may convict and, in that scenario, he stated that the court’s duty is straight forward in that the accused may not be discharged.<sup>3</sup>

[20] The second scenario is where a court is of the opinion that there is no evidence upon which an accused person may be convicted, and the question was whether the court still has a discretion not to discharge an accused person. It was when he was considering this scenario that he concluded that any prosecution based on self-incriminating evidence would vitiate the proceedings.

[21] Reverting to the present application, the PCC refused the application for discharge because of its view that there is a prima facie case. In the words of Nugent JA, it would appear that the PCC’s duty is straightforward, the person subject to the Inquiry may not be discharged. That being the case a failure to discharge under those circumstances cannot establish exceptional circumstances.

[22] When the applicant was faced with the above difficulty, she sought to advance her case with reference to a decision of this Court in **Boon**<sup>4</sup>, a case that involved the review of unconcluded proceedings before a committee of the Health Professions Council of South Africa. In this regard the argument was that in **Boon**, which is on all fours with this matter regarding the basis of the review, the Court with reference to

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<sup>3</sup> Lubaxa, para [11]

<sup>4</sup> Boon v HPCSA and Another, case no. 6678/2016, an unreported judgment of Van Staden AJ, delivered on 2 August 2017

*Towles, Edgar Jacobs Ltd v President, Industrial Court*,<sup>5</sup> confirmed that the High Court has supervisory power over decisions or proceedings of a body or tribunal on which statutory duties are imposed and that *'[t]his includes the power to intervene in unconcluded proceedings, inter alia, where serious injustice would otherwise occur or justice would not be attained in any other way, for instance, where an appeal or review in the ordinary course would not suffice.'*<sup>6</sup>

[23] I have no quarrels with the legal position that was stated in Boon and in fact it appears to be in accordance with the long line of decisions to the effect that intervention before the conclusion of proceedings is only warranted in exceptional circumstances. How the reference to that decision assists the applicant is, however, difficult to understand where there are no facts that are pleaded to suggest that serious injustice would otherwise occur or justice would not be attained in any other way, for instance, where an appeal or review in the ordinary course would not suffice.

[24] In my view, the applicant's prospects of success in the review are poor but that is not the only consideration. When dealing with irreparable harm and the balance of convenience, the applicant proceeds from the same mistaken premise as she does in respect of her *prima facie* right. This premise starts with her argument that there is no evidence upon which she may be found guilty unless she gives self-incriminating evidence. This, however, is her opinion and not that of the PCC. The PCC, as stated already refused the application for a discharge on the basis there is a *prima facie* case.

[25] Proceeding from that premise she then argues that she does not know what case she is expected to meet, and that she will lose the remedy of a discharge whether she testifies or not. She then concludes that she should not be required to give evidence at the Inquiry when the very question as to whether she is in law required to give evidence at the Inquiry is pending before this Court.

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<sup>5</sup> 1986 (4) 660 (C)

<sup>6</sup> *Boon*, para [49], with reference to *Van Wyk v Midrand Town Council* (4) SA 185 (W) 187 F-G and *Brock v SA Medical and Dental Council* 1974 (1) SA 396 (N) at 400

[26] The difficulty with this argument is that it ignores the provisions of regulation 10 of the Inquiry Regulations which provides “*If the application for a discharge is refused, the respondent or his or her legal representative may address the professional conduct committee and lead evidence in support of his or her case, re-examine the witnesses after cross-examination by the pro forma complainant and thereafter close his or her case.*” The requirement for her to make an election flows from the regulations and there is no challenge to the constitutionality of the provision. In the absence of a challenge to the regulations, it cannot be said that there will be harm, let alone irreparable harm, to require the applicant to make an election that the regulation requires him to do.

[27] For all the above reasons, I am not satisfied that the applicant has satisfied the requirements for an interim interdict. The result is that the applications must be dismissed with costs.

## **ORDER**

[28] In the result I make the following order:

The application is dismissed with costs including cost of counsel to be taxed or agreed on scale B.

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**L.G. Nuku**  
**Judge of the High Court**

## **APPEARANCES**

**For applicant:** Adv. Janet McCurdie

**Instructed by:** MacRobert Attorneys

**For first respondent:** Adv. Mukesh Vassen

**Instructed by:**

M Attorneys