IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 10/6/2014. SIGNATURE

Case Number: 46326/2012

10/6/2014

In the matter between:

HEALTH PROFESSIONS COUNCIL OF SOUTH

AFRICA Applicant

and

THE PROFESSIONAL CONDUCT COMMITTEE OF

THE HEALTH PROFESSIONS OF SOUTH AFRICA First Respondent

ANN-MARIE RENCKEN-WENTZEL Second Respondent

JUDGMENT

POTTERILL J

[1] The applicant is applying for the following:

> *"(1) An order reviewing the ruling of the Professional Conduct Committee to stay the enquiry of the second respondent pending the outcome of a custody dispute to which second respondent is not a party;*
>
> *(2) An order setting aside the decision of the Professional Conduct Committee of staying the enquiry into conduct of the second respondent so that the applicant should be placed in the position to set the matter down for a proper enquiry in terms of the Health Professions Council; and*
>
> *(3) Costs of the application."*

[2] The second respondent was served with a notice in terms of Regulation 4(a) of the Regulations published under Government Notice Number R.765 of 2001 of an enquiry into the conduct of this respondent by a Professional Conduct Committee of Professions Board for Psychology. The charge sheet set out that the second respondent is guilty of unprofessional conduct during court proceedings between a Ms. Williams and her husband Mr. Williams in that *inter alia* she made written findings and conclusions about Mr. Williams without assessing and consulting him personally to verify and/or establish the truth of the allegations against him.

[3] At the date of the hearing the second respondent's counsel raised the point *in limine* that the disciplinary hearing is premature due to urgent proceedings that were instituted in the South Gauteng High Court in April of 2009. They proposed a stay of this hearing until the urgent application relating to Mr. and Mrs. Williams-Ward (new married surname) and their biological children. Another strong argument

forwarded on behalf of the second respondent's contention that the disciplinary hearing should be stayed read as follows:

> *"We do not want, and we don't act on behalf of Melissa, we don't act on behalf of the Ward family, but we have a responsibility from our side not to prejudice any potential rights of that young child, Melissa, or for that matter any of the parents. And we don't want to see these proceedings as a weapon in terrorem in a pending legal action that has not been resolved to this date. And that is our simple point, as to why we say this may well be premature."* [p32 of the record]

[4] The main considerations of the first respondent for granting a stay of the hearing were stated as follows:

> *"The Committee is loath to be used as a possible tool to attack the credibility of an expert in a matter of vital importance and concerning the well-being and interests of minor children." (page 24 of the finding and ruling of the Committee as set out in lines 9-11)*

[5] I was informed from the bar that the rules/regulation of the first respondent has no provisions for an adjournment or stay of a disciplinary hearing.

[6] On behalf of the applicant it was argued that the effect of the stay pending the finalisation of a High Court matter wherein the parties in the High Court matter is not proceeding with has the effect of a final stay. The applicant can accordingly not set the matter down until a court reviewed and set aside the stay of proceedings granted by the respondent. The stay should accordingly be uplifted. It was further submitted

that it was irrational or grossly unreasonable to have stayed the proceedings because there was no lawful reason or cogent grounds to do so. Although there is an opposing affidavit from the second respondent she agrees that the proceedings before the first respondent against the second respondent should resume without delay. Prayer 1 should thus be granted. There is however a contention that the first respondent was not wrong in granting the stay of the proceedings and prayer 2 is thus in contention.

[7] The Professional Conduct Committee of Professions Board for Psychology is a body that is called into life in terms of Regulations. It would thus not have any inherent jurisdiction. however it would always have the right to entertain an application for postponement by the complainant or *pro forma* prosecutor on good cause shown. An example that comes to mind is when the complainant or *pro forma* prosecutor is in a serious accident the morning of the hearing. The Committee would not be barred from granting a postponement to a later date as one of its options. The same would apply if witnesses could not be present.

[8] A stay in proceedings is however another kettle of fish and should be used sparingly. *In casu* the submissions on behalf of the applicant is correct; there were no cogent grounds or lawful reasons to stay the proceedings. In ***Dilworth v Reichard*** **(2002) 4 All SA 677 (W)** Claassen J referred to and applied ***Davis v Tipp NO and Others*** **1996 (1) SA 1152 (W).** In the last mentioned matter the applicant was employed by the Greater Johannesburg Transitional Metropolitan Council. The Council convened an enquiry in terms of its standard conditions of service into allegations of bribery and corruption and theft which had been made against the applicant. The applicant objected to answering questions as it might affect his constitutional rights to remain silent and not to incriminate himself at a pending criminal trial and requested a postponement of the enquiry until after completion of the criminal trial. The chairman of the enquiry rejected his contention as well as his request for a postponement as a result whereof the applicant brought an application

before the High Court for an order staying the proceedings of the enquiry until after completion of the criminal trial. It was submitted before Nugent J that if the enquiry proceeded the applicant might of necessity be called upon to answer evidence of criminal conduct given against him if he wished to avoid a finding of misconduct which could in turn be used by the State in the pending criminal proceedings. Nugent J (as he then was) at 1158G-1159B found as follows:

> "*The right to remain silent derives from an abhorrence of coercion as a means to secure convictions by self-incrimination, and it exists to ensure that there is no potential for this to occur. It achieves this by protecting an accused person from being placed under compulsion to incriminate himself; not by shielding him from making legitimate choices ....*
>
> *In the present case the applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment that is a consequence of the choice which he has made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak. Hard as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice."*

[9] In the ***Dilworth*** matter ***supra*** an exception was raised against a plaintiff's particulars of claim in a civil matter. Claassen J once again relies on the ***Davis*** matter ***supra*** and quotes from page 1157E-G:

> *"Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it*

will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the Courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented."

The upshot of this judgment is thus that where criminal proceedings are pending civil trials are not to be postponed to accommodate criminal hearings on the basis of the right to remain silent.

[10] I cannot agree with the second respondent's contention that the stay does not amount to a permanent stay. Although the High Court is the upper guardian of children a High Court cannot in civil litigation act *mero motu* if parties are not proceeding with a matter. This will only be the situation where a Judge of the High Court has been tasked with case management of such a matter. It is thus very dangerous to stay proceedings pending the finalisation of a High Court civil matter as parties may abandon the litigation; as in this matter they have. Even though this only came to light after the decision this is a factor that the first respondent will always have to take into consideration. It would thus always be wise to postpone a matter to a specific date so as to circumvent a stay which would then result in a permanent stay. A permanent prolonged stay does not serve the public interest in that it is trite that disciplinary enquiry proceedings should be adjudicated expediently.

[11] I also cannot agree with the argument of the second respondent that the decision to stay the proceedings was lawful, reasonable and fair in the particular circumstances. The disciplinary enquiry although linked in that the second respondent made a report

pertaining to the children for the High Court proceedings is very distinct to the High Court proceedings. The second respondent was not a party to the proceedings and a High Court will on the evidence presented to the High Court decide the credibility of an expert witness or not. The mere fact that there was a disciplinary hearing against the expert witness will not *per se* affect the credibility of the witness in the High Court. It is the duty of the High Court Judge to assess the credibility of the witness after due cross-examination.

[12] I accordingly make the following order:

12.1 An order reviewing the ruling of the Professional Conduct Committee to stay the enquiry of the second respondent pending the outcome of a custody dispute to which second respondent is not a party;

12.2 An order setting aside the decision of the Professional Conduct Committee of staying the enquiry into conduct of the second respondent so that applicant should be placed in a position to set the matter down for a proper enquiry in terms of the Health Professions Act;

12.3 Costs of this application, which include the costs consequent upon the employment of two counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 46326/2012

HEARD ON: 5 June 2014

FOR THE APPLICANT: ADV. J.G. RAUTENBACH SC AND N. MAKHUBELA

INSTRUCTED BY: Mkhonto & Associates Inc.

FOR THE SECOND RESPONDENT: ADV. E. VAN VUUREN

INSTRUCTED BY: Webber Wentzel Attorneys

DATE OF JUDGMENT: 10 June 2014