/SG

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE:
CASE NO: 54835/2013

9/5/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

5/5/14 .....

DATE SIGNATURE

In the matter between:

LYNETTE MARY ROUX	APPLICANT
And	
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	1ST RESPONDENT
THE REGISTRAR: HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	2ND RESPONDENT
OLIVER MICHAEL POWELL	3RD RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant applies for a final interdict restraining the first and/or second respondents from proceeding with an inquiry into the conduct of

the applicant, a clinical psychologist, in terms of the Health Professions Act 56 of 1974 ("the Act")

The third respondent ("Powell") is the complainant who laid certain charges against the applicant with the first respondent.

[2] Before me, Mr Beltramo SC appeared for the applicant, Mr Foden for the first and second respondents and Mr Snyckers SC for the third respondent (Powell).

Introduction and Background

[3] The applicant, in her aforesaid capacity as a clinical psychologist, was appointed to conduct forensic work and furnish a report to the office of the Family Advocate in Johannesburg, regarding litigation between Powell and one Ms Linda Petzer about access to a minor child, Byron, born of the relationship between them. The applicant furnished the family advocate with a report on 19March2004. She thereafter assumed the role of a therapeutic psychologist and began treating Byron. During March 2005, and whilst still treating Byron, the applicant supplemented her March 2004 report.

[4] In April 2005, Powell, through the registrar, (second respondent) submitted a complaint to the first respondent against the applicant. The first respondent, the Health Professions Council of South Africa, was established in terms of section 2 of the Act and has as its objects, amongst others, to promote and to regulate inter-professional liaison between health professions in the interest of the public and to control and exercise authority in respect of all matters affecting the profession. The first respondent must, in terms of section 3(j) of the Act, serve and protect the public in matters involving the rendering of health services by persons practising a health profession.

One of the functions of the first respondent, set out in section 3(n) of the Act, is:

> "To ensure the investigation of complaints concerning persons registered in terms of this Act and to ensure that appropriate disciplinary action is taken against such persons in accordance with this Act in order to protect the interest of the public."

[5] Powell's first complaint was that the applicant had acted unprofessionally when she assumed multiple relationships ("the multiple relationships charge") namely that of being an investigator appointed by the family advocate and then also a therapist to Byron. Secondly, Powell complained that the applicant had misdiagnosed Powell's condition ("the misdiagnosis charge").

[6] Acting in terms of Regulation 31b, promulgated in terms of section 61 of the Act, the second respondent forwarded a copy of the complaint to the applicant requesting her to respond, which she did in writing, in February2006.

Thereafter, in terms of Regulation 3(2), the matter was placed before the Committee of Preliminary Inquiry of the Professional Board for Psychology ("the Committee"). On the advice of an expert consulted by the Committee, the Committee resolved, in May2007, in terms of Regulation 3(3) and 3(4) that an inquiry into the conduct of the applicant should be held with special reference to the multiple relationships charge.

[7] The pro-forma complainant (defined in regulation 1 as a person appointed by a professional board to represent the complainant and to present the complaint to a professional conduct committee) prepared a draft charge-sheet referring to the multiple relationships charge only and the charge-sheet was sent to the applicant by the registrar (second respondent) specifying the date, time and place where the inquiry into this charge would be held.

[8] The inquiry was postponed on numerous occasions for various reasons. The charge-sheet was also amended on at least three occasions. Importantly, it was amended by the pro-forma complainant, without reference to the Committee after Powell insisted that the pro-forma complainant also prefer the misdiagnosis charge against the applicant.

[9] Because of repeated postponements of the inquiry, amendments of the charge-sheet and delays over a number of years, the applicant applied to this court for declaratory and interdictory relief against the first respondent and Powell. She sought an order that the inquiry instituted against her in terms of section 41 of the Act be declared unlawful,

unreasonable and/or procedurally unfair and directing that the enquiry be permanently stayed.

[10] Following the amendment of the charge-sheet by the introduction of the misdiagnosis charge, the applicant also filed an amended notice of motion in which he sought additional relief, *inter alia*, a declarator that the charge-sheet be set aside, alternatively that count 1 thereof (the misdiagnosis charge) be set aside, and that the first respondent be directed to hold an inquiry only into the alleged misconduct in respect of count 2 (the multiple relationships charge).

[11] The learned judge, TUCHTEN J, dismissed the application but granted leave to appeal to the Supreme Court of Appeal ("the SCA") on a single issue only, namely the setting aside of charge 1.

In this regard, the notice of appeal filed by the applicant (as appellant) following the granting of leave to appeal, reads as follows:

> "The Appellant (Applicant in the court *a quo*) hereby notes an appeal against that part of the judgment of his Lordship Tuchten J

handed down on 3 September 2010 in the South Gauteng High Court of South Africa, Johannesburg, (*sic*) under case number 2009/20493 in terms of which the learned Judge dismissed the relief to set aside charge 1 embodied in the charge sheet served on the Appellant on 4 September 2009 with costs ..."

[12] The main thrust of the appeal was that the pro-forma complainant had acted beyond the statutory powers by adding the misdiagnosis charge to the charge sheet without the authority of the Committee. This was the only issue before the SCA, the learned judge of appeal stating the following in paragraph [13] of the unreported judgment of that court:

"Before us, the litigation between the parties has been reduced to a single issue: whether a pro forma complainant has the authority to prefer charges against a health practitioner which were not authorised by the committee of preliminary inquiry?"

[13] The appeal was upheld. The following is stated in paragraph [27] of the judgment:

"The pro forma complainant accordingly did not have the authority to include the misdiagnosis charge in the charge sheet. He was furthermore not entitled to accept expert opinions sourced by the second respondent and formulate the misdiagnosis charge based on such opinions. He had a duty to act in accordance with the instructions of the committee. In the result the High Court erred in finding that the pro forma complainant had the power to determine the ambit of the inquiry, including the specific charges to be preferred."

[14] The appeal was upheld with costs.

The dispute between the parties, and the issue to be decided

[15] In upholding the appeal with costs, the SCA set aside the order of this court and replaced it with the following:

"(a) Count 1 of the charge-sheet dated 4September2009 is set aside.

(b) The first respondent is ordered to hold an inquiry into the appellant's alleged misconduct solely in respect of Count 2 within two months of the date of this judgment.

(c) The first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application." (Emphasis added)

[16] The judgment of the SCA was delivered on 21September 2011, which means, on a general reading of order (b), the inquiry had to be held by 21November2011.

[17] After the SCA delivered its judgment on 21September2011, there was a flurry of activity: the attorneys representing the various parties corresponded with one another. There were telephone calls made and discussions held about the need for the inquiry to be held by 21November. There were issues of availability and the lack thereof. There were complaints about the failure to give the prescribed thirty days advance notice for the inquiry, which the registrar at one stage set down for hearing on 21November2011. The inquiry could not proceed.

Members of the Professional Conduct Committee for Psychology were, for example, not available.

I consider it unnecessary to embark upon a more detailed discussion about all these developments. A comprehensive account is to be found in paragraph 66 of the applicant's founding affidavit in this interdict application.

[18] Already on 15 November 2011, the applicant's attorneys wrote to the first respondent (also, in general, described as "the HPCSA") pointing out that where the SCA made it clear that the inquiry was to be conducted within two months after the judgment, the judgment was clear, and, viewed in its proper context, meant that should the first respondent fail to hold the inquiry within the stipulated two month period, it could no longer prosecute the applicant on Count 2. Plainly put, so the letter went, the first respondent was barred from prosecuting the applicant on Count 2 unless it did so within the two month period stipulated by the SCA. The first respondent was threatened that should the inquiry be set down after the expiry of the two month period, the applicant would

launch an application for an interdict restraining the first respondent from holding the inquiry.

[19] The flurry of activity carried on even after 21November 2011. By 25January2012 the first respondent's attorneys advised their counterparts that they had obtained legal advice to the effect that they must proceed with the inquiry, irrespective of the expiry of the two month period. Powell's attorneys also adopted the view that the inquiry should be set down for hearing. A date in April 2012 was reserved but the proposed inquiry was aborted again, *inter alia* because there was no confirmation that the Psychology Board members were available.

[20] Powell, as the complainant, felt that his rights were being compromised by the ongoing delays, and, on 18 May 2012, he launched contempt of court proceedings, under case number 27620/2012, in this court, against the first and second respondents, citing the applicant, as an interested party, as the third respondent.

[21] Paragraphs 1 and 2 of the notice of motion issued by Powell, read as follows:

"1. Declaring the first respondent to be in contempt of the order of the Supreme Court of Appeal dated 21September2011 under case number 786/2010.

2. Committing the second respondent to jail for such contempt until such time as the order referred to in 1 above is complied with by the first respondent."

[22] The first and second respondents were now between the devil and the deep blue sea: if they proceeded with the inquiry they would be interdicted by the applicant. Because they failed to institute an inquiry they were facing contempt of court proceedings.

[23] In a desperate measure, the first and second respondents launched a counter-application to the contempt proceedings, the relevant paragraph reading as follows:

"1. Permitting and directing the first and second respondents to hold a professional conduct inquiry into the third respondent's alleged misconduct solely in respect of count

2 despite the passage of two months since the decision of the Supreme Court of Appeal under case number 786/2010."

The counter-application was dated 1 August 2012.

The applicant, as third respondent, was not cited as a co-respondent to the counter-application. Consequently, she was not given the opportunity to oppose the relief sought and applied for the counter application to be set aside as an irregular proceeding. Her objection was upheld in a judgment of 24 May 2013 by PRETORIUS J so that the counter-application was set aside.

[24] The contempt application is still pending, and Powell still has to file a replying affidavit. From my debate with counsel during the hearing, it appears that the contempt application is being held in abeyance, correctly in my view, pending the outcome of the present application because the result could have a bearing on the way forward for the contempt application.

[25] The next significant step in this, somewhat tortuous, sequence of events was that the first and second respondents, acting on the legal advice that they had obtained, and to which I have referred, set the inquiry down for hearing on 25September2013. The second respondent (Registrar) sent a written notice to the applicant, dated 17July2013, notifying her of the hearing in terms of Regulation 4(a) promulgated in terms of the Act. The charge-sheet was attached and, correctly, relates only to Count 2 which is the multiple relationships charge. The charge reads as follows:

> "That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that during or about October 2004 until November 2005 and in respect of your client, minor Byron Powell you, whilst already being engaged in a forensic role, also entered into a psychotherapy relationship with your client whilst this multiple relationship could reasonably be expected to impair your objectivity and/or competence and/or effectiveness towards your client in performing your functions as psychologist."

I repeat that this charge was based on independent expert medical advice obtained by the Committee, and it is also supported by two medical experts, a clinical psychologist and a clinical and counselling psychologist, consulted by Powell, and whose medico legal reports are attached to Powell's answering affidavit as the third respondent in the application before me.

[26] The applicant's response to the notification to attend the hearing was the interdict application now before me. It was set down for 17September2013 to restrain the first and second respondents from proceeding with the planned inquiry on 25September 2013. It was set down as an urgent application. On 17September 2013 it was removed from the roll. I assume this happened by agreement between the parties and the inquiry was not proceeded with pending the outcome of the application which came before me on 17April2014.

[27] The application was crafted on the basis that the main relief sought was interim interdictory relief pending the outcome of the contempt proceedings. In the alternative, a final interdict was sought. The applicant clearly abandoned the interim application and before me

sought the final interdict which is contained in prayer 3 of the notice of motion and reads as follows:

> "... finally interdicting the first and/or second respondents from proceeding with an inquiry into the conduct of the applicant relating to the charge set out in annexure 'LMR-40' to the founding affidavit."

The charge is the one I quoted. There is also a prayer for costs on a scale as between attorney and own client. Costs are only sought against Powell, as third respondent, if he opposes the application, which he did.

[28] The issue is to interpret the meaning of order 2(b) of the SCA, which I have quoted, but it bears repeating:

> "The first respondent is ordered to hold an inquiry into the appellant's alleged misconduct solely in respect of Count 2 within two months of the date of this judgment."

[29] The question is: does it mean that, once the two months have expired, the first and second respondents are debarred from ever holding the inquiry (the applicant's contention) or does it mean that, despite the expiry of the two months, the inquiry can, and must, still be held (the contention of the respondents).

[30] I add that the first and second respondents revived the aborted counter-application which was struck out in the contempt proceedings by launching a counter-application in this interdict application, dated 3 October 2013, the main prayer of which reads as follows:

> "Permitting and directing the first and second respondents to hold a professional conduct enquiry into the third respondent's alleged misconduct solely in respect of Count 2 despite the passage of two months since the decision of the Supreme Court of Appeal under case number 786/2010."

Counsel before me were in agreement that, in the event of the interdict application being dismissed, it would be appropriate for me to grant the counter application in these terms.

More about interpreting the order

[31] The approach to be adopted when interpreting a court's judgment or order is set out in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 4 SA 298 (AD) 304D-H.

"Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention." – At 304E

"But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it." – At 304G-H

[32] It was contended by counsel for the applicant that because the two month period has lapsed, the first respondent is precluded from holding

an inquiry into her conduct. It was contended that failure by the first respondent to hold an inquiry within the two month period would lead to it being barred from proceeding with an inquiry into the multiple relationships charge, "alternatively it is an implied term of that judgment that should such inquiry not be held within a period of two months, then the first respondent was barred from proceeding with any such inquiry".

I have some difficulty with this argument. There seems to be no apparent reason why the SCA would have intended failure to comply with the two month period to result in a permanent bar to the proceedings. If that was the intention of the SCA then, surely, it would have said so.

Such an order, had it been made, would also amount to a situation of the SCA usurping the functions of the first respondent vested in it by statute. In this regard it is clear that the SCA was fully alive to the relevant statutory provisions contained in the Act and recognised the importance of the need to protect the public. It is convenient to repeat the passage from paragraph [3] of the judgment already referred to:

"The HPCSA must, in terms of section 3(j) of the Act, serve and protect the public in matters involving the rendering of health services by persons practising a health profession. Importantly for this case, one of the functions of the HPCSA is set out in section 3(n) of the Act, which is:

> 'To ensure the investigation of complaints concerning persons registered in terms of this Act and to ensure that appropriate disciplinary action is taken against such persons in accordance with this Act in order to protect the interest of the public.'"

An interpretation as drastic as the one contended for by the applicant, would bring an end to the repeated efforts by the third respondent, over many years, to have his complaint, recognised by the Committee on expert medical evidence when it instructed the pro forma complainant to prepare the charge sheet, heard and adjudicated upon.

[33] Moreover, counsel for the respondents pointed out that, once the decision had been taken by the first respondent to proceed with the

inquiry, it is obliged to do so and cannot simply decide to call it off (realistically, I assume, this must be subject to no unforeseen circumstances taking place such as the death of a crucial witness and so on).

In this regard, counsel for the respondents referred me to the well known case of *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 2 SA 293 (TPD). This particular subject is discussed by the learned judge president at 310F to 311H. I will only quote a few extracts from these passages:

> "The question then presents itself whether the council or the disciplinary committee is obliged to institute an inquiry and exercise its powers as a quasi -judicial body if it is established by the inquiry committee that the evidence furnished in support of the complaint discloses *prima facie* evidence of improper or disgraceful conduct. Section 41 of the Act merely provides that the council shall have power to institute an inquiry. It does not provide expressly that the council shall be obliged to institute an inquiry. The words 'shall have the power' of themselves only

mean that it would be possible and competent for the council to institute an inquiry into a complaint, a power which it would otherwise not have. The natural meaning is enabling only. There may however be circumstances which may couple the power with a duty to exercise it. ... (At 310F-I and the authorities there quoted)."

At 311B-H (only extracts quoted) the following is said:

"Members of the medical profession have a real and direct interest in the prestige, status and dignity of their profession and have a right to expect of the council to exercise its powers under the Act to protect the prestige, status and dignity of their profession in the event of a complaint being lodged about conduct which is damaging to the profession and in respect of which the Act has given the council powers to deal with it. Similarly a member of the public, to whom the practitioner had stood in a professional relationship and who is affected by such conduct in respect of which a complaint has been received by the council, has a right to expect the council to exercise its powers under the Act.

If such complaints of professional misconduct or improper or disgraceful conduct go unheeded, one of the main and important objects of the Act will be defeated or be rendered nugatory and the medical profession and public interests in so far as members of the public are affected by such conduct will be unprotected. It could not have been the intention of the Legislature that the council should be given a discretion to institute an inquiry on a genuine and valid complaint so that in the case of one complaint it would be able to use its powers of inquiry and in the case of another identical complaint it should be able to refuse to use its powers. To allow this would be to make it possible for discrimination to be exercised between different persons.

It will consequently in all the circumstances seem that the object of the powers conferred on the council was to effectuate a legal right for persons who have a genuine and valid complaint about registered practitioners in respect of their profession to have their complaint inquired into.

If this construction of the words 'shall have the power' is correct then a council or disciplinary committee is under a legal duty to institute an inquiry and exercise its powers as a *quasi-* judicial body if it is established by an inquiry committee that the evidence furnished in support of a complaint discloses *prima facie* evidence of improper or disgraceful conduct."

[34] Mr Snyckers pointed out that the legal position, as explained by the learned judge president in *Veriava*, has since been adopted in the statutory provisions themselves. In this regard I was referred to Regulation 3(4) and 4(a) which read as follows:

"(4) If a committee of preliminary inquiry decides, after due consideration of the matter, that an inquiry must be held into the conduct of the accused, it shall direct a registrar to arrange for the holding of an inquiry.

4(a) On receipt of a directive referred to in Regulation 3(4) the registrar shall issue a notice, which is attached hereto and essentially in the form of annexure 'A' and addressed to the

> accused, stating where and when the inquiry will be held and enclosing a charge-sheet as formulated by the pro forma complainant." (Emphasis added)

[35] An interpretation of the order, such as the one contended for by the applicant, would, in my view, not be in harmony with the legal position as described above. It is also not in harmony with the clear indications in the judgment as a whole of the SCA's concern for the interests of the public and the need to protect those interests – e.g. what was said in paragraph [3] *supra*, and, for example in paragraph [34]:

> "Finally, there is a disturbing aspect in this case that I am constrained to address. The purpose of establishing the HPCSA was to protect the public interest. The complaint was lodged in April 2005. The inquiry is yet to be heard, six years later. Such a state of affairs reflects badly on the HPCSA and affects public confidence in it."

[36] Against this background, I find myself in respectful agreement with the submissions by counsel for the respondents that the order cannot be

interpreted as evincing an intention to bring a permanent end to the inquiry if it is not held within two months but simply as demonstrating the concern of the SCA about the delays and as an effort to expedite proceedings.

[37] I turn briefly to an argument offered on behalf of the applicant with reference to paragraph [32] of the judgment which concludes with the sentence "the inquiry, if it continues, can relate only to the multiple relationships charge". (Emphasis added) The argument, if I understood it correctly, is that the SCA, by using these words, recognised the fact that the inquiry will not continue after expiry of the two month period. Of course, the SCA never stated this to be the position and, more importantly in my view, never qualified order 2(b) in the same or similar vain. As earlier remarked, had this been the intention, one would have expected that the learned judge of appeal would say so.

[38] In dealing with this argument, Mr Foden also urged me to read paragraph [32] as a whole and in its full context:

> "The principle of legality dictates that administrative authorities such as the HPCSA cannot act other than in accordance with their statutory powers. The decision of the pro forma complainant to include the misdiagnosis charge was not 'sourced in law' and has offended against the principle of legality. The decision has to be reviewed and nullified for want of statutory power. It follows that the misdiagnosis charge has to be set aside. This inquiry, if it continues, can relate only to the multiple relationships charged."

It is clear, in my view, that the main thrust of paragraph [32] is a fortification by the SCA of its conclusions with regard to applying the principle of legality and the SCA is doing no more than to deal conclusively with the only issue that was before it (my earlier reference to that was said in paragraph [13] of the judgment). The last sentence, relied upon in isolation on behalf of the applicant, does no more, in my view, than to sum up the conclusion arrived at in the preceding words in paragraph [32]. It only states, as does order 2(b), that the inquiry is to proceed only on count 2. Perhaps it would have been clearer, with great respect, if the learned judge of appeal had used the phrase "when it continues" instead of "if it continues" but, even on the present wording,

I fail to see how a "tacit interdict" as described by counsel, can be read into the order which, as stated, does not contain this qualification "if it continues", neither is such an interdict formulated in express wording as one would have expected to happen.

[39] It was also argued on behalf of the respondents that, where the SCA issued a clear and unqualified mandamus for the first respondent to hold the inquiry, and where it did so after duly recognising the interests of the public, there is no room for an interpretation which reads a "tacit interdict" into the mandamus to the effect that the inquiry will come to nought if not heard (and presumably also concluded) within the two months. Such an interpretation would fly in the face of the clear instructions of the SCA.

[40] On this subject, I also find it convenient to quote and extract from the opposing affidavit of the first and second respondents to the interdict application. I find myself in respectful agreement with what is stated in these passages:

"4.5.6 The interpretation contended for by the HPCSA does not ignore the two-month period stated by the Supreme Court of Appeal. As appears from the applicant's summary of events after the Supreme Court of Appeal's judgment (paragraph 66 of her founding affidavit) both I and the HPCSA made every reasonable effort to hold the inquiry.

4.5.7 We were obstructed by the applicant's technical objections and the non-availability of panel members.

4.5.8 The attention of the Supreme Court of Appeal was focused on one single issue: whether a pro forma complainant has the authority to prefer charges against a health practitioner which were not authorised by the committee of preliminary inquiry. This appears from paragraph 13 of the judgment.

4.5.9 The Supreme Court of Appeal did not consider the following possibilities:

4.5.9.1 What would happen if it were not possible to hold the inquiry within two months?

4.5.9.2 What would happen if the applicant were not available to attend the hearing?

4.5.9.3 The time periods that would be required for the filing of the charge-sheet.

4.5.9.4 The time periods required before any pre-trial hearing to take place.

4.5.9.5 Would a new charge sheet have to be prepared or could the old one be used as regarded (*sic*) charge 2?

4.5.10 In the absence of specific consideration of the above points it is submitted that the two-month period in the Supreme Court of Appeal's judgment must be regarded as directive in nature.

4.5.11 Taken within the context of the judgment and the HPCSA's purpose, together with the court's disapproval of the absence of prosecution, the judgment cannot be said to remove the authority of the HPCSA to hold the inquiry."

[41] During the debate before me, Mr Beltramo pointed out that, before the SCA, there was some discussion about the time that would be reasonably required for the holding of the inquiry. That is how the two-month period was included in the order. Mr Snyckers, who was also present at the time, conceded that such a debate took place but he emphatically stated that there was no question of a "tacit interdict" having been proposed, considered or introduced in any manner whatsoever. Had this happened, it would have been vociferously opposed.

[42] Mr Snyckers reminded me that the mandamus issued by the SCA against the first respondent (order 2(b) is a clear mandamus) is one *ad factum praestandum*. In this case it is convenient to refer to what is stated by

the learned authors Herbstein and Van Winsen: *The Civil Practice of the High Courts of South Africa* 5th edition vol 2 page 1022:

> "When a judgment is one *ad factum praestandum*, namely in order to perform some Act, for example pass transfer, remove an obstruction or vacate premises, the judgment creditor cannot seek its enforcement by the levying of a writ. His remedy is to apply for the committal of the judgment debtor for contempt of court, or when appropriate, to seek an order authorising the deputy sheriff to take the necessary steps, with or without the assistance of the police."

Counsel pointed out that it has been held that the principle also applies in the case of a mandamus issued against a public body where the remedy lies in contempt proceedings. See, for example, *Nyathi v MEC for Department of Health, Gauteng* 2008 5 SA 94 (CC) 118A-B and 119D-F. See also Herbstein and Van Winsen op cit at 1106 and further.

[43] It was submitted by Mr Foden on behalf of the first and second respondents that where no provision was made for what would happen

if the inquiry were not to be held in time, the most likely interpretation is that the inquiry must be held, and if it is not held within the two months, then the public (third respondent) would have recourse, in this case, in the form of contempt proceedings, already issued as explained. It was argued by counsel that one must assume that the SCA would not order somebody to do something but agree that it was in order if it was not done (to the detriment of the public under these circumstances and given the clear objective of the Act to protect the interest of the public).

Conclusion

[44] In all the circumstances, I have come to the conclusion that the interpretation of the order of the SCA contended for by the applicant falls to be rejected so that the application must fail and the counter-application, providing for the inquiry to be held nevertheless, ought to be granted.

[45] The interested parties, in this case, more particularly, the applicant and the third respondent, have the necessary remedies at their disposal, as described, to ensure the speedy finalisation of the inquiry without any further undue delay.

Costs

[46] It is clear that there was some uncertainty amongst the parties about how to interpret the order of the SCA.

[47] I accept, for present purposes, that the efforts to obtain clarity were *bona fide* on the part of all concerned.

[48] In the circumstances, I am not inclined to mulct the unsuccessful applicant with an adverse costs order.

[49] In these, somewhat unusual, circumstances, it seems to me that justice will best be served if each party is to pay his or her or its own costs.

The Order

[50] I make the following order:

1. The application is dismissed.

2. The counter-application of the first and second respondents is upheld, and they are permitted and directed, as soon as is reasonably and practically possible, and without undue delay, to hold a professional conduct inquiry into the applicant's alleged misconduct solely in respect of Count 2, despite the passage of two months since the decision of the Supreme Court of Appeal under case number 786/2010.

3. Each party is ordered to pay his, her or its own costs flowing from the application and the counter application.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

54835/2013/sg

Heard on: 17 April 2014
For the Applicant: Adv P Beltramo SC
Instructed by: Bowman Gilfillan Attorneys
For the 1st and 2nd Respondent: Adv R A Foden
Instructed by: Matabane Incorporated
For the 3rd Respondent: Adv F Snyckers SC
Instructed by: Darryl Furman and Associates c/o Morris Pokroy Attorney

Date of Judgment: