IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 22/8/14

Case number: A1067/2010

In the matter between:

FAZLE WAHAAB PEER Appellant

and

HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA Respondent

(1) REPORTABLE: YES/NO IS NOT APPLICABLE
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
22/8/2014
DATE SIGNATURE

JUDGMENT

BAM J

1. On 22 October 2007, the appellant, a general medical practitioner, after a plea of guilty, was found guilty of unprofessional conduct by a professional conduct committee of the respondent. The conviction involved the submission of false claims to a medical fund. The resultant penalty was deletion of the appellant's name from the Register kept in accordance with the Health Professions Act, No. 56 of 1974.

2. The appellant's appeal to an *ad hoc* appeal committee against the conviction and sentence was unsuccessful. The appellant now appealed against both the conviction and the penalty imposed. The appeal lies against the finding of the professional conduct committee as confirmed by the appeal committee.

3. It was pointed out on behalf of the respondent that the appellant only filed the Notice of Appeal in this Court on 7 December 2010, about 18 months after the appeal before the respondent's appeal committee was dismissed. It was accordingly argued on behalf of the respondent that the appellant did not furnish sufficient grounds for the condonation application. The appellant however explained that his attorney of record applied for the transcribed record on 7 July 2009 but succeeded in getting hold thereof only on 8 November 2010, after which date the Notice of Appeal was filed as indicated above.

4. Although the appellant's reasons for the delay in prosecuting the appeal can be criticized, it seems, in view of what follows below, to be in the interests of justice, and both parties, that condonation should be granted and the appeal be disposed of on the merits.

APPEAL AGAINST CONVICTION

5. The appellant was charged before the respondent with 22 counts of medical claim fraud. In the charge sheet it was alleged that the appellant and/or his practice submitted false claims to the Sizwe Medical Fund during the period 2001 and 2003.

6. To these charges the appellant, who was represented by counsel, pleaded guilty and advanced a written plea explanation with the following contents:
   (a) That he was guilty of unprofessional conduct;
   (b) That the respective claims were submitted to Sizwe Medical Fund in respect of each specific patient during the relevant period;
   (c) That the claims were submitted for payments in respect of professional services rendered;
   (d) That the claims were submitted by his practice without his knowledge. That the claims were false as the practice never rendered services to each specific patient. That he was not entitled to payment

of such professional services and that Sizwe Medical Fund had therefore suffered financial loss.

7. It was common cause that the amount in respect of the 22 false claims totalled R8 783.98.

8. Despite the appellant's plea of guilty and his accepted responsibility and liability, it was contended by Mr Swanepoel, who argued the appellant's case, and in the appellant's heads of argument, that the appellant actually had a *"defense"*, a lack of *mens rea,* and that this Court should find that the appellant was wrongly convicted. In this regard Mr Swanepoel based his argument on the fact that the appellant, as explained in his plea explanation, exculpated himself by stating that he was not personally involved in the submission of the false claims, that the claims were not signed by him, that he was not aware of the false claims and that it was submitted without his knowledge. The appellant also indicated that he suspected a former employee who, for personal gain, processed the false claims which were eventually submitted to Sizwe Medical Fund by the appellant's accountants.

9. Mr Swanepoel further argued that the explanation advanced by the appellant was accepted by the pro-forma complainant and not rebutted. In this regard Ms Jele, who appeared on behalf of the respondent submitted that the pro-forma complainant had no authority to accept the plea, and accordingly that the trial committee was not bound by the pro-forma complainant's acceptance thereof. In making this submission, Ms Jele failed to take into account the specific ruling of the trial committee and its reasons for the appellant's conviction. This submission was therefore without substance. Ms Jele's argument in this regard was evidently aimed at justifying the penalty eventually imposed by the trial committee. At this stage it suffices to say that the trial committee, as well as the appeal committee, in their judgments

indicated that the appellant was guilty of only the 22 counts referred to in his plea.

10. In view of the fact that the appellant was charged before a tribunal with misconduct, the common law principles pertaining to the law of evidence that are applicable to criminal cases, also apply. In this regard the question arising is whether the trial committee, and for that matter the appeal committee, were obliged to adhere to the principle that an accused person's exculpatory explanation contained in the document advanced during the plea procedure, concerning his denial of personal involvement. See *S v Cloete* 1994(1) SACR 420 A, at 425c, where the Court referred to the said principle as it is stated in *R v Valachia and Another* 1945 AD 826, at 837:
". . . the rule is that when proof of an admission made by a party is admitted, such party is entitled to have the whole statement put before the Court and the judicial officer or jury must take into consideration everything contained in that statement relating to the matter in issue..."
The Court in *Cloete* concluded, at 428b:
"To sum up: it is clear that the evidential value of informal admissions in s 115 statements derives from the ordinary common law of evidence. That being so, there would appear to be no reason of principle why the rule enunciated in R v Valachia (supra) should not be applicable also to such statements."

11. It follows that the appellant's exculpatory version of no personal involvement had to be afforded evidential weight, which, according to the judgments of the two committees was in fact done.

12. Although the appellant's explanation clearly implied that he had no *mens rea,* it seems that the appellant could therefore only have been convicted on the principle of vicarious liability. This was conceded by Mr Swanepoel.

13. It can be assumed that the appellant, represented by counsel, was fully *aufait* with the allegations in the charge sheet and his imputed liability for the conduct of his employees. This assumption is substantiated by his plea of guilty and the accompanying explanation that he was not personally involved. The appellant clearly appreciated, and therefore admitted, that he was liable for the submission of the false claims.

14. The question arising, however, is whether the appellant, despite his admissions in that regard, could in law have been held vicariously liable for the submission of the false claims. In *Ex Parte Minister of Justice: in Re Rex v Nanabhai* 1939 AD 427, the Court quoted, with approval, the following paragraph from *R v Weinberg* 1939 AD 71:
"Where an act is absolutely prohibited by a statute without reference to the guilty mind of the doer of the act (as for example would be the case when the word 'knowingly' is stated as the ingredient of a crime) the maxim actus non facit reum nisi mens sit rea does not apply; and secondly when the element of mens rea is not a requisite the ordinary common law rule applies to the effect that the master is criminally responsible for the act of his servant in the course of his employment.

15. In this matter the appellant was charged with unprofessional conduct which was founded on the allegation that he himself and /or his practice submitted the false claims. The unprofessional conduct for which the appellant was eventually convicted was based on, as submitted by Mr Swanepoel, his liability for negligently failing to control the administration in regards to the submission of claims. The appellant's unprofessional conduct did therefore not include the element of *mens rea* as required in a charge of fraud in a criminal matter. In the circumstances the appellant was admittedly responsible for the administration in his practice and therefore the conduct of any

employee in that regard. Accordingly the appellant was indeed liable on the principal of vicarious liability.

16. It follows that the appellant's appeal against his conviction is without merit and stands to be dismissed.

APPEAL AGAINST PENALTY

17. It is trite that a court of appeal's powers to interfere with a sentence imposed by a lower tribunal are limited. This may only happen in matters where the trial court, or the committee in this matter, erred in some or other material respect, or misdirected itself, or imposed a sentence that is disturbingly inappropriate in the circumstances. See *S v Nkosi and Another* 2011(2) SACR 482 SCA, Par [34].

18. It is without doubt indeed so that the submission of false claims is a serious matter that may in certain circumstances result in the convicted practitioner's name being removed from the Register. This in itself is a drastic measure with many devastating consequences. In the event of a medical practitioner having been convicted of misconduct where it was found that he had personal knowledge of the submission of false claims, or that he was personally involved, such a penalty would clearly have been appropriate.

19. Ms Jele strenuously argued that the trial committee, as well as the appeal committee, were entitled to take into account that apart from the 22 counts the appellant was convicted of, the appellant in documents which formed part of the bundle of documents before the trial committee, admitted that he was liable to repay Sizwe Medical Fund more than R300 000.00, involving a large number of false claims.

20. It was however conceded by Ms Jele that the appellant was not charged with anything else but the relevant 23 counts (of which 1 was withdrawn). In this regard it is also of importance that the trial committee limited itself in its judgment to the 22 counts the appellant was convicted of. There is also no indication on record that the appellant, or his counsel, was alerted to the possibility that the trial committee may consider any other possible transgression by the appellant.

21. It follows that the trial committee and the appeal committee were bound to only take into account the fact that the appellant was convicted of the 22 counts he pleaded to.

22. The approach of the appeal committee in apparently considering other aggravating issues not mentioned by the trial committee, was a misdirection. The appeal committee was bound to consider nothing else but the issues and the evidence before the trial committee.

23. Ms Jele's argument that the trial committee, in imposing the penalty, was entitled to take other possible transgressions of the appellant into account was therefore without substance. If the respondent could prove other transgressions against the appellant it is unexplained why the appellant was not prosecuted for any other alleged offences.

24. This Court also has to consider whether the penalty imposed is in the circumstances commensurate with the 22 counts of professional misconduct, taking into account any other possible aggravating or mitigating circumstances.

25. It has to be taken into account that there was no evidence that the appellant was indeed personally involved, or that he had knowledge of the submission of the false claims, as well as that the amount involved, R8783.98 (subdivided between 22 claims), was a relative small amount. Although it is a very serious matter when false claims are submitted, it must be taken into account that the appellant's liability resulted from his apparent negligence to have better control over the submission of claims.

26. In view of the aforementioned issues, in my view, the penalty imposed by the trial committee, sanctioned by the appeal committee, is too severe and disturbingly inappropriate. The nature and extent of the appellant's unprofessional conduct is clearly not deserving of the imposed sanction. This Court is therefore entitled to interfere with the imposed penalty.

27. Mr Swanepoel submitted that this Court should consider to substitute the order of the trial committee with an order suspending the appellant from practicing for a specified period. Taking into consideration all the relevant facts, including the appellant's personal circumstances, and the fact the appellant's negligence apparently stretched over a period of three years, this submission seems to be a fair in the circumstances.

28. It needs to be mentioned that in terms of the provisions of section 42(1A) the order that the appellant's name be removed from the Register remain effective despite the appeal. However, consequent upon an application brought by the appellant in this court on 24 December 2010, Botha J made an order suspending the penalty imposed by the trial committee pending this appeal. The appellant was therefore entitled to practice pending this Court's decision.

29.Accordingly I propose that the following order be made:

1. The appeal against the conviction is dismissed;
2. The appeal against the penalty order succeeds;
3. The penalty imposed by the trial committee is deleted and substituted by the following:

In terms of the provisions of section 42(b) of the Health Professions Act, No. 56 of 1974, Dr Fazle Wahaab Peer is suspended for a period of 3 months, with effect from 8 September 2014, from practicing or performing acts specially pertaining to his profession as medical practitioner.

A J BAM JUDGE OF THE HIGH COURT

I agree,

S A M BAQWA JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

S POTTERILL JUDGE OF THE HIGH COURT

22 August 2014