



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1356/2019

In the matter between:

**THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA
T MAFAFO N.O
S RAMASALA N.O**

**First Appellant
Second Appellant
Third Appellant**

and

DR DAVID STEPHEN GRIEVE

Respondent

Neutral citation: *The Health Professions Council of South Africa and Others v Grieve* (1356/2019) [2021] ZASCA 06 (15 January 2021)

Coram: DAMBUZA, PLASKET, NICHOLLS JJA, WEINER
and SUTHERLAND AJJA

Heard: 12 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 15 January 2021

Summary: Administrative Law: Review of decision of the Health Professions Council of South Africa: allegations that doctor persuaded patients to invest in a financially distressed company of which he was a director and misappropriated moneys invested by patients: Council the primary *custos morum* of the health professions: decision in line with the Council's supervisory duties over the health profession: no proper basis for review.

ORDER

On appeal from: Gauteng High Court, Pretoria (Khumalo J sitting as court of first instance):

- 1 The appeal succeeds with costs.
- 2 The order of the high court is set aside and replaced with the following order:

- '1 The *point in limine* is dismissed with costs
- 2 The matter is remitted to the Professional Conduct Committee'.

JUDGMENT

Dambuza JA (Plasket, Nicholls JJA, Weiner and Sutherland AJJA concurring)

Introduction

[1] On 25 November 2014 the respondent, Dr David Grieve, appeared before the professional conduct committee (the committee) of the first appellant, the Health Professions Council of South African (the Council). He was charged with unprofessional conduct, it being alleged, amongst other things, that during the period 2004 to 2009 he improperly persuaded a number of his patients to invest in a financially distressed company of which he was a director, and that he transferred funds invested in that company to his private bank account. On the two days that the matter served before the committee the second and third appellants acted as chairpersons thereof.

[2] A *point in limine* raised by Dr Grieves, that the Council lacked jurisdiction in relation to the subject matter of the charge, was dismissed by the committee. After his attempt at lodging an internal appeal with the Council's Appeal Committee failed, Dr Grieves launched an application, in the Gauteng High Court, Pretoria (high court, Khumalo J), for review of the Council decision to institute disciplinary proceedings against him. The high court granted an order setting aside the decision of the committee and upholding Dr Grieve's *point in limine*. This appeal against the judgment of the high court is with the leave of this court.

Background

[3] Dr Grieve is a general medical practitioner from Centurion, Gauteng. On 4 August 2014 he received a notice from the Council, inviting him to

attend a disciplinary inquiry scheduled for the period 24 to 26 November 2014 in relation to unprofessional conduct charges preferred against him. He was charged with contravening the norms and standards of his profession, alternatively, bringing the good name of his profession into disrepute by: (a) persuading some of his patients and former patients to invest in a company of which he was a director when he knew that the company was in financial distress; and/or (b) transferring funds invested in his company into his private bank account; and/or (c) causing financial prejudice to the persons concerned who were persuaded to deposit large sums of money into bank accounts of companies that were subsequently liquidated.

[4] Dr Grieve objected to the committee instituting disciplinary proceedings against him, asserting, *in limine*, that the factual allegations that formed the basis of the charges did not constitute unprofessional conduct as envisaged in the Health Professions Act 56 of 1974 (the Act) in that they did not relate to the 'health profession'. The committee was therefore acting beyond the powers conferred on it in terms of s 49 and did not have the jurisdiction to prosecute him, so he contended. The *point in limine* was dismissed by the committee. Dr Grieves attempted to appeal against the dismissal of his *point in limine*. However the Council refused to afford him an appeal hearing, saying that such procedure was not provided for in the Act. Dr Grieve then approached the high court for review of the decision by the Council, through its committee, to charge him.

[5] In the high court Dr Grieve persisted in his contention that the Council had no authority to institute the disciplinary proceedings as the conduct complained of did not relate to the health profession. He also contended that

in assuming jurisdiction over him the Council concluded, incorrectly, that because in 2010 it had considered charges similar to his, it had jurisdiction in respect of the allegations against him. Similarly irrelevant, according to Dr Grieve was the premise that because a report had been made about his conduct at Lyttleton Police Station, and the matter had become public knowledge, a public interest duty arose for the Council to proceed with the inquiry. In essence the basis for the review was that the decision to institute disciplinary proceedings against him and to dismiss the special plea was not rationally connected to the empowering provision in the Act.

[6] The Council opposed the review application on the basis that it was premature, having been launched before the finalization of the merits of the disciplinary hearing. It was contended on its behalf that both the internal appeal that Dr Grieve attempted to lodge against the dismissal of his *point in limine* and the review proceedings constituted impermissible piecemeal litigation tactics.

[7] In upholding the *point in limine* the high court drew a distinction between Dr Grieve being accused of having abused the doctor patient relationship with his patients, which, according to the court, ‘would undoubtedly have put the health profession into disrepute’ and the allegations that he ‘persuaded his patients to invest in the companies when he knew or ought to have known that [they] were in financial distress’, which, on the court’s reasoning, was not unprofessional conduct. It found that the doctor’s conduct did not relate to ‘treatment’ of his patients, or to the health profession. It relied on the regulations which define the Scope and

Profession of Medicine¹ and found that the doctor's conduct did not accord with the acts relating to the health profession as listed or defined therein. The high court then concluded that in the circumstances the Council could only determine whether the doctor's engagements with his patients constituted unprofessional conduct if or when he was convicted of criminal conduct as provided in s 45 of the Act.

On appeal

[8] Although in his Heads of Argument on appeal Dr Grieve insisted that the Council did not have the requisite jurisdiction, this stance was abandoned at the hearing of the appeal. Instead it was submitted on his behalf that the charges lacked the necessary particularity, such as the names of the investor patients and the companies in which they invested. However, that is not the case that was brought before the high court. Furthermore, as submitted on behalf of the Council, the doctor never sought any further particulars to the charges.

[9] Be that as it may, the concession was correctly made. Dr Grieve's counsel accepted that the conduct complained of fell within the jurisdiction of the Council. Section 41(1) of the Act confers power on the Professional Boards of Council to 'institute an inquiry into any complaint, charge or allegation of unprofessional conduct against any person registered under the Act'. It was common cause that Dr Grieve was a registered health practitioner with the Council in terms of the Act. The committee is a Professional Board appointed by the Council in terms of s 15 of the Act. The

¹ Issued under Government Notice R237 published on 6 March 2009 in Government Gazette 31958 in terms of s 33(1) read with s 61(2) of the Act.

only issue was whether the conduct complained of, if proved, would constitute unprofessional conduct.

[10] Unprofessional conduct is defined in the Act as ‘improper or disgraceful or dishonourable or unworthy conduct or conduct which, when regard is had to the profession of a person who is registered in terms of this Act is improper or dishonourable or unworthy’.² This definition is broad, and nothing in it supports the contention that the Council’s jurisdiction is confined to the conduct of rendering of health services.

[11] Contrary to the limited disciplinary powers which Dr Grieve contended for, in terms of the Act the Council bears extensive supervisory functions which include: protection of the public from conduct arising during the rendering of health services³; maintenance of professional and ethical standards within the profession⁴; ensuring that investigation of complaints concerning persons registered in terms of the Act are done and that appropriate disciplinary action is taken against such persons in accordance with the Act in order to protect the interests of the public⁵; and ensuring that persons registered in terms of the Act behave towards users of health services in a manner that respects their constitutional rights to human dignity, bodily and psychological integrity and equality, and that disciplinary action is taken against persons who fail to act accordingly.⁶ In addition, the functions of the Professional Bodies include the maintenance and enhancement of the health profession and the integrity of persons practising

² Section 1 of the Act.

³ Section 3(j) of the Act.

⁴ Section 3(m) of the Act.

⁵ Section 3(n) of the Act.

⁶ Section 3(o) of the Act.

such profession, guiding the relevant health professions, and protection of members of the public.⁷

[12] The Council is therefore not merely a medical malpractice watchdog; it is also the primary guardian of morals of the health profession.⁸ As this court held in *Preddy and Another v Health Professions Council of South Africa*⁹:

‘It has been said of the various predecessors of the council that each was the repository of power to make findings about what is ethical and unethical in the medical practice and the body *par excellence* to set the standard of honour to which its members should conform’.

[13] In *Preddy* the appellants, both specialist medical practitioners registered with the Council in terms of the Act, had been found guilty of unprofessional conduct arising from receiving kickbacks in return for referring patients to a particular radiology firm. The Disciplinary Committee of Council found the receipt of the ‘perverse incentives’ by the doctors to be disgraceful conduct. The condemned conduct in *Preddy* did not relate to the practice of medicine. It was also not a listed prohibited form of conduct under the regulations. But it was found to be morally and ethically reprehensible because the medical practitioners concerned had used their access to the relevant patient to make undue financial gains (in addition to the professional fees due to them for their services). In the appeal before us the allegations are, in essence, that Dr Grieve used his access to his patients to benefit himself and his companies unduly, to the prejudice of the patients.

⁷ Subsections 15A (g) and (h).

⁸ *De Beer v Health Professions Council of South Africa* 2007(2) SA 502 (SCA); *Veriava and Others v President SA Medical and Dental Council and Others* 1985 (2) SA 293 (T).

⁹ *Preddy and Another v Health Professions Council of South Africa* 2008 (4) SA 434 (SCA) para [6].

If the allegations are proved, the misconduct in this case could be more serious than in *Preddy*.

[14] Should the Council have awaited the results of criminal prosecution? Indeed a criminal conviction may trigger disciplinary proceedings by the Council or Professional Board as provided in s 45 of the Act. However the Council's disciplinary functions are not limited to instances where there has been criminal conviction. It is the Council's duty to act against conduct that is improper, unethical, dishonourable, disgraceful and unworthy. Conduct may be unethical without being criminal. And criminal prosecution may result in an acquittal for reasons other than the innocence of the respondent or accused. The Council remains obliged to discharge its duties as the moral compass of the health profession. For example, in *De Beer*¹⁰ this court confirmed the increase, by the Council, of a penalty that had been recommended by the disciplinary committee, against a doctor who had sexually abused his patient.¹¹ The Council's decision in *De Beer* was not premised on a criminal conviction. It was an incidence of the Council's initiative in fulfilment of its *custos morum* responsibility.

[15] In this case the allegations were that unprofessional conduct occurred within a doctor-patient relationship. The Council as the administrative body charged with the function of defining the norms and standards, and monitoring adherence to the ethical prescripts of the medical profession, was the primary repository of disciplinary power in relation to unethical conduct by its registered members.

¹⁰ Fn 8 *supra*.

¹¹ *Ibid*

[16] The fact that the conduct complained of was not defined or listed in the regulations did not detract from the Council's administrative powers in respect of other conduct that it reasonably considered to be unprofessional. Indeed s 49 of the Act provides for specification of acts or omissions in respect of which the Council may take disciplinary action. However, the matter does not end there because the section also provides that the powers of the Council shall not be limited to the specified acts. It reads as follows:

‘The Council shall, in consultation with the Professional Board, from time to time, make rules specifying the acts or omissions in respect of which the Professional Board may take disciplinary steps under this Chapter; provided that the powers of the Professional Board to inquire into and deal with any complaint, charge or allegation relating to a health profession under this Chapter, *shall not be limited to the acts or omission so specified*’. (emphasis supplied)

[17] In the end, the two jurisdictional bases for the exercise of the Council's disciplinary authority are registration, by the health professional concerned, with the Council and allegations which, if proved, would constitute improper, or disgraceful or dishonourable or unworthy conduct. In some instances, such as this case, a doctor-patient relationship will be a feature of the alleged conduct. However, such a relationship is not a prerequisite for the council's jurisdiction.

[18] In this case it was submitted on behalf of the Council that the allegations made against Dr Grieve, if proved, would constitute unprofessional conduct; hence the decision to institute disciplinary proceedings. I agree that the decision to institute disciplinary proceedings was rational and within the powers of Council.

[19] Consequently:

- 1 The appeal is upheld with costs including the costs of two counsel.
- 2 The order of the high court is set aside and replaced with the following:
 - ‘1 The *point in limine* is dismissed with costs.
 - 2 The matter is remitted to the Professional Conduct Committee’.

N DAMBUZA
JUDGE OF APPEAL

Appearances

For Appellant: J G Rautenbach SC (with him B Maphosa)
 Instructed by: Mkhonto Ngwenya Incorporated, Pretoria
 Phalatsi & Partners, Bloemfontein

For the Respondent: H F Jacobs SC (with him D E Hugo)
 Instructed by: Hills Incorporated, Pretoria
 Kramer Weighmann and Joubert Inc.,
 Bloemfontein.