Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A535/2015

In the matter between:

DR H GOVENDER **Appellant**

and

THE HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA ("THE HPCSA") **First Respondent**

THE MEDICAL AND DENTAL PROFESSIONS BOARD

OF THE HPCSA **Second Respondent**

THE DISCIPLINARY APPEAL COMMITTEE

OF THE HPCSA **Third Respondent**

THE PRO-FORMA COMPLAINANT OF THE HPCSA **Fourth Respondent**

THE PROFESSIONAL CONDUCT COMMITTEE

OF THE HPCSA **Fifth Respondent**

Court: Justice A Le Grange et Justice J Cloete

Heard: 26 August 2016

Delivered: 26 August 2016

JUDGMENT

CLOETE J:

Introduction

[1] This is an appeal in terms of s 20 of the Health Professions Act 56 of 1974 against the judgment of the third respondent (the Disciplinary Appeal Committee of the HPCSA) upholding the conviction of the appellant by the fifth respondent (the Professional Conduct Committee of the HPCSA). For convenience the third respondent will be referred to as the Appeal Tribunal and the fifth respondent as the Disciplinary Tribunal.

[2] The appellant, a neurosurgeon at Tygerberg Hospital ("the hospital") was initially charged with two counts of unprofessional conduct, but during the course of the proceedings before the Disciplinary Tribunal he was discharged on the second count.

[3] The first count faced by the appellant (relevant for purposes of this appeal), which was amended and also amplified by further particulars provided by the fourth respondent ("PFC"), was that he acted unprofessionally when on 15 June 2008 he failed and/or neglected to correctly complete an entire notification of death form in respect of one Jacobus Cornelius Blomerus ("the deceased") who passed away at the hospital in the early hours of that morning as a result of a brain haemorrhage. The appellant pleaded not guilty.

[4] Two witnesses testified before the Disciplinary Tribunal, namely the deceased's father, Mr Jacobus Zacharias Blomerus, who was called by the PFC, and the appellant, who testified in his own defence.

The evidence before the Disciplinary Tribunal

[5] Mr Blomerus Snr testified that on 1 July 2008 his wife received a letter from his pension fund notifying her that he was deceased and that she should therefore make application for a widows pension.

[6] From that date his bank account was closed and his pension payments and other benefits cancelled. He could no longer use his identity document, drivers licence or passport and was unable to take a scheduled trip to Botswana. It took him weeks to have the error rectified by the Department of Home Affairs.

[7] Upon receiving the patently incorrect notification of his own death Mr Blomerus Snr immediately attended at the neurology section of the hospital in order to investigate how this had come about. He knew that the appellant was one of the neurosurgeons who had attended to the deceased. He had met the appellant for about 15 minutes on the day his son passed away after having been notified by the hospital that he was dying.

[8] He and his wife travelled to the hospital from their home in Gansbaai where he met the appellant, who explained the treatment administered following his son's admission via ambulance from Hermanus Hospital a few days earlier, as well as the tragic inevitability of his imminent death.

[9] Mr Blomerus Snr was unable to make contact with the appellant to assist him in getting to the bottom of the matter. Nor was he successful in making contact with the head of that section. He spoke to one of the secretaries and, in his words *'It came out after they provided some documents to me where we discovered that there was a mistake in the certificate that was issued'.*

[10] When asked by the PFC whether he knew *'who issued or signed for the death certificate to be issued'* Mr Blomerus Snr replied that, according to the copy of the death certificate he received, it was the appellant who had done so.

[11] Mr Blomerus Snr was referred to a notification of death form on which sections A to D had all been completed (Exhibit "G(B)"). Section A reflected the particulars of the deceased as Jacobus Zacharias Blomerus with identity number 4……. and date of birth 17 August 1968.

[12] He identified the names and identity number as his own, but testified that he had not seen this particular form before giving evidence. He was asked whether he knew how his particulars had found their way onto the form and replied that he presumed they were taken from another form completed by ambulance personnel who transported his son to the hospital after he had supplied his particulars as the deceased's next of kin.

[13] Mr Blomerus Snr had assumed that the notification of death form was fully completed by the appellant because it bore his signature. He conceded that he had not witnessed the appellant completing the form, nor did he know who had in fact completed it. He was not able to dispute the appellant's version that when he

signed the form it contained only certain particulars completed by a member of the administrative staff, which he then signed after having satisfied himself that they were correct. He was also not able to dispute the appellant's version that it was only after the appellant signed the form that another administrative staff member had inserted the balance of the information reflected therein. That concluded the case for the HPCSA.

[14] The appellant's evidence was that he had contacted Mr Blomerus Snr when his son's condition deteriorated following surgery. He confirmed what was discussed with Mr Blomerus Snr on arrival at the hospital and testified that it was some 14 to 16 hours later, early on the morning of Sunday 15 June 2008, that the deceased passed away.

[15] The appellant explained that the standard procedure in place at the hospital at the time was as follows. When a patient was admitted to a ward he arrived with 4 patient stickers and a file already prepared by administrative staff in the admissions section. Each sticker reflected the patient's forename and surname, his date of birth, gender, home language and allocated inpatient (IP) number. No other personal particulars were provided whether on the patient's stickers or in his patient file.

[16] He was referred to copies of the deceased's hospital stickers (Exh "H") which contained the names Jacobus Blomerus, his date of birth of 17 August 1968, his gender, his home language as Afrikaans and his IP number of 7…….

[17] The appellant also explained the hospital's standard procedure to be followed upon the death of a patient. The first step was to identify the patient with reference to the information contained on his hospital stickers and inpatient number as it corresponded to that reflected on the patient's file.

[18] The next step entailed entering the relevant information concerning the date, time and cause of death in the inpatient folder. This data was then passed on to the administration department for a notification of death form to be generated via a central depot and returned for the doctor concerned to sign.

[19] It was the appellant's evidence that upon receipt of the notification of death form he checked the particulars completed thereon by one of the administrative staff against the information contained on the deceased's hospital stickers which were returned with his file for this purpose. This was the only information which he had available to him to confirm they were correct. He checked that it correctly contained the deceased's forename and surname, his date of birth, date of death and inpatient number. He thereafter signed the form and it was returned to the administration department. The appellant's evidence accorded with what was contained in Exh "G(A)", being a partially completed notification of death form bearing his signature.

[20] The appellant was referred to a letter he wrote by hand on the day of the deceased's death requesting the hospital's pathology unit to conduct a post-mortem examination at the instance of the deceased's spouse in which he also requested them to re-issue a full death certificate thereafter. He explained that the deceased's spouse subsequently changed her mind and that no post-mortem examination was in fact carried out.

[21] It was also the appellant's evidence that it was standard procedure, once the notification of death form was signed by the doctor concerned, that it was returned to the administrative section for those staff to complete the remaining particulars such as the deceased's identity number and details of next of kin (referred to in section B as *'particulars of informant'*). The doctors did not have access to this type of information which was captured by the administrative staff at the time of a patient's admission and stored on their computers.

[22] As it turned out, an unidentified administrative staff member then erroneously transposed the particulars of Mr Blomerus Snr with those of the deceased in the blank spaces still left on the form. This administrative error resulted in the final version of the notification of death form reflecting the deceased's identity number as that of Mr Blomerus Snr (although the date of birth in the same section was clearly that of the deceased), and the insertion of Mr Blomerus Snr's second name of Zacharias instead of the deceased's second name of Cornelius. It also resulted in the deceased being reflected as the informant (or his own next of kin).

[23] The appellant's evidence was further that the particulars of the funeral undertaker and the deceased's thumbprints appearing on Exh "G(B)", and which thus formed part of the entire form, would have been attended to by the undertakers concerned and the mortuary staff respectively. The doctor signing the notification of death form did not take the deceased's thumbprints and again would have no information about the undertakers engaged to attend to the burial or cremation.

[24] The appellant thus confirmed that he had not personally completed the entire form (which was the charge that he faced) and moreover pointed out that his handwriting

was different to that of the persons who at various stages completed the rest of the form.

[25] None of this evidence was challenged in cross-examination save that the PFC tried to persuade the appellant to concede that the number 7, wherever it appeared on the form, had been written by the same individual. The appellant correctly responded that they differed in appearance, given that some were crossed and others were not. The PFC then asked the appellant to confirm that when he signed the form he was verifying that the particulars of the deceased reflected in section A were correct. When the appellant tried to repeat his earlier evidence that at the time he signed the form the particulars then reflected were correct, the chairperson of the Disciplinary Tribunal ruled that he was only permitted to answer with a yes or a no. When he was thereafter specifically asked what information had been included when he signed the form, the appellant remained consistent in his account.

[26] Thereafter certain questions were posed by the chairperson, one other member and the legal advisor of the Disciplinary Tribunal. These questions either related to collateral issues or were answered by the appellant in a manner entirely consistent with his earlier evidence. In response to a question by the chairperson he explained that an inpatient file contained information of a clinical nature only, and repeated that particulars such as a patient's identity number, telephone number, address and next of kin would not be found therein. That concluded the evidence.

The findings of the Disciplinary Tribunal

[27] In its judgment the Disciplinary Tribunal formulated the issue as follows at para [35]:

> *'The crux of this inquiry is whether the pro-forma complainant has on a balance of probabilities proved that the respondent has failed or neglected to correctly complete the Notification of Death form…'*

[28] The Disciplinary Tribunal rejected the appellant's version on the following grounds. First, although he alleged that all of the demographic data of Mr Blomerus Snr and the deceased was not contained in the clinical file, and was kept by administrative staff who refused him access to that information, he could not explain how and where he got Mr Blomerus Snr's details in order to contact him when his son was dying.

[29] Second, it found that the appellant was not a credible witness because he evaded simple questions that required him to answer with a yes or a no, and gave long, irrelevant and vague responses. Third, he materially contradicted himself in relation to: (a) when the information of Mr Blomerus Snr and that of the deceased ought to have been completed on the form; and (b) who precisely it was who had completed the particulars thereon. The Disciplinary Tribunal regarded as particularly damning of the appellant that he could not explain the presence of two different sets of handwriting in section A of the form.

[30] It then proceeded to find by majority that, because the form requires the person signing it to verify the accuracy of the information contained in section A (being the particulars of the deceased), which information was incorrect, the appellant was guilty as charged.

The findings of the Appeal Tribunal

[31] The appellant advanced 3 grounds of appeal before the Appeal Tribunal (the same grounds were advanced before us). They were that (a) the Disciplinary Tribunal erred in dismissing an application for the discharge of the appellant at the close of the HPCSA case; (b) a proper evaluation of the evidence would have resulted in the appellant's acquittal; and (c) there were irregularities in the conduct of the chairperson and in the failure by the Disciplinary Tribunal to disclose in its judgment which members constituted the dissenting minority and the reasons for their dissent.

[32] For the reasons that follow later I will only refer to the Appeal Tribunal's finding on (b) above.

[33] Although it correctly accepted that it had not been proven that the appellant completed the entire form (which of course was the charge that he faced) the Appeal Tribunal dispensed with the submissions of the appellant's counsel in this regard in the following way. First, it found that the amplification of the charge by the PFC to specify that the form was completed in full by the appellant did not mean that the HPCSA had relied on completion of the entire form as the unprofessional conduct with which the appellant had been charged. It reasoned at para [25] of its judgment that:

> *'For instance, it could not have been understood from the reply to a request for further particulars that the appellant completed the Form to mean that the appellant also completed the Section of the Form that was meant to be completed by the funeral undertaker…'*

[34] Second, it rejected counsel's argument, based on the evidence, that when the appellant signed the form, the information reflected in section A was correct. It found that:

> *'This argument is baffling. It cannot be that the information in Section A is correct at some point and incorrect at some other point subsequently.'*

[35] Without embarking on a proper evaluation of the evidence, the Appeal Tribunal proceeded to conclude that *'the appellant failed or neglected to correctly complete the Notification of Death Form when he completed Section D2 of the Form'.* It thus dismissed the appeal.

Discussion

[36] It bears emphasis that what the Disciplinary Tribunal was called upon to determine was whether the HPCSA had proven, on a balance of probabilities, that the appellant was guilty of unprofessional conduct for having incorrectly completed all of the particulars on the notification of death form, because this was the only charge that he faced.

[37] The charge, as originally formulated in the charge sheet, was that:

> *'…you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that on or about 15 June 2008, in respect of Jacobus Cornelius Blomerus (hereinafter referred to as "the deceased"), you acted in a manner that is not in accordance with the norms and standards of your profession in that you:*

> *1.1 failed and/or neglected to correctly complete the Notification of Death forms with the names of the deceased to be Jacobus Zacharius* [sic] *Blomerus, whereas in fact and in truth, the deceased is Jacobus Cornelius Blomerus…'*

[38] The reference to *'forms'* was subsequently amended to *'form'*. In the request for further particulars delivered on behalf of the appellant the following pertinent questions were asked:

> *'33. By whom was the information contained in each of the aforesaid Notification of Death forms allegedly completed and/or filled in?*
>
> *34. Does the pro-forma complainant dispute that the respondent did not complete and/or fill in Part A in any of the aforesaid forms?'*

[39] In its reply to such request the HPCSA responded *'by Dr H Govender'* and *'yes'* respectively. Accordingly, at the commencement of the hearing before the Disciplinary Tribunal, the case that the appellant was called upon to meet was that he had completed all of the information in the notification of death form, including all of the information contained in part (or section) A, being all of the particulars of the deceased. As was held in *Law Society v Nel* 2012 (4) SA 274 (SCA) at para [8]:

> *'[8] It is self-evident that a charge against a legal practitioner in a disciplinary enquiry must be formulated with adequate particularity to enable that legal practitioner to answer the charge, and the enquiry must be restricted thereto. It also follows that a council which initiates a disciplinary enquiry is bound by the charge/s which it prefers against a legal practitioner.'*

[40] In *De La Rouviere v SA Medical and Dental Council* 1977 (1) SA 85 (N) at 97D-G the test in matters of this nature was formulated as follows:

> *'There can be no quarrel with an approach that the respondent is the body,* par excellence*, to set the standard of honour to which its members should conform and to decide, upon proved facts, whether or not a member's conduct conforms thereto. There are however two legs to an enquiry of this nature: to establish the facts and then upon those facts to conclude whether or not the proved conduct falls short of the required standard. This also appears from reg. 14 (*c*) which enjoins the body holding the enquiry (the Council or the disciplinary committee) to determine, firstly, whether sufficient facts have been proved to its satisfaction to support the charge and, secondly, whether the charge so supported constitutes improper or disgraceful conduct. The setting of the required standard of honour is more of a subjective nature and, as it is a function entrusted to the respondent, a Court will be slow to interfere with a decision honestly arrived at. The same consideration does not necessarily apply to the first leg of the enquiry which is more an objective one. The members of the Council are not, by virtue of their training and profession, necessarily in a better position to decide whether certain conduct has as a fact been proved or not. A Court will accordingly, depending upon the particular circumstances, be less slow to interfere with such a factual finding.'*

[41] It will be noted that reference is made in the above quoted passage to regulation 14 (c), which was one of the regulations applicable at the time. The current regulations (published under GN R 102 in GG 31859 of 6 February 2009) somewhat inexplicably have no similar provision. However *De La Rouviere* is still good law.

[42] It is trite that an appeal court will be reluctant to upset the factual findings of a trial court (or, in this case, a tribunal), and will only do so if satisfied that there has been a material misdirection which, broadly speaking, can fall into one of two categories. The first is where the findings on the proven facts are flawed. The second is where the reasons for the tribunal's findings may, as far as they go, be satisfactory, but the tribunal has overlooked certain facts or has failed to properly consider the probabilities.

[43] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and Others* 2003 (1) SA 11 (SCA) at para [6] the Supreme Court of Appeal, referring to certain factual and credibility findings made by the trial court, held as follows:

> *'But this appraisal does not seem to have depended on an analysis of the various factors enumerated in the previous paragraph but largely on the Court a quo's estimation of the overall probabilities. If that estimation is shown to be suspect, so too must be the Court a quo's conclusions on credibility.'*

[44] I have certain fundamental difficulties with the reasoning and findings of the Disciplinary Tribunal. First, it was wrong to conclude that the appellant could not explain how and where he obtained Mr Blomerus Snr's details in order to contact him when his son was dying. There is nothing in the record to indicate that he was ever even asked this question. In addition, neither Exhibits "G(A)" or "(B)" reflect a contact telephone number for Mr Blomerus Snr, although provision is made therefor. Moreover, it was never the appellant's testimony that he was refused access to this information by the administrative staff, but merely that he, and other doctors, had no direct access to it. There are thus any number of possibilities as to how the appellant was able to make contact, but given the absence of any evidence adduced in this regard they would be nothing more than speculation.

[45] Second, the record reflects that the appellant neither evaded questions nor did he give long, irrelevant and vague answers. Indeed, the Disciplinary Tribunal's legal assessor, Adv Singh, remarked when he was questioning the appellant that *'I think you gave your evidence in a very cogent and clear way'.* That the appellant was at times inappropriately stifled in giving his account, and eventually became somewhat

irritated by having to repeat himself, often more than three times in relation to a single aspect, cannot redound on his credibility.

[46] Third, the appellant did not materially contradict himself on any relevant aspect of his testimony. His consistent and in fact uncontested evidence about the standard operating procedures at the hospital (over which he had no control) established that he had followed them meticulously, and there was simply nothing placed before the tribunal by the HPCSA to gainsay his version.

[47] Fourth, there is no merit in the tribunal's finding that the appellant could not explain the presence of two different sets of handwriting in section A of the form. That is precisely what he did when explaining the hospital's standard operating procedure. Moreover, even a cursory comparison between his handwriting contained in Exhibit "J" (being the request for the post-mortem investigation) and the handwriting appearing on Exhibit "G" makes it abundantly clear that it was not his handwriting in the body of that form. It is now settled law that a court is itself entitled to compare handwriting specimens, even where expert evidence is adduced: see *S v Boesak* 2000 (1) SACR 649 (SCA) at para [57]. Of course, no expert evidence was adduced in the present matter.

[48] Fifth, while it may be that the wording of the form indicates that the person signing it verifies the accuracy of the information contained in section A (being the particulars of the deceased), the appellant's uncontroverted evidence was that when he signed the form, the particulars then reflected thereon were accurate according to the information that he had available to him. It was thus wrong of the Disciplinary Tribunal to find that, because this was required in terms of the wording of the form,

whatever was subsequently inserted somehow became the appellant's responsibility. Put differently, the hospital's standard operating procedure at the time may have been questionable, but that is not the charge that the appellant faced.

[49] It follows that the HPCSA failed to prove sufficient facts on a balance of probabilities to support the charge. Accordingly, it failed to pass the first leg of the enquiry referred to in *De La Rouviere*. The second leg of the enquiry would only have become relevant had this been done. Accordingly, the appellant was wrongly convicted.

[50] As far as the findings of the Appeal Tribunal are concerned, they were fatally flawed. First, it is trite that the charge against the appellant stood to be read as qualified and restricted by the further particulars provided. Second, it failed to have any regard to the evidence before the Disciplinary Tribunal in reaching its conclusion regarding the completion of the information in section A, as is borne out by its finding that *'*(i)*t cannot be that the information in Section A is correct at some point and incorrect at some other point subsequently'.*

[51] I will now deal briefly with the other two grounds of appeal. The first relates to the Disciplinary Tribunal's refusal to discharge the appellant at the close of the HPCSA case. I do not believe that this ground is well-founded. The Disciplinary Tribunal cannot fairly be criticised for requiring the appellant to furnish an explanation for an incorrectly completed form which, it was common cause, bore his signature. The second relates to the conduct of the Chairperson during the course of the proceedings. While we may have dealt with the matter differently, I do not believe

that the conduct of the Chairperson was such that there were any material irregularities, particularly bearing in mind that these were not proceedings before a court of law presided over by a magistrate or judge. As far as the failure to furnish reasons for the dissent of the minority is concerned, there is no provision therefore in the applicable regulations.

Conclusion

[52] **I would thus make the following order:**

1. **The appeal is upheld.**
2. **The appellant's conviction and sentence are set aside.**
3. **The costs of this appeal shall be borne by the first respondent as well as any other respondents who opposed, jointly and severally, the one paying, the other to be absolved.**

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J I CLOETE

LE GRANGE J

I agree and it is so ordered.

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A LE GRANGE