IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15535/2022

In the matter between:

Dr Vuyelwa Euphemia Nongogi	**Applicant**
And	
The Professional Board for Medical and Dental Professions	**First Respondent**
The Minister of Health	**Second Respondent**
The Health Professions Council of South Africa	**Third Respondent**
The Chairperson of the Professional Conduct Committee	**Fourth Respondent**
The Pro Forma Complainant of the Health Professions Council of South Africa	**Fifth Respondent**
The Minister of Justice and Correctional Services	**Sixth Respondent**

JUDGMENT ELECTRONICALLY DELIVERED ON

8 NOVEMBER 2022

Baartman, J

[1] The applicant, a medical practitioner in private practice, approached the court on an urgent basis to suspend the 6 months' suspension imposed on her following disciplinary proceedings. The applicant sought the following relief in Part A:

> '1. Condoning non-compliance with the Rules of Court...matter be heard as one of urgency in terms of Rule 6(12).
>
> 2. An order declaring that the Applicant's filing of a notice of appeal in terms of the Regulations for the Conduct of Inquiries into alleged Unprofessional Conduct...under the Health Professions Act 56 of 1974...has the legal effect of suspending the penalty imposed by the First Respondent's Professional Conduct Committee on 15 July 2022 on the Applicant until the finalisation of the appeal process contemplated in terms of the Act, including any appeal to the High Court.
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> 3. In the alternative, an order that, pending the determination of Part B, that the operation of the penalty imposed by the First Respondent's Professional Conduct Committee on 15 July 2022 on the Applicant is suspended.
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> 4. That Part B[1] stand over for determination until the internal process contemplated in terms of the Act has come to an end, and granting the

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[1] 'Part B: 7. Reviewing and setting aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the First Respondent's decisions (taken by the First Respondent's Professional Conduct Committee on 22 June 2022, 14 and 15 July 2022) as follows:
7.1 to convict the Applicant on counts 1,2,4(ii), 5, 8, 9, 10 and 11;
7.2 by imposing a penalty of 6-month suspension from practice on the Applicant;
7.3 by refusing the Applicant's application for the postponement on 22 June 2022;
...
9. An order that section 42(1A) of the Act is declared unconstitutional and invalid to the extent that the section has the effect of not suspending the operation of a penalty imposed in terms of section 42 of the Act in circumstances where an appeal has been noted against the conviction(s) in respect of which the penalty of suspension or erasure has been imposed or a review application has been launched...
10. An order that section 42(1A) of the Act is declared unconstitutional and invalid...'

Applicant leave to bring any appeal to the High Court as contemplated in terms of the Act, on these same papers, as supplemented.

5. That the First Respondent shall pay the costs of Part A. …'

[2] The applicant, who practises as a general practitioner in Khayelitsha in the Western Cape, was charged with 11 counts of unprofessional conduct. After many delays, the hearing went ahead in her absence and on 14 July 2022, the applicant was informed that she had been convicted on 6 of the 11 counts and sentenced to 6 months' suspension.

[3] It is apparent from the written judgment that on 17 February 2021, the applicant was legally represented when she appeared at a pretrial hearing. Thereafter the matter was struck off the roll and re-enrolled, but on 1 December 2021, counsel informed the disciplinary panel that the applicant had been booked off sick. The matter was postponed to 5 April 2022 on which date counsel presented a second medical certificate as justification for the applicant's absence from the hearing, although the certificate did not disclose an illness.

[4] At the insistence of the disciplinary committee (**the committee**), an improved certificate was presented from which it appeared that the applicant suffered from 'influenza with lower respiratory infection' and that 'Pneumonia Isolation for 7 days' was required. Reluctantly, the committee agreed to postpone the matter to 22 and 23 June 2022. However, on 22 June 2022, the applicant appeared in person and requested a postponement to obtain legal representation. Apparently, due to financial constraints, she could no longer afford her previous legal representative. The committee refused the application and proceeded in the applicant's absence and convicted her on counts 1, 2, 8, 9, 10 and 11.

[5] It is common cause that the committee erred when it imposed sentence in that it took count 5 into consideration as if it had also convicted the applicant on that count. It follows that the sentence imposed will have to be set aside and an alternate sentence imposed. The applicant has already served 3 of the 6 months' suspension. The applicant, in terms of the relevant statutory provisions, duly filed a notice of appeal against her conviction and sentence.

[6] The respondents held the firm view that the notice of appeal did not suspend the operation of the sentence and the applicant was threatened with criminal sanction should she practise as a medical doctor during the period of suspension. Against that background, the applicant approached the court on an urgent basis for a declarator in respect of section 42(1A) of the Health Professions Act 56 of 1974, which provides as follows:

> '(1A) If an appeal is lodged against a penalty of erasure or suspension from practice, such penalty shall remain effective until the appeal is finalised.'

The declarator (prayer 2 referred to above)

[7] The impugned section is contrary to the common law position that the noting of an appeal suspends the operation of the order appealed against. Section 18 of the Superior Courts Act 10 of 2013 (**the Act**) replaced the common law and now regulates the effect of noting an appeal on the order appealed against as follows:

> **'Suspension of decision pending appeal**
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> (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal....'

[8] The legislator, deliberately, prescribed an alternate, onerous regime for appeals against a sentence of 'suspension or erasure'. Mr Roux

SC, the applicant's counsel, proffered the following explanation for the distinction:

'39. The reason for the distinction is obvious, namely the legislature considered the imposition of the penalty of erasure or suspension from practice as sufficient justification to protect members of the public against such a medical practitioner by prescribing that the penalty shall remain in operation, despite the lodging of an appeal and the possibility that the medical practitioner may be successful with the pending appeal and the penalty may therefore be said aside.'

[9] The applicant complains that the practical effect of the impugned provision, although clear, 'is singularly unfair...and effectively...takes away a medical practitioner's right of appeal'. That result, so the submission went, is inconsistent with the Constitution as a successful appellant would have been unable to practise pending the appeal process with no remedy to rectify the position. Counsel further submitted that the impugned provisions compromise 'three constitutional rights, the right of access to courts, the right to administrative justice and the right to practise one's profession.'

[10] In Waymark[2], the court held as follows:

'[29] The principles of statutory interpretation are by now well settled. In *Endumeni* the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of –

(a)the language used in the light of ordinary rules of grammar and syntax;

(b) the context in which the provision appears; and

(c) the apparent purpose to which it is directed.' (Internal footnotes omitted.)

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[2] *Road Traffic Management Cooperation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC).

[11] Evidently, legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights.[3] The impugned section has been subject to judicial scrutiny. In Peer[4], the court granted interim relief suspending a penalty of erasure following a conviction on 22 counts of fraud. Peer pleaded guilty to submitting false medical claims. His appeal against the penalty was dismissed. The court *a quo* accepted that an appeal against the dismissal was pending. Peer sought interim relief in Part A and in Part B; he sought that the section be declared unconstitutional and invalid. The court *a quo* granted interim relief as follows:

> '...section 42(1A) would not pass constitutional muster if it is not subject to judicial oversight. In my view it is an obvious conclusion. For the reasons...I am of the view that section 42(1A) contains no provision authorising anybody to grant relief against the severity of its provisions. There is therefore no exercise of a discretion that can be judicially reviewed. For that reason, I am of the view that there is a reasonable prospect that if Part B...is pursued, appropriate relief may be granted.
>
> For the same reason this court would be entitled to grant interim relief. I do not think it is necessary for this court, sitting on an urgent application, and being concern with... interim relief, to go through all the procedures that would be required at the hearing of Part B of the notice of motion.'

[12] In this urgent application, the grounds for a declarator were not clearly articulated. Mr Bhoopschand SC, the first respondent's counsel, complained that the founding affidavit was 'lengthy and tardy' ...[and] 'this application is not a model of clarity.' Mr Masuku SC, who appeared with Mr Francis, the second respondent's counsel, echoed the same sentiments. I have sympathy for the legitimate complaint. I, conscious of the important separation of powers doctrine, accept that the power to regulate the medical profession is the legislator's prerogative. I share the sentiments expressed in Peer that the

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[3] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.
[4] *Peer v The Chairperson: Medical and Dental Professions Board* 2010 JDR 1609 (GNP).

constitutional challenge in Part B, on the face of it, has prospects of success. In this urgent application, the founding papers do not sufficiently set out the case for a proper consideration of a declarator. I accept that the respondents had difficulty in dealing with the case made out in argument after counsel had spent considerable time clarifying the founding papers.

[13] In the circumstances of this matter, where the legislator had in unambiguous terms expressed the regime to apply when a medical practitioner is sentenced to 'suspension or erasure' and the reasons for the regime are understood by all as being the protection of the public against practitioners found wanting, a proper case had to be presented for the declaratory relief sought.[5] The respondents were unclear about the case they were called upon to meet on an urgent basis. I therefore intend to refuse the application for a declarator.

Alternative relief (prayer 3)

[14] The jurisdictional requirements for interim relief are well known; I deal with them in turn.[6] Mr Bhoopchand further complained that the application 'suffers...terminally from its defects, including the shocking failure of Applicant to identify a single right worthy of protection'. About the applicant's right to practise her profession, he submitted that 'it would be highly prejudicial to the Respondents if this court grants relief based on a case made out in the heads of argument...the prejudice ...is untold...if Applicant protests that her right to practise her profession is impugned, then First Respondent would have raised the argument that it is bound by its obligation to protect the public...'

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[5] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

[6] The requirements for interim relief are: (1) a *prima facie* right though open to some doubt, (2) a well-grounded apprehension that the right will be irreparably harmed if the interdict is not granted, (3) the balance of convenience must favour the award of the interdict; (4) there must no alternative remedy available to the applicant. *Setlogelo v Setlogelo* 1914 AD 221.

[15] The applicant said the following about her right to practise her profession:

'15...Fifth Respondent informed the Applicant's legal representatives that the ...appeal does not have the effect of suspending her penalty...and should she carry on with her practice in the meantime she will be committing a criminal offence...

32. ...The said penalty has the effect of depriving her for a period of 6 months of the whole of the income she otherwise would have earned from her practise. In the meantime, she will remain liable for the expenses relating to her practise, which includes monthly rental in the amount of R3 000, monthly stationary expenses and office supplies in the amount of R5 000, monthly salaries in the total amount of R40 000, monthly maintenance of the premises from which she practises in the amount of R1000 and monthly premiums for ADT security in the amount of R517.00. The 6-month suspension will have the further effect of obliterating the goodwill of her practice, meaning she is likely to suffer a substantial drop in the number of patients upon resumption of her practise after 6 months, resulting in further losses. This all occurred in the context of a doctor who was already financially distressed due to underlying medical conditions and Covid. ...'

[16] The applicant continued to set out her financial obligations in great detail, including those she incurs in respect of her dependant minor grandchild and legal costs.

[17] The first respondent said the following:

'10. The First and Third Respondents are the moral custodians of the medical profession, and their functions include the regulation of the profession and the protection of the public. These obligations have to be weighed against the tenor of the Applicant's allegations. ...

11. Applicant is exclusively focussed on her own interest without regard for the welfare and the safety of her patients, and without insight into her role as a registered practitioner, or the obligation of the First Respondent to regulate the conduct of practitioners in the country. ...

17. Applicant has unfortunately burdened this urgent application unduly with lengthy and argumentative allegations, mostly worded in the third person, ...

22. Applicant has not indicated whether she remains practising pending the appeal...I confirm the interpretation [Fifth Respondent]...should [the

applicant] practise her profession before an appeal is finalised, she would be committing a criminal offence [annexure VN2]

...

25. ...To the extent that Applicant seeks interdictory relief, she fails to stipulate the requirements therefore or the facts underpinning those requirements. Nor does the Applicant seek an order arising from any infringement of her rights.'

[18] The fourth respondent said the following:

'...52 The prospect of success is similarly unhelpful to the alternative relief sought in Part A of the Notice of Motion. Since it appears...the applicant seeks an order effectively interdicting the implementation of section 42(1A) of the Act, no attempt has been made to meet the requirements of such an interdict.'

[19] In reply, the applicant said:

'...26. I was advised that in law I am entitled to practise, having regard to the case made out in this application. I was also thereafter advised that I should wait for the issues to be confirmed...Consequently, my practice is dormant, I cannot earn any income and have to continue paying the expenses listed in the founding papers, in circumstances when the grounds of appeal and review show I should never have been convicted...As a consequence of my suspension and thus not earning an income, I sought loans in the amount of R259 000 and R25 000 respectively from family ...'

[20] I am persuaded that the papers do indicate that the applicant, among others, seeks to protect her right to practise her profession. The first respondent has emphasised its regulatory role and the balance it must strike between the practitioner and the general public. I agree that the papers leave much to be desired, but they are not so deficient as to non-suit the applicant. The *prima facie* right implicated is the applicant's right to practise her profession.

A well-grounded apprehension of irreparable harm

[21] The applicant has indicated that her practice will be dormant for the period of suspension but that she is still liable for the substantial

monthly expenses in respect of the business. She has a dependant minor granddaughter and incurs monthly expenses in respect of her education and other needs.

[22] She has already served half of the period of suspension in circumstances where it is common cause that the committee erred at least in respect of count 5 and that the sentence must be reconsidered, irrespective of the merits or outcome of the appeal. It is axiomatic that the same sentence cannot be imposed nor a more onerous one. It follows that the relevant authorities do not view the applicant's case as one deserving 'erasure'; therefore, she will be fit to practise after suspension. I am stating the obvious, not attempting to usurp the relevant committee's function. In the circumstances of this matter, where the applicant has already served half the sentence, the harm is obvious.

The balance of convenience

[23] The respondents, particularly the first respondent, have obligations towards the general public to protect them from unscrupulous medical practitioners. A suspension or erasure is imposed for the more serious offences, therefore, the noting of an appeal does not suspend the penalty. It recognises that the relevant authority is best placed to assess whether a practitioner should be permanently or temporarily removed from office. A suspension is imposed when the practitioner can be 'rehabilitated' and 'erasure' when the practitioner 'poses a danger to society'. The consequences of a failure to carry out this mandate could result in serious injury or even death to the unsuspecting public.

[24] I have accepted that the constitutional challenge in Part B holds good prospects and that an alternate sentence will be imposed. Even if a suspension, which would be competent, is imposed upon reconsideration, it would be for less than 6 months. The applicant has

already served 3 months, so the balance of convenience favours the applicant.

No alternative remedy

[25] If the remainder of the sentence is not suspended, the applicant would have no alternate remedy once the sentence is reconsidered. As indicated, an alternate, lesser sentence is implied irrespective of the applicant's prospects on appeal in respect of the other counts.

Urgency

[26] As indicated above, the application was brought on an urgent basis. The respondents addressed the lack of urgency in detail. The matter first appeared in the urgent court on 5 October 2022 before Le Grange J, who postponed the matter to 19 October 2022, by agreement between the parties, and the second respondent tendered the costs.

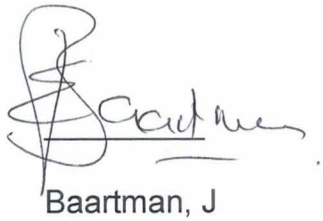
[27] On the latter date, the matter was crowded out and was only heard on 27 October 2022. At that hearing, the respondents persisted that the matter should be struck off the roll for want of urgency. On 5 October 2022, they would probably have succeeded; they were, however, content to agree to postpone the matter. I have decided to deal with the merits because of the view I take in respect of interim relief.

Conclusion

[28] I, for the reasons stated above, am persuaded that the applicant has made out a case for interim relief despite the many shortcomings in her founding papers. However, I am not persuaded to grant the relief pending finalisation of Part B; instead, I intend to grant the relief pending finalisation of the internal appeal process and reconsideration of the sentence imposed considering the admitted error in respect of count 5.

Order

[29] The operation of the penalty imposed by the first respondent's Professional Conduct Committee on 15 July 2022 on the applicant is suspended pending finalisation of the pending internal appeal proceedings and reconsideration of the 6 months' suspension that has been imposed.



Baartman, J