

KUMURAI CHIKWAVA
versus
HEALTH PROFESSIONS AUTHORITY ZIMBABWE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 26 March & 31 October 2018

Opposed application

C Shonhiwa, for the applicant
T Kativhu, for the respondent

KWENDA J: The applicant is a medical practitioner. In 2015 he appeared before a disciplinary committee duly constituted in terms of s 112 (2) of the Health Professions Act [*Chapter 28:19*] facing three counts of performing acts pertaining to the profession or calling in an unethical, improper or disgraceful manner alternatively improper or disgraceful conduct, when regard is had to his profession or calling. The charges emanated from the following facts
1st count

In the year 2014 applicant practised obstetrics and maternity at No. 15A 6th Avenue, Parktown, Waterfalls contrary to an endorsement on his practising licence for the year 2013-2014 prohibiting him from doing maternity and obstetrics until he undertook a period of twelve months orientation at a Central Hospital under supervision of Obstetricians who will provide reports. The ban followed a conviction in the year 2013 for misconduct in his practice of maternity. The endorsement is common cause and was never challenged by the applicant

Six women testified that they had personally delivered babies at the applicant's clinic and that the applicant offered antenatal care by himself. They were happy to have delivered babies with his assistance. The applicant admitted delivering the babies contrary to the ban but said it was because the women kept coming to him. It is also common cause the one Dr Chidzewe Nzou, who was the applicant's practitioner in charge failed to restrain the applicant. Dr Chidzewe Nzou had on occasions intervened to issue birth records since the

applicant was no longer authorised to do so. Accordingly the applicant practised obstetrics well knowing that he was serving a ban.

Count 2

Doctors who deliver babies have a statutory obligation to facilitate the registration of the births by the Registrar of births. Following the ban on obstetrics, the Registrar of Births withdrew from the applicant the Birth Record Confirmation Book. Notwithstanding the withdrawal of the book, the applicant continued to deliver babies but failed to facilitate the process of acquiring birth certificates which is a mandatory requirement to be fulfilled by a medical practitioner practising obstetrics and maternity. The applicant delivered six babies which he failed to assist in acquiring birth certificates.

The applicant admitted that The Registrar withdrew the Birth confirmation Book following the departure of Dr Nzou. He also admitted that he released the patients' antenatal notes and records to assist them in obtaining birth certificates. In the process he released confidential medical records and information.

Count 3

During the same year, the applicant practised from unregistered premises. This again was common cause.

The disciplinary committee found the applicant guilty on all three counts. The applicant had a previous conviction on maternity related offence handed down in 2013. He had been sentenced to removal from the register of Medical and Dental Practitioners wholly suspended on condition that he did not commit a similar offence. Applicant had committed the three counts at a time when the previous conviction was still fresh. Accordingly the Disciplinary Committee recommended in terms of s 113 (1) of the Act that the applicant's names be removed from the register. The respondent accepted the recommendation and removed the applicant from the register on 26 June 2015.

The applicant appealed to the Secretary General who constituted an Appeals Committee. The applicant stated the following as his only ground of appeal:

“The MBPCZ erred at law in removing the appellant from theregister after placing reliance on the recommendation of the Disciplinary Committee....which recommendation was based on malicious, false, unfounded evidence and allegations.

NB Take notice that before this hearing of the appeal the appellant shall submit written submission and documentary evidence in support of his appeal.”

The Appeals Committee dismissed the appeal on the 21st September 2015 after upholding a preliminary objection and accepting that there were no proper grounds before it. The decision was communicated to the applicant on 23 September 2015.

The applicant had the right to appeal to this Court against the respondent's decision within three months. The period of right to appeal to this court lapsed on the 22nd December 2015. It is common cause that this application was filed one year ten months after the right had lapsed seeking:-

1. Condonation of his late noting of appeal
2. Leave to appeal out of time and
3. No order as to costs

The applicant's grounds of application are as follows:-

1. Explanation for non-compliance

Applicant submitted that he was not represented at his appeal before the respondent's appeals committee. He did not understand the implications of the dismissal of his appeal. He thought the appeal would be heard again. He said he approached his present legal practitioner for legal advice but they insisted on a deposit. He was out of pocket. Somehow, he puts his explanation into question when he submits in the same affidavit that the same legal practitioners assisted him in another matter, HC 7414/14.

2. Prospects of Success

The applicant submitted that the respondent's appeals committee erred in dismissing his appeal on a technicality because there is no prescribed form of appeal. Since he was not legally represented the Appeals Committee was not supposed to dismiss his appeal on a point *in limine*. He submitted further that the respondent had been determined to remove him on the register by all means. It had subjected him to numerous psychiatric assessments which he had passed. He said the maternity ban imposed on him was not justified. To the contrary, the respondent had allowed the applicant to continue practicing despite a conviction and that is not consistent with his submission that the respondent was determined to deregister him.

The applicant did not state what it is that he intended to submit before the Appeals Committee on the merits. He said he had intended to make submissions on the merits of the conviction. He never did. Accordingly the court does not know what he bases his prospects of success on.

3. Importance of the matter to the parties

The applicant submitted that his deregistration “affects (his) passion andlivelihood”

4. Convenience to the Court

Applicant submitted that it was convenient to this court to hear his appeal. I failed to understand the point being made. The court has no interest in the outcome except to do justice.

5. Avoidance of delays in the administration of justice

The applicant submitted that it was in the best interest of avoiding delays for his appeal to be heard by this court. Once again I failed to appreciate the point that was being made. The applicant delayed prosecution of his appeal and he is entirely at fault.

A delay of twenty two months is unnecessary.

RESPONDENT’S RESPONSE

The respondent opposed the application.

1. The respondent submitted that the delay by applicant in noting the appeal was inordinate
2. The application was fatally defective in that the application had not submitted draft notice of appeal. The merits of the appeal are therefore not ascertainable.
3. The applicant had failed to adequately explain his failure to comply with the time frame stated in s 128 of the Act. It was not conceivable that he would not appreciate the implications of the dismissal of his appeal because he was a doctor of 30 years’ experience. Actually he had consulted lawyers on the issue.
4. The applicant had no prospects of success since the evidence was overwhelming. His previous convictions in the years 2011 and 2013 were common cause. In the year 2011 the applicant had been found guilty of misconduct resulting in his suspension from practice for 12 months.
5. The importance of the matter was tilted in favour of refusing condonation because applicant’s persistent misconduct was putting the lives of unsuspecting members of the public in danger. Therefore condonation was to be refused in the public interest. Actually a patient died as a result of applicant’s negligence.

In addition to the abovementioned grounds of opposition, the Court noted that the applicant had once again lacked diligence in pursuing this application. He did not take steps to set down this matter after filing an answering affidavit on 1 December 2017. The rules of this court required him to set down the matter within one month of filing an answering affidavit

(See r 236 of the High Court Rules). He did not do so. Instead, the respondent filed heads of argument first. That still was not a wakeup call to the applicant who only applied for set down in March 2018.

The law

The parties agree that in exercising its discretion the court is guided by guidelines which have been discussed many times in case law.

- (a) the degree of non-compliance
- (b) the explanation thereof
- (c) prospects of success on the merits
- (d) importance of the case
- (e) balance of convenience
- (f) finality to litigation.

Bishi v Secretary for Education 1989 (2) ZLR 240 (H).

Kombayi v Berkhonr 1988 (1) ZLR 53 (S)

Ndebele v Ncube 1992 (1) ZLR 288 (3).

The delay in this matter is undoubtedly inordinate. The explanation given by the applicant is not convincing. He has not stated how he intends to challenge the findings of the disciplinary committee. There are no valid grounds upon which this court can find that the verdict is likely to be upset on appeal. There is no doubt that as soon as the verdict is upheld then the suspended sentence would become operational. It is a sentence of deregistration. The applicant did not dispute the facts put across by the prosecution at his disciplinary trial. He cannot be heard to say he did not appreciate the exigencies of the dismissal of his appeal because the wording of the determination is clear and simple. The practice of the medical profession is a matter of life and death. Applicant appears undeterred by previous convictions and suspensions. He is a serious threat to the wellbeing of humankind. Regulations of conduct of medical practitioners by the responsible authority cannot be lightly interfered with.

This application has no merit and must fail. Accordingly it is ordered as follows

The application be and is hereby dismissed with costs.

