

CHAKUPA NYAMUPAGUMA
versus
THE CHAIRPERSON
(The Disciplinary Committee of Nurses Council of Zimbabwe)
and
THE NURSES COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 4 June & 3 July 2019

Opposed application

H. Mukonoweshuro, for the applicant
R. Kunze, for the respondent

ZHOU J: This is an application for the setting aside of the proceedings which were instituted against the applicant by the respondents on 20 November 2018 and the decision in terms of which the applicant was found guilty of improper conduct as provided for in the Health Professions Act [*Chapter 27:19*]. The specific improper conduct which the applicant was found guilty of was of operating an unlicensed practice in contravention of s 107 of the same Act. The application is opposed by both respondents.

Although the application is clearly one for review and says so in the notice thereof, the draft order seeks declaratory relief. Be that as it may the parties made submissions in support of their respective positions. Nothing turns on the specific formulation of the order *in casu* as it is clear that the applicant is seeking to impeach the proceedings which led to a decision that she was guilty of misconduct. The grounds upon which the application is based are set out in the court application and amplified in the applicant's founding affidavit.

The factual background to the matter are as follows. The applicant is a General Registered Nurse in terms of the Health Professions Act. The second respondent is a council established in terms of s 41 (1) of the Health Professions Act. Its functions and powers, as defined in s 42 (1) of that Act, include "to define and enforce ethical practice and discipline among nurses". The first respondent is Chairperson of a Disciplinary Committee of the

second respondent. On 20 November 2018 the applicant appeared before the first respondent on charges of committing “an improper or disgraceful conduct or conduct which when regard is had to the Nursing Profession is improper or disgraceful”. The particulars of the charge, as set out in the letter dated 19 October 2018 by which the applicant was invited to attend a preliminary inquiry were as follows: “Sometime in February 2018, you wrongfully, unlawfully and/or intentionally operated an unregistered Health Practice at Parirenyatwa Group of Hospitals”. The letter states that: “Details of the charge are stated in Annexure ‘A’ attached hereto”. The said annexure gives details of a visit to Parirenyatwa Group of Hospital by health inspectors from the second respondent and their discovery of the issues which gave rise to the charge. The applicant filed a statement of her defence in response to the allegations. In the response she objected to the jurisdiction of the second respondent to deal with the case against her. She also contested the allegations on the merits. On 5 December 2018 the first respondent rendered a decision in terms of which she found the applicant not guilty of contravening s 99 (a) and (b) of the Health Professions Act. The applicant was, however, found guilty of improper conduct as provided for in s 107 of the Health Professions Act for operating an unlicensed practice. This is the decision which the applicant seeks to impeach in the proceedings on the grounds that (a) the first respondent had no jurisdiction to try her for the criminal offence of contravening s 99 (1) (a) and (b) of the Health Professions Act; (b) the finding of guilt based on “operating an unlicensed practice” was not based on any legal provision requiring a practice to be licenced, (c) there was violation of the *audi alteram partem* principle in so far as the charge of operating an unlicensed practice” was not put into the applicant to enable her respond to it; and (d) the conclusion that the applicant was operating an unlicensed practice is irrational.

The objection to the jurisdiction of the first respondent is predicated upon the fact s 99 (1) and (2) criminalizes the conduct stated therein. The applicant’s contention is that only a Magistrates’ Court would be competent to determine the guilt or otherwise of the applicant for contravening that section. But the applicant was not facing criminal prosecution when she appeared before the first respondent. The letter notifying the applicant of the disciplinary proceedings clearly stated that she was being charged in terms of s 107 (a) as read with s 108 and s 99 (1) (a) and (b) of the Act. The precise misconduct alleged was, as stated in that letter, of committing “an improper or disgraceful conduct or conduct which when regard is had to the Nursing Profession is improper”. This is the charge which was put to the applicant at the hearing. The wording of the charge is taken from s 107 (1) of the Act. The alleged

breach of s 99 (1) (a) and (b) is the one which was being alleged to be constitutive of the misconduct. The fact that the same breach would ground a criminal prosecution does not prevent the disciplinary committee from relying on it to charge the applicant for misconduct. The first respondent did not purport to sit as a criminal court when he dealt with the matter. For these reasons the objection to the jurisdiction of the first respondent is without merit and must fail.

The second ground for challenging the proceedings is that of irrationality. This complaint arises from the conclusion of the disciplinary tribunal that the applicant was operating an unlicensed practice. The tribunal came to this conclusion after finding that the allegation of operating an unregistered health practice could not be sustained because Parirenyatwa Group of Hospital from which the applicant operated is a registered institution. The Disciplinary Tribunal however found that what the applicant was operating was a practice and that such practice was not registered.

A decision is irrational if it is so outrageous in its defiance of logic or accepted moral standards, see *Silver Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* (2) 1999 (2) ZLR 88 (H) at 92A; *Chiroodza v Chitungwiza Town Council & Anor* 1992 (1) ZLR 77 (H). For it to be characterised as irrational the impugned decision must be so wrong that the decision-maker “must have taken leave of his or her senses” or something else must be inferred from it.

There is no determination by the first respondent to show how the conclusion that the applicant was operating an unlicensed practice was reached. The evidence led shows that this was not a practice but a case study for training purposes. The applicant sought and was granted the authority to do the exercise as part of a course which she was studying. She even asked for and was granted the authority to engage a locum nurse to assist her run the project. Those facts do not show improper or disgraceful conduct on her part to justify the conclusion reached. The evidence of Kerith Mukumbi shows that the applicant was allowed to operate from the hospital. In her evidence the clinical director was the one responsible for granting the approval. Whether all the other offices in the institution were informed by the clinical director is not a matter for the applicant. From her evidence it seems that Kerith Mukumbi had issues with the fact that her own superiors did not brief her about the exact nature of the applicant’s operations at the hospital. Because of that she then sought to blame the applicant but in fact her case seems to be against her superiors rather than the applicant. These were clearly proceedings being instituted for the improper motive of settling issues with the

clinical director by instituting disciplinary proceedings against the applicant. In the face of written approval by the clinical director for the applicant to operate it is difficult to comprehend the basis upon which the proceedings even proceeded to a finding of guilt.

From the above, I come to the conclusion that the finding that the applicant was guilty of misconduct was irrational. Apart from what has been said above, the irrationality also arises from the fact that the applicant was found guilty of misconduct based on factual allegations which did not arise from the charge. She was found guilty of operating an unlicensed practice yet no such allegation was ever out to her. Even the evidence led did not speak to that allegation.

The approval adopted violated the principle of natural justice known as the *audi alteram partem* rule which enjoins a decision maker to give an affected party a chance to be heard before making a decision adverse to that party. A breach of the *audi alteram partem* rule is presumed to be prejudicial to the affected party, see *Students Union UZ & Ors v Vice Chancellor, UZ & Ors* 1998 (2) ZLR 454 (H). The applicant was not given the opportunity to respond to the charge of operating an unlicensed practice. It was therefore not open to the first respondent to find her guilty of that alleged misconduct. What is worrying about the conduct of the first respondent is that no reasons are given for coming to the conclusion that the applicant was “guilty of improper conduct... for operating an unlicensed practice.” The record of proceedings does not show that issue was ever discussed in the proceedings. Also, where it details the “Findings of the Committee” the record does not refer to an unlicensed practice.

On the question of costs, the draft order states that each party must bear its own costs. This matter would have justified a special order of costs against the respondents given their attitude in opposing the application in the face of evidence showing that the applicant was clearly authorised to operate in the manner that she did by the responsible authority. The clinical director who approved her practice was not even called to testify. Instead, subordinates of the clinical director came to testify. In the case of Kerith Mukumbi she was not even the PNO when the approval was given yet she sought to challenge the approval on the basis merely that her bosses did not report to her about it.

In the result, IT IS ORDERED THAT:

1. The disciplinary proceedings instituted against the applicant on 20 November 2018 and the subsequent determination handed down on 5 December 2018 be and are hereby set aside.

2. Each party pays its own costs.

H Mukonoweshuro & Partners, applicant's legal practitioners
Chihambakwe Mutizwa & Partners, respondents' legal practitioners