IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2011.04.18
DATE

SIGNATURE

CASE NUMBER: 36873/09

19/4/2011

L VAMBE
APPLICANT

v

THE CHAIRPERSON, MEDICAL & DENTAL PROFESSIONS BOARD
1st RESPONDENT

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA
2nd RESPONDENT

THE REGISTRAR, THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA
3rd RESPONDENT

JUDGMENT

MABUSE J:

[1]. In this application the applicant, a major male surgeon, currently practising as such at 5th Floor Arwyp Medical Centre, Kempton Park, Gauteng, seeks the following orders against the Respondents:

1.1 An order interdicting and restraining the First, Second and Third Respondents from proceeding with the prosecution of the applicant on the charges contained in paragraphs 1 and 3 of the second charge sheet dated 21 November 2006 and with any

other prosecution on any other charges that might arise out of the same facts. In the alternative, an order in terms of the decision of the Third Respondent, alternatively the First Respondent's decision to prosecute the applicant on the charges contained in paragraphs 1 and 3 of the second charge sheet dated 21 November 2006 be reviewed and set aside. In addition the applicant seeks further ancillary relief.

THE PARTIES:

[2]. The First Respondent is the chairman of the Medical and Dental Professions Board, a professional body duly established in terms of the provisions of section 15 of the Health Professions Act 1974 (Act NO. 56 of 1974) ("The Act"). He is cited herein in his official capacity as the chairman of the Medical and Dental Professions Board. The First Respondent conducts business at 553 Vermeulen Street, Arcadia, Pretoria. The Second Respondent is a juristic person established in terms of the provisions of section 2 of the Act and also conducts its business at 553 Vermeulen Street, Arcadia, Pretoria. The Third Respondent is the registrar of the Second Respondent duly appointed as such in terms of the provisions of section 12(1) of the Act. He also conducts business at the same place as the other Respondents.

PURPOSE OF THE APPLICATION:

[3]. The purpose of this application is to seek and procure an order in terms of which the First, Second and Third Respondents are interdicted and restrained from proceeding with a prosecution of Applicant on charges contained in the amended charge sheet dated 21 November 2006, in the alternative, an order declaring the continued prosecution of the applicant as unlawful. This application is seen against the following background.

[4]. On 7 May 2007 a professional conduct committee of the First Respondent held an enquiry ("the enquiry") into a charge of unprofessional conduct against the applicant in terms of Chapter 4 of the Act. Prior to the said enquiry and in terms of Regulation 4(a) and (b) of the Regulations relating to the Conduct of Enquiries Into Alleged Unprofessional Conduct Under the Health Professions Act 1974 published in Government Gazette Nr. R765 dated 24 August 2001 ("the Regulations"), the applicant was served with a notice of the enquiry that

enclosed a charge sheet as formulated by the pro-forma complainant. The notice and the charge sheet were both dated 21 November 2006 and the notice was issued under the hand of the Third Respondent.

[5]. The charge sheet contained one count of alleged unprofessional conduct divided into three sub-paragraphs and read as follows:

"That you are guilty of unprofessional conduct or conduct which when regard is had to your profession as unprofessional in that upon or about May 2005 and in respect of Mr. A.R. Ilias (your patient), you acted in a manner that was not in accordance with the standards of your profession in that you performed an endoscopy on a patient to remove food bolus (sic) and:

1. *Caused the perforation in your patient's esophagus (sic); and/or*
2. *Delayed in consulting a thoracic surgeon when it was clear to you that there was a free perforation into the right pleural cavity; and/or*
3. *Performed a jujenostomy on your patient in an inappropriate manner."*

[6]. On receipt of the said charge further particulars to the charge sheet were sought and furnished from and by the pro-forma complainant in pursuance of the Regulations 5(1) and (2) of the Regulations. A copy of the relevant request for further particulars from the applicant to the pro-forma complainant and the pro-forma complainant's further particulars are attached to the application.

[7]. On 4 May 2007 the applicant's attorney and counsel attended a pre-inquiry discussion as contemplated by Regulation 6 of the Regulations. No minutes of the said pre-inquiry discussion were prepared. However, in terms of the provisions of Regulation 6(b) of the Regulations, the pro-forma complainant was advised, on the applicant's behalf, that the applicant intended pleading guilty to the amended charges and furnished the pro-forma complainant with a plea-explanation containing the guilty plea which would be tendered on the applicant's behalf and an exposition of his explanation concerning the plea. The applicant has attached a copy of his plea-explanation to the application.

[8]. The plea that was tendered on his behalf and as formulated in the plea-inquiry was accepted by the pro-forma complainant as well as the facts contained in the plea-explanation. As

proof of the confirmation of the acceptance of the plea-explanation by the pro-forma prosecutor the applicant thought it necessary to annex to his papers a verbatim transcript of the proceedings at the enquiry of 7 May 2007 and contends that page 1 of the said verbatim transcript of the proceedings at the enquiry of 7 May 2007 commencing at 09:14 and ending at page 2 line 20 where the following was said:

"CHAIRPERSON: *...Are there any preliminary announcements before we come to the plea or not.*

MR NKUNA: *Yes there are. On the charge sheet you will note that there is one count with three paragraphs, 1, 2 and 3.*

CHAIRPERSON: *Yes.*

MR NKUNA: *I am not proceeding with paragraph 1 and 3.*

CHAIRPERSON: *You are not proceeding with 1 and 3?*

MR NKUNA: *Yes, and the accused is to plead to paragraph 2.*

CHAIRPERSON: *To paragraph 2 only?*

MR NKUNA: *Yes.*

MR STRAUSS: *Mr Chairman, may I ask through you, Mr Nkuna, do you then formally withdraw 1 and 3?*

MR NKUNA: *Yes I do.*

CHAIRPERSON: *So that is a matter for the record then. So count 2 is the only remaining one?*

MR NKUNA: *Yes. Just paragraph 2 ... (intervenes).*

CHAIRPERSON: *Yes, does that conclude your preliminary remarks?*

MR NKUNA: *Yes.*

CHAIRPERSON: *Mr Farrell, any remarks from you?*

MR FARRELL: *Thank you, Mr Chairman. Mr Chairman, my learned friend is correct, by agreement he is withdrawing paragraphs 1 and 3 of the charge. The proceedings will only be in respect of paragraph 2 of the charge.*

The plea in respect of paragraph 2 will be one of guilty as formulated in a plea explanation which we will be handing up to you and if I might just read it into the record. The plea is as follows:

> *"I am guilty of unprofessional conduct in that on or about 19 May 2005 and in respect of Mr A.R. Ilias I failed to timeously consult a cardiothoracic surgeon after a chest X-ray demonstrated the presence of an uncontained esophogeal perforation."*
>
> *That is the paragraph to which he pleads guilty and we provide an explanation in respect of that plea in the document which we will hand up to you momentarily.*

9.2.2 *Page 3 of the record commencing at line 22 and ending on page 4 line 6 where the following was stated:*

MR STRAUSS: *But I do have a question to address to Mr Nkuna. Mr Nkuna, as you are aware of the plea of guilty is not strictly in accordance with the wording of the remaining count 2. We have a different, rather different plea. Different plea, worded plea, that is to say it is worded differently from exact wording of the existing charge 2. Now does that in effect mean you accept it? That is my first question. Through you Mr Chairman, do you accept the plea of guilty as*

preferred and do you accept the implication, that it really then changes count 2?

MR NKUNA: *Yes I do.*

9.2.3 *Page 4 of exhibit "E" commencing at line 14 and ending at line 18 where the following is stated:*

MR FARRELL: *Possibly just for the record I should indicate that by agreement between my learned friend and I this is the only document that will serve before this honourable committee for purposes of adjudication of the finding of guilty. Thank you.*

CHAIRPERSON: *Right, thank you."*

[9]. The applicant contends that the facts recorded in annexure "F" and to which he has referred this court were a culmination of a plea-bargain agreement entered into between the pro-forma complainant, acting personally and in his said capacity, and the applicant himself, represented herein by his attorney and counsel, on 4 May 2007 which plea-bargain agreement had the following salient express terms:

1. The applicant would tender and the pro-forma complainant would accept an amended plea as formulated in the plea-explanation in respect of count 2 of the charge.
2. The pro-forma complainant would withdraw paragraphs 1 and 3 of the charge sheet; and ,
3. that only the facts contained in the plea-explanation would serve before the professional conduct committee and no further evidence would be adduced by the pro-forma complainant and himself.

[10]. According to the applicant the withdrawal of paragraphs 1 and 3 of the said Charge sheet was a material and integral term of the plea-bargain agreement and was understood to constitute a final withdrawal of those charges. The pro-forma complainant, when

concluding the agreement, was or should reasonably have been aware of the provisions of Regulation 7(t) of the Regulations which read as follows:

"*The professional conduct committee may make a finding of not guilty even if the accused has pleaded.*"

The applicant contends that had the withdrawal of paragraphs 1 and 3 not constituted a final withdrawal of those charges, the applicant would not have entered into the plea-bargain agreement. On the basis of the plea-bargain the applicant contends that the professional conduct committee of the Medical & Dental Professions Board invoked the provisions of Regulation 7(t) of the Regulations and found him not guilty of the charge in respect of the paragraph of the charge to which the pro-forma complainant and him had agreed. In his founding affidavit he referred the court to page 26 lines 17 to 23 of the annexure which reads as follows:

"*Chairperson:* *The Committee has given the defence and the pro-forma complainant the opportunity to respond to its reservations about the sufficiency of available evidence of professional misconduct. The Committee is still of the opinion that there are insufficient grounds to justify a finding of guilty. Dr. Vambe you are accordingly found not guilty of the complaint as charged that concludes his enquiry.*"

[11]. Following the aforementioned enquiry and in particular on 5 June 2007 the pro-forma complaint, on behalf of the Second Respondent, wrote a letter to the applicant's attorney which read as follows:

"*Dear sirs*

Enquiry: Dr L Vambe / complaint Mr. N Ilias obo Mr. AR Ilias.

I refer to previous correspondence in this regard and confirm that the matter has been finalised and the accused being acquitted on all charges.
I further confirm that I am now closing my file in this regard.

Yours Faithfully

Mr. CM Nkuna
Legal Adviser"

[12]. Following the verdict of the disciplinary committee of the First Respondent, on 6 May 2008 the family of the late Mr. Ilias, the patient, instituted civil proceedings against the applicant before this court under Case Number 21844/08 arising out of the incidence of May 2005. The legal representative of the applicant then delivered to the Plaintiff's attorneys a notice in terms of Rule 36(4) of the Uniform Rules in the said action. The Plaintiff's attorneys duly replied thereto. Included in the documents that were delivered in reply, the Plaintiff's attorneys made available to the applicant's attorneys the following documents:

12.1 The notice, dated 14 May 2008, addressed to Dr. L Vambe at PO Box 1399, Fourways 2055 and given under the hand of the Third Respondent which state that:

"You are hereby given notice in terms of provision 4(a) of the Regulations published under Government Notice Nr. R765 of 2001 (copy of which is enclosed), that an enquiry into your conduct will be held by a Provisional Conduct Committee of the Medical & Dental Board at Council Chambers Health Professions Council of South Africa, 553 Vermeulen Street, Arcadia, Pretoria on 30 and 31 July 2008 at 10h00. The Charge sheet as formulated by the pro-forma complainant is enclosed. As you will notice from the attached regulations, you may be legally represented in the act enquiry. You should, however, timeously make arrangements in this regard.

Given under the hand of the Registrar of the Counsel on 14 May 2008.

Signed, Adv. Boyce Mkhize
Registrar"; and

12.2 A charge sheet dated 21 November 2006 which was again annexed as "I". The said charge sheet read as follows:

"Charge sheet

That you are guilty of unprofessional conduct or conduct, which when regard is had to your profession is unprofessional in that upon or about May 2005 and in respect of Mr. A.R. Ilias ("your patient"), you acted in a manner that was not in accordance with the standards of your profession in that you performed an endoscopy on your patient to remove food bolus and:

1. *caused the perforation in your patient's esophagus; and/or*
2. *performed a jejenostomy on your patient in an inappropriate manner."*

[13]. It is clear that the said documents constitute a notice as contemplated in Regulation 4(a) of the Regulations and a charge sheet. The notice confirmed that a professional conduct enquiry would be held into the applicant's conduct by a professional conduct committee of the Second Respondent on 30 and 31 July 2008 at 10h00. In the circumstances this would have been the second enquiry into the conduct of the applicant arising out of the events of May 2005 albeit on different bases.

[14]. Towards the end of June 2008 the applicant's attorneys telephoned the pro-forma complainant who confirmed firstly that he was the pro-forma complainant in the second enquiry and furthermore that the second enquiry had been set down for hearing on the dates stipulated in the said notice. On 22 July 2008, as required by the provisions of Regulation 6 of the Regulations, a discussion was held prior to the enquiry. The discussion was attended by one Mr. Nkuna who in his capacity as the pro-forma complainant for the second enquiry as well as the applicant's attorney and counsel. The events were recorded in a letter from the applicant's attorney to the Third Respondent of the same date. The said letter dated 22 July 2008 from the applicant's attorneys to the First Respondent reads as follows:

"1. Paragraphs 1 and 3 of the Charge sheet dated 21 November 2006 were withdrawn by the pro-forma complainant in terms of an admitted plea-bargain agreement. In this regard the pro-forma complainant's attention is specifically drawn to the verbatim transcript of the professional conduct enquiry of 7 May 2007 and specifically page 2 lines 8 to 11.

2. *The charge sheets dated again 21 November 2006 and attached to the notice of disciplinary enquiry of 14 May 2008 is a precise repetition of the withdrawn charges 1 and 3 of the first charge sheet.*

3. *The persistence with the prosecution is in breach of the admitted plea-bargain agreement, is mala fides in addition to which it is unlawful in that it is in breach of the provisions of the Health Professions Act 47 of 1974 and the provisions of the Promotion of Administrative Justice Act.*

4. *The Respondent formally notifies the pro-forma complainant that his repudiation of the plea-bargain agreement is not accepted and/or his rights are reserved, including his right and intention in the event of the court proceedings becoming necessary, to request a cost order de bonis propiis against the pro-forma complainant.*

5. *In addition to the aforegoing the Respondent does not admit the jurisdiction of the Professional Conduct Committee to entertain the current proceedings and asserts that the proceedings are unlawful.*

6. *The Respondent expressly requests the pro-forma complainant to respond the above recordal.*

We confirm that Mr. Nkuna indicated that he will respond to the above recordal upon receipt of further sections from his superiors and by not later than 23 July 2008."

[15]. On 23 July 2008 the pro-forma complainant responded as follows to the said letter from the applicant's attorneys:

"We confirm that at the hearing held on 7 May 2007 paragraphs 1 and 3 of the Charge sheet were withdrawn in terms of the plea agreement according to which your client pleaded guilty to paragraph 2.

We further confirm that the Charge sheet attached to the notice dated 14 May 2008 is a repetition at (sic) the withdrawn charges.

We however do not agree with the assertion that the reinstatement of the charge amounts to repudiation of the plea-bargain agreement. We submit that there is nothing in law that precludes the pro-forma complainant from reinstating withdrawn charges or whatever the circumstances and that is his prerogative to this effect is not overridden by a plea-bargain arrangement.

We are therefore of opinion that the proceedings are lawful and within parameters of our Act.
Yours faithfully,
Mr. C Nkuna Legal Adviser."

[16]. On 29 July 2008 the applicant's attorneys dealt with the pro-forma complaints as follows. In the said letter the applicant's attorneys stated that:

"2. *The attitude encapsulated in your letter and the reply is legally unsustainable. In fact your letter demonstrates that the resumed prosecution into the conduct of Dr. Vambe is unlawful and in bad faith.*

3. *Our client intends bringing the High Court proceedings in terms of which he will seek an order:*

3.1 *directing you, the Registrar and the Medical & Dental Professions Board to comply with the admitted plea bargain agreement; and*

3.2 *interdicting and restraining you, the Registrar and the Medical & Dental Professions Board from proceeding with the prosecution of our client on the charges upon which he previously stood, and currently stands, arraigned as well as from proceeding with any other prosecution on any other charges which might raise of our client's management of the late Mr. AR Ilias; and*

3.3 *You are to pay the costs of the application on a punitive and appropriate scale.*

4. *To the aforegoing, we request that the professional conduct inquiry set down for h on 30 July 2008, be postponed, pending final adjudication of the court proceedin foresaid. Failing such agreement, we shall request the Professional Conduct Comr to grant our client a postponement to enable him to bring the proceedings aforesaic*

5. *In the circumstances, we request that the professional conduct enquiry into the con of our client be postponed by agreement pending final adjudication of Court proceedings, in terms of which our client seeks to stay this and related prosecution.*

Yours faithfully

MACROBERT INC;"

It is for this reason that this matter is now before this court. Accordingly, pending th decision of this court, the matter did not proceed on the appointed dates.

[17]. The applicant has attached to his application as annexure "M" a schedule of professional conduct enquiries dealt with by his attorney in which plea-bargain agreements were concluded. According to the applicant plea-bargain agreements are a virtually daily occurrence at the professional conduct enquiries held by the committees of the First Respondent in terms of chapter 4 of the Act. The applicant submits that it is an entrenched, accepted and part of quasi judicial proceedings before the disciplinary tribunal held in terms of chapter 4 of the Act and furthermore that in not one of the matters listed in the said annexure "M" has the prosecution been recommended in respect of charges withdrawn pursuant to plea-bargain agreements.

The applicant contends that he tendered an altered plea of guilty in respect of count 2 of the charge as an act of self-conviction, in exchange of the following official concessions by the pro-forma complainant:

1. that paragraphs 1 and 3 of the said charge sheet would be withdrawn; and
2. that only the facts embodied in the plea-explanation would serve as evidence before the provisional conduct.

[19]. He contends that had it not been for the fact that a plea-bargain agreement had been entered into, he would not have tendered the plea as he did. In his letter of 23 July 2008 the pro-forma complainant did not deny his capacity or his authority to enter into the plea-bargain agreement. The applicant submits that in any event the pro-forma complainant was in a similar position to that of a prosecutor in criminal proceedings and is in law possessed of the capacity to enter into plea-bargain agreements and was not precluded in law or by virtue of the provisions of the Act from validly entering into a plea-bargain agreement.

[20]. According to the applicant it was, if not express, certainly implied or tacit that the withdrawal of paragraph 1 and 3 of the charge sheet would be final and that the net effect of the agreement would be tantamount to a stopping of the prosecution against the applicant. *Inter alia* the withdrawal of paragraphs 1 and 3 of the charge sheet was unconditional in terms of the agreement and is confirmed as such in the transcript and this was confirmed in writing by the pro-forma complainant in a letter of 5 June 2007 in which the pro-forma complainant confirmed the finalisation of the matter in its entirety and the fact that he was closing his file.

[21]. The applicant contends accordingly that the plea-bargain agreement is a legally valid and enforceable agreement to which the pro-forma complainant and the respondents are bound. On that basis the applicant submits that the attempts to prosecute him in respect of the charges which were formally withdrawn against him on 7 May 2007 in terms of a plea-bargain agreement are unlawful and should be properly stayed.

[22]. The applicant contends furthermore that the decision to proceed with his prosecution in breach of a solemn and binding plea-bargain agreement constitutes an administrative action which is unlawful and procedurally unfair. It constitutes an administrative action in breach of section 3 of the Promotion of Administrative Justice Act 3 of 2000 (Paja) and consequently should be reviewed and set aside in terms of section 6 of that Act. The putative attempt to prosecute him in breach of the plea-bargain agreement is also a prosecution neither contemplated nor authorised by the provisions of chapter 4 of the Act of the Regulations. According to him the said putative prosecution is as a result *ultra vires* the Act and Regulations and accordingly unlawful.

[23]. The Respondents admit that the applicant faced disciplinary proceedings before a professional conduct committee of the Board for his role in contributing to the death of one of his patients as a serious charge. They contend however that the applicant pleaded guilty to one of the three counts in the charge against him whilst conceding his actions in some respect had amounted to unprofessional conduct. The Committee of the Board however did not accept his plea. The Board consequently recharged the applicant with the relevant two counts. It is this decision that is an issue in this application.

[24]. According to the Respondents the applicant's attempts to have the Board interdicted from persuading the two counts in the charge sheet against him are essentially an attempt to escape liability for his actions. The Respondents contend furthermore that the Board is no ordinary body. It is the *custos morum* of the profession and as such has, in law, the duty to pursue allegations of unprofessional conduct against any practitioner who starts to practise in its field. It is therefore also *dominis litis* in any disciplinary process against such practitioners.

[25]. According to the Respondents, various Committees of the Board are involved in pursuing allegations of unprofessional conduct and these are separate entities constituted differently, each playing a distinct role in any disciplinary process. A Committee of Professional enquiry first decides whether or not an allegation must be pursued or, to use the applicant's words, whether a prosecution must take place. A Professional Conduct Committee then decides on the guilt of an accused practitioner and therefore acts as an adjudicatory body. These Committees of the Board perform duties or exercise powers granted to the Board and delegated to them.

[26]. When dealing with allegations of unprofessional conduct against a registered practitioner, the Board is both a form of plaintiff and a judge. In its appointment of a pro-forma complainant to represent the complainant it does not transfer to him its prerogative to decide whether or not allegations of unprofessional conduct it has looked into warrant a disciplinary enquiry. The Respondent contends that the applicant is not entitled to the relief sought for the following reasons: the plea agreement on which the applicant relies is invalid as the pro-forma complainant entered into it without having being expressly authorised by

the Act or Regulations promulgated in terms thereof. At any rate the Board is not bound by the plea-bargain agreement. Nothing the pro-forma complainant does, as a representative of the complainant, binds the Board. There was no decision of the Board or any of the Committees to withdraw charges 1 and 3 against the applicant and only the Board could withdraw these charges.

[27]. An enquiry only takes place if the committee of preliminary enquiry decides it should, having determined that the allegations warrant such further enquiry. The pro-forma complainant merely represents the complainant in the process initiated by the committee of the preliminary enquiry. According to the Respondent if the plea-agreement is considered valid it contains two implied terms, firstly, that the committee accepts it and finds the applicant guilty and that one of the penalties available to the committee be imposed on the applicant. The Committee's decision to find the applicant not guilty meant the plea-agreement was not accepted by the committee. He was not sanctioned at all for his actions. The pro-forma complainant was therefore no longer bound by the plea-agreement and in these circumstances was able to formulate charges against the applicant based on the original complaint and according to the still standing resolution of the committee of preliminary enquiry.

[28]. The Respondents state that the applicant cannot, in all fairness, expect to walk away scot-free as granting him the relief sought would entail, after acknowledging at least in part that his actions led to the death of one of his patients. In their answering affidavit the respondents raised a *point in limine* on the basis that the application is defective for non-jointer of the complainant.

[29]. The Board is a statutory body established in terms of the provisions of section 15(1) of the Act. It exercises certain powers including, in terms of section 41, the power to hold enquiries into allegations of unprofessional conduct against registered practitioners and, where such registered practitioners are found guilty, to impose the penalties prescribed in section 42(1). Only when a case forms or is likely to form subject of a criminal case in a court of law can the Board postpone the holding of an enquiry until the criminal case has been disposed of. Furthermore the Board has a legal duty to pursue complaints of unprofessional

conduct made against practitioners registered under the Act. Neither this legal duty nor the power granted to it under section 41 may be usurped by any person or body.

[30]. Only a committee to which the Board has duly delegated its powers can perform this duty legally. The Board has the powers in terms of the regulations relating to the functions and functioning of the Professional Board published under Government Gazette Number R979 in Government Gazette 20371 of 13 August 1999, as amended, to establish professional conduct committees consisting of as many persons as it determines, all of whom are appointed to such committees by the Board and necessarily include one member of the Board who acts as the committee's chairperson. Regulation 3 of the Regulations provides that such committee's decisions are of force and effect from the date determined by the committee.

[31]. The Regulations define a "*pro-forma*" complainant as a person appointed by the Board to represent the complainant and present the complaint to the committee. The first step in addressing allegations of unprofessional conduct, which must be contained in a written document sent to the Council or the Registrar or the Board, is to hold a preliminary enquiry. The committee of the preliminary enquiry looks at the information before it, including the complaint, the explanation provided by the registered practitioner, which he invited to provide in terms of Regulation 3(1)(b) and any other relevant information to make a determination whether or not sufficient grounds exist for the holding of an enquiry.

[32]. If the committee of the preliminary enquiry so decides, it directs the registrar to arrange for an enquiry to be held in terms of Regulation 3(4). For this purpose the Registrar must ensure a pro-forma complainant, tasked with the formulation of the charge sheet based on the complaint and on the resolution of the committee of the preliminary enquiry, is appointed. The pro-forma complainant acts on the basis of the committee of preliminary enquiry's resolution and derives his mandate from it. However, he takes no further instructions from the committee of preliminary enquiry or any other committee or member of the Board. In conducting the enquiry the pro-forma complainant has no discretion in the institution of the enquiry. He acts because a resolution of an enquiry requires that both parties, the applicant and the complainant, be before the committee that will decide whether the applicant is guilty of the allegations against him.

[33]. The position of a pro-forma complainant is not akin to that of a prosecutor in a criminal court. On the contrary he has no discretion on whether or not to pursue allegations of unprofessional conduct against a registered practitioner. The Respondents contend that comparing the process by which it is alleged a plea-bargain agreement was concluded in this case with criminal proceedings, is misleading. In criminal proceedings it is indeed appropriate that the prosecutor is properly authorised to enter into such agreements as he or she is *dominis litis*. Furthermore where a Court does not accept a plea-agreement in terms of section 105(A) of the Criminal Procedure Act 51 of 1977, the trial begins *de novo* into the allegations against the accused. The plea-agreements are inherently agreements in which the accused accepts a responsibility for his actions and accepts that he or she will be sanctioned for these and does so in order to minimize such possible sanction not to escape it entirely.

[34]. The duty of the Third Respondent in such circumstances is to notify the said practitioner of the date and time of the enquiry and to provide him with the charge sheet which would have been formulated by the pro-forma complainant. It is thereafter the duty of the Board to appoint members of the Professional Conduct Committee who will hear the matter. Accordingly nothing in the Regulations empowers the pro-forma complainant to enter into plea-agreements nor is there anything in his appointment or mandate that grants him any such discretion. In addition the actions of the pro-forma complaint bind him not the Board or any of his Committees.

[35]. It is the Respondents' case that before any enquiry can be held Regulation 6 provides for the discussion to be held between the parties. At this stage the issues in dispute are identified and admissions are dealt with, as are any issues relating to the discovery of documents or expert evidence. The various steps of the hearing are set out in Regulation 7 which include that the accused practitioner is asked to plead; the hearing of evidence from both parties and a finding being made by the committee as to the guilt of the accused practitioner. In this respect Regulation 7(t) of the Regulations, as it applies at all relevant times, grants the committee the power to find the accused not guilty even if he has pleaded guilty. The committee may therefore not accept the applicant's plea of guilty. Once guilt is

established further evidence is led with respect to the appropriate sentence to be handed down.

[36]. Regulation 8 provides for an internal appeal proceedings. It is available to both the accused and the pro-forma complaint. A further committee of the Board is tasked with deciding the appeal.

[37]. I now turn to the *point in limine* raised by the Respondents against the application. The Respondents have raised a *point in limine* for non-joinder of the complainant on the ground that the complainant has a direct and substantial interest in the result of any disciplinary proceedings against the applicant and specifically in the relief sought in his application. It is the complainant's father who has died and it is the complainant's father's death which is essentially an issue. The complainant has conveyed his dismay at the result of the disciplinary proceedings against the applicant. The respondents state that it appears from his letter that the complainant understood the plea of the applicant to mean that only sentencing would be the issue. The complainant formally sought an appeal of the Committee's decision. He has indicated his desire to pursue other avenues of redress he might have against the applicant or other relevant parties such as the Respondents.

[39]. On 21 May 2008 the Second Respondent was informed by the complainant's attorneys of his civil claim against the applicant. The complainant had requested information pertaining to the enquiry held into the allegations made against the applicant. According to the respondents, the issues that had arisen between the complainant and the respondents involved substantially the same issues of fact and law as those raised in this application. Furthermore the applicant relies on an agreement between himself and the pro-forma complainant who represents the complainant in the disciplinary proceedings against him. Accordingly, so contend the Respondents, the complainant's joinder is therefore warranted and this application is defective for want of such joiner.

[40]. The dispute in this case turns on the validity of the plea agreement that the applicant, then represented by his counsel and attorney, and the pro forma complainant, then one Nkuna, concluded on 4 May 2007. That the applicant and the pro-forma

complainant concluded a plea agreement on 4 May 2007 is not in dispute. What is in dispute is firstly, whether or not the pro-forma complainant had the necessary authority in terms of the Act or Regulations to conclude the plea agreement in dispute. Should the court find that the pro-forma complainant did not, in terms of either the Act or the regulations, have any authority to conclude this agreement, it must still investigate, on the basis of all the evidence before it, whether or not the second respondent had not tacitly or by conduct authorised the pro-forma complainant to conclude the plea agreement or whether or not Regulation 6 of the Regulations does grant the pro forma complainant implied authority to enter into plea agreements.

[41] The applicant contends that the said plea agreement is valid and that the respondents are bound by it. The thrust of the applicant's case is that in the past the pro forma complainant concluded at least nine such plea agreements and that the respondents never called into question the pro forma complainant's authority to conclude them.

[42]. By referring the court to the nine matters in which the pro-forma complainant had concluded plea agreements whose validity the respondents never challenged and by unwaveringly holding onto the view that the plea agreement that is in dispute in this matter is valid for all intents and purposes and that the respondents are bound by it, I understand the applicant's case to be, in principle, that the respondents should not be allowed to aver that, at the time the pro-forma complainant concluded the disputed plea agreement, he did not have the necessary authority.

[43]. Although this was not expressly stated in the papers, the applicant could only have relied on *estoppel.* It is the applicant's case, as I understood it, that the respondents should be *estopped* from disputing the authority of the *pro forma* complainant to conclude the disputed plea agreement. The applicant can only succeed to prevent the respondent from averring lack of authority on the part of the pro-forma complainant if he satisfies the court:

(a) that the respondents had previously by words or conduct held out the existence of a certain state of facts;

(b) that the respondents had led him or his legal representative, to believe in the existence of a certain state of fact;

(c) that he, the applicant, has by reason of such belief acted to his *prejudice.*

(d) that the person who made the representation could bind the respondents by means of the representation.

[44]. In **Arris Enterprises (Finance) Pty Ltd v Protea Assurance Co Ltd 1981(3)SA274 A at page 291, Corbett CJ** stated the following;

"The essence of the doctrine of estoppel by representation is that a person is precluded, i.e. estopped from denying the truth of the representation previously made by him by another if the latter, believing in the truth of the representation , acted thereon to his prejudice (see Joubert The Law of South Africa vol 9 para 367 and authorities there cited). The representation may be made by in words i.e. expressly, or it may be made by conduct, including silence, inaction, i.e. tacitly (ibid para 371); and in general it must relate to an existing fact. (ibid para 372)"

[45]. At the pain of repetition, the respondents' position with regard to the said plea bargain is clear. According to the respondent, the plea bargain on which the applicant relies was invalid and that its invalidity arises from the fact that neither the Act nor the Regulations authorised the pro forma complainant to conclude such an agreement. It is correct, and I agree with the respondents' argument, that the pro forma complainant was not expressly authorised by either the Act or Regulations to conclude any plea bargain. On the face of it, it would appear that it was irregular and unlawful for the pro forma complainant to conclude the plea agreement with the applicant. This however does not necessarily imply that he had no implied authority to conclude the relevant plea agreement.

[46]. But then if it is the respondents' case that the pro forma complainant did not have the necessary authority whatsoever to conclude the relevant plea agreement, the crucial question is why did the second respondent not react against such previous plea

bargains the same as it did against the plea bargain concluded on 4 May 2007, by recharging, as it purports to do with the applicant, all the accused practitioners involved in those other matters? The second respondent admits that plea agreements have been entered into by the pro forma complainants and the accused registered practitioners. The second respondent's admission is phrased as follows:

> "50.1 *I admit that plea arguments have, to my knowledge been entered into between pro forma complainants and the accused practitioners".*

[47]. After admitting that plea agreements have in the past been entered into between the pro forma complainant and accused registered practitioners, the second respondent brazenly denies that those nine plea agreements were any more valid than the plea agreement at the heart of the current matter. It is important, in my view, to observe that although the Second Respondent does not dispute the pro-forma complainant's authority to conclude the plea agreements in those other matters it fails to indicate the basis on which it states that they were no more valid than the plea agreement in dispute.

[48]. It is, in my view, no excuse for the second respondent to state that it had no knowledge of the inquiries in which the applicant's attorney was involved in any plea agreements that may have been completed by the applicant's attorney or, for that matter, any other attorneys. That is not the issue. After all the applicant had furnished, in the said annexure "M", the respondents with a list of nine matters in which his very same attorneys had concluded plea agreements with the pro forma complainant.

[49]. The purpose of furnishing the respondents with such a list was clearly to enable them to easily identify the relevant files; secondly to refer to and study those files for the purpose of enabling the respondents to establish the reasons for the conclusion of such plea bargain agreements; to establish the circumstances under which such plea agreements were entered into those matters and apply their mind to the facts of the current case to establish whether or not the circumstances that prevailed at the

conclusion of the plea agreements in those nine matters were not present in the current matter.

[50]. The respondents state that in its appointment of pro forma complainant to represent the complainants the complaints, it does not transfer to him its prerogatives to decide whether or not conclude the pre agreements; that nothing empowers the pro forma complainant to enter into plea agreements and that only the Board could withdraw the charges. This is in direct contrast to the plea agreements that were concluded in all those nine matters and to which the second respondent did not object.

[51]. The respondents tacitly concede that a plea agreement may, under certain circumstances, be invalid and not binding on the pro forma complainant, especially if the disciplinary committee finds the accused practitioner not guilty and does not sanction him at all after such accused practitioner has pleaded guilty. This contention does not, in my view hold any water for, at the conclusion of the disputed plea agreement, the relevant pro forma complainant was aware of what section 7(t) of the Act provided. It states that;

"the professional conduct committee may make a finding of not guilty even if the accused has pleaded guilty."

Accordingly, acting in terms of the powers vested in it by the provisions of section 7(t) of the Act, the Professional Conduct Committee found the applicant not guilty of the charge he had pleaded guilty to and acquitted him. The said acquittal was consequently the natural consequence of section 7(t). The effect of the respondents' contention as set out above would be to emasculate the purpose of the said section.

[52]. It is, in my view, irrelevant whether or not the disciplinary proceedings in terms of the Act may be likened to a criminal case in which the public prosecutor is a *dominis litis*. What is of paramount importance with regards to this matter, in my view, is the admission by the second respondent that plea agreements have in the past been concluded between the pro forma complainant and the registered practitioners and that such plea agreements remained for all intents and purposes legally binding on the second respondent. What of is of utmost importance furthermore is the

admission by the second respondent that such plea agreements are valid and considered to be binding once completed between the pro forma complainant and the registered accused practitioners despite the fact that their conclusion is not, according to the Respondents, sanctioned either by the Act or the Regulation. The lasting impression that the second respondent has done by its conduct is that it has created a convention that has become well established and accepted precedent that has now crystallised into an integral part of the process of dealing with matters of this nature.

[53]. By its conduct, the second respondent has given the pro forma complainant a revocable authorisation to conclude plea agreements. It has, over a period and in nine other matters, given the applicant to believe that such an authorisation had been given to the pro forma complainant. As a consequence the applicant has, to his detriment, concluded the plea agreement.

[54]. In the circumstances, the pro forma complainant's powers were modified. There was, in my view, a duty on the respondent, as a *custos morum*, to act in respect of the nine matters in which the pro forma complainant had concluded, with the applicant's attorneys, plea agreements. By their conduct the respondent had represented to the applicant and his legal representative that authorisation had been granted to the pro forma complainant to conclude plea agreements. In the result the respondent is estopped from averring that the pro forma complainant did not have the necessary authority to conclude the plea agreement, or, that permission or authorisation to conclude plea agreements had not been given to the pro forma complainant. See **Garlick v Phillips 1949(1) S A 121 AD**. Although this authority was more concerned with the law of landlord and tenant, it is the following principle,

"In the present case there was a very long continued failure by the lessee both under the lease of 26th September, 1946, and under previous leases to pay his rent on due date and no objection was taken thereto, consequently an application of the above principle revocable permission to respondent to pay his rent late or led respondent to believe that such permission had been given and in consequence thereof respondent continued to pay his rent late. If the first be the true legal position the tenant's obligation to pay rent in advance was temporarily modified or suspended by the permission to pay late given by appellant. If the second be the true legal position then something in the nature of an

estoppel arises which precludes appellant form denying that he had given such permission" that, in my view, is of crucial importance. I see no reason why I should not apply the above principle in this particular case.

[55]. In this application, reference was made to a long list of matters in which the pro forma complainant had concluded that the valid pre agreements with the applicants attorneys; the pro forma complainant who should have known better never informed the applicant's legal representative on 4 May 2007 when they concluded a plea agreement which is in dispute the he lacked the necessary authority to conclude plea agreements; the failure of the second respondent to challenge, on the basis of lack of authority, the pro forma complainant's plea agreements concluded in other matters; the fact that the respondents only seemed to recharge the applicant after a complaint by a family member of the deceased in this matter, all support the applicant's contention that the respondents' attempts to recharge him constitute an unlawful and procedurally unfair administrative action.

[56]. It is clear from the letter dated 8 May 2008 by the second respondent's legal adviser that the decision to recharge the applicant in this matter was only taken after a complaint had been received, as I indicated earlier, from one Mr Naushad Elias, the deceased's family member. The said letter, and I wish to quote copiously from it, reads inter alia as follows:

"COMPLAINT: DR L VAMBE

We refer to previous correspondence in this regard and wish to respond as follows to your complaint.

Prior to the hearing, a meeting was held between the pro forma complainant and the defence Counsel. Such meetings are required by our regulations with a purpose of insuring all issues that are in dispute are dealt with thus enable the actual hearing to run smooth.

Upon considering all documentation from both parties including the expert summaries, an agreement was reached in terms of which Dr Vambe was to plead guilty to the charge that he delayed referring the deceased to a thoracic surgeon resulting in the consequences that followed. A detailed plea explanation was complied and played before the Committee.

We may add that in the event an accused pleads guilty to a charge and his Counsel enters a written plea into the record, no oral evidence is led and the requirement to call witnesses falls away. This is the reason that why you were informed that you were no longer required to testify at the hearing.

Having considered the Plea, the Committees was not entirely satisfied with the Plea and returned a finding of not guilty.

We understand your disappointment of the outcome of the matter but wish to point out that the manner in which the case was concluded is entirely within the provisions of the relevant Regulations.

We also noted that some of the charges were, as part of the Plea bargain, not pursued. Due to the fact Dr Vambe did not plead to those charges that the outcome on the main charge was not favourable one, we have instructed the pro forma complained to reinstate those charges. You will be notified once a notice and Charge sheet is finaised.

We trust that you will find this in order

Yours faithfully

MR C M NKUNA
LEGAL ADVISER"

[57]. It is only apposite at this stage to consider the position of the Second Respondent *vis-a-vis* the pro forma complainant. The powers of the second Respondent are circumscribed in Regulations 3 of the Regulations. According to the said regulation, it

is the duty of the Committee to decide whether or not any grounds for holding an inquiry exist. If the committee should decide that an inquiry should be held, it directs the Third Respondent to arrange for the holding of the inquiry. The Committee does not formulate the charge sheet nor does it give any prescription as to how a charge sheet against a registered practitioner should be framed. In **Tucker & Another v. S A Medical and Dental Council and Others 1980(2) SA 207 at page 212 the court held the following;**

" The Committee of the preliminary inquiry, as its name indicates, is there purely to determine whether a prima facie case exists against the practitioner concerned..... It is not concerned to establish whether the charge sheet will actually be proved eventually. It is concerned only with the question whether there ought to be an inquiry at all". See also **Veriava and Others v. President, S A Medical and Dental Council and Others 1985 (2) SA 293(T) at page 309,** where the court emphasised that the Committee has not been bestowed with any powers in terms of the Regulations to formulate a charge. The court stated as follows:

"The inquiry committee merely does the preliminary investigation, the type of work for which it was appointed. If the preliminary investigation shows that evidence furnished in support of the complaint discloses prima facie evidence improper or disgraceful conduct in respect of the practitioner's profession, then there is a complaint to be inquired into by the council or the disciplinary committee..... If this reasoning is correct, which I believe it to be, then the only function of the inquiry committee is to conduct a preliminary investigation to determine whether the evidence furnished in support of the complaint discloses prima facie evidence of improper or disgraceful conduct in respect of the profession of the practitioner".

[58] As indicated earlier, it is clear from the provisions of Regulation 6 that the prerogative to formulate a charge sheet has been bestowed on the pro forma complainant. Apart from formulating the charge sheet against the accused practitioner, the pro firma complainant receives requests for further particulars and responds to such requests; see Reg. 5(2); he is in charge of the formulation such further particulars; he attends, with the accused practitioner's legal representative, a pre-inquiry conference where exceptions, objections or points *in limine* to the charges are raised; he discusses the pleas to the charge or charges; he furnishes to the other party copies of all the

documents, reports, notes and X-ray and other exhibits to the party who intends using them at the inquiry; in turn he himself peruses such documents; more importantly he makes admissions with regards to the allegations of the charge or exhibits; he consults with expert witnesses; in terms of Regulation 7 he prosecutes at the inquiry and he is defined as a person who has been approved by the Board to represent the complainant and to present the complaint to the Professional Conduct Committee and to consult witnesses, where necessary.

[59]. There are, in my view, further areas of evidence that indicate beyond any shadow of doubt that the pro-forma complainant is bestowed with the powers to formulate a charge against the accused practitioner. Regulation 4 (a) state as follows:

"On receipt of the directive referred to in Regulation 3 (4), the registrar shall issue a notice, which is attached hereto and essentially in the form of annexure A and addressed to the accused, stating where and when the inquiry will be held and enclosing the charge sheet as formulated by the pro forma complainant."

That the formulation of the charge sheet is the prerogative of the pro forma complainant it is also clear from annexure "A" to the Regulations, which is a Notice To appear Before a Professional Conduct Committee of The Professional Board. It states, among others, that;

".....is hereby given notice that an inquiry into your professional conduct will be held by the Professional Board for ..... at..... (place) .....on.....(date and time) the charge sheet as formulated by the pro forma complainant is enclosed".

[60]. Relying on the above authorities I find that the respondents' contention that a decision of the Board or of any of the committees to withdraw the charges is required cannot be true. Equally I find no merit in the respondents' contention that only the Board can withdraw the charges. It is as clear as crystal that the Board does not have such powers it purports to have and that any attempt by it to dictate to the pro forma complainant how he should formulate the charges or to withdraw any allegation of professional misconduct against a practitioner would amount to the usurpation of the pro forma complainant's powers by the Board.

[61]. The pro forma complainant, as a functionary of the Board, is bestowed with the powers not only to decide on the formulation of the charges against the practitioner but also to decide whether or not to proceed with any allegation of unprofessional conduct. Accordingly I find that the pro forma complainant was authorised not only to conclude the plea bargain in dispute but also to withdraw allegations of unprofessional conduct against the applicant.

[62]. The respondent's contention that the application is defective for non-joinder of the complainant does not have merit, in my view. Firstly the Regulations of the respondents do not accommodate the complainant. The complainant is not part of the process of making a decision on whether or not a particular registered practitioner should be hauled before a professional Conduct Committee or is he a pro forma complainant. Respondents have already admitted that the complainant's interests are taken care of by the pro forma complainant. The pro forma complainant represents the complainant and presents the complainant's case to the committee. Apart from complaining to the second respondent about the conduct of a particular practitioner, the Regulations do not require the complainant to do anything. Accordingly there is no merit in the contention that the complainant should have been joined.

I am satisfied that the applicant has made a good case an accordingly I make the following order:

1. **The decision of the Third Respondent to prosecute the applicant on the charges contained in paragraphs 1 and 3 of the second charge sheet dated 21 November 2006 is reviewed and hereby set aside.**

2. **The First Second and Third Respondents are hereby interdicted from proceeding with the prosecution of the applicant on the charges contained in paragraphs 1 and 3 of the second charge sheet dated 21 November 2006 and with any prosecution on any other charges that might arise out of the same facts.**

3. **The First, Second and Third Respondents are jointly and severally ordered to pay the costs of this application, the one paying and the others to be absolved.**

P.M.MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys:	*Macrobert Inc.*
Applicant's Counsel:	*Adv. Farrell*
Respondent's Attorneys:	*Gildenhuys Lessing Malatji Inc.*
Respondent's Counsel:	*Adv. NJ Jele*
Date Heard:	*7 September 2010*
Date of Judgment:	*2011 April 19*