



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A75/2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	YES / NO
(2) OF INTEREST TO OTHER JUDGE:	YES / NO
(3) REVISED:	YES / NO
DATE	

In the matter between:

BRYAN JOHN DOWLEY

APPELLANT

and

**HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

RESPONDENT

Coram: Baqwa J and Le Grange AJ

This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

ORDER

On appeal from: a decision of an Appeal Committee of the Health Professions Council of South Africa (HPCSA) held through Microsoft Teams Virtual Platform on 16 February 2021:

1. The appeal is upheld.
 2. The Appeal Committee's first, second, fifth and sixth orders are set aside and replaced with an order that Mr. Dowley is found not guilty on Count 1.
 3. The respondent is ordered to pay the costs of the appeal, to include the cost of two counsel where so employed.
-

JUDGMENT

Le Grange AJ (Baqwa J concurring):

- [1] Before this Court is an appeal in terms of section 20 of the Health Professions Act 56 of 1974 against a decision of the respondent's Appeal Committee (HPCSA) finding the appellant (Mr Dowley) guilty on the charge:

'That you are guilty of unprofessional conduct or conduct which, when regard is had to your profession, is unprofessional in that during the period January 2019 - February 2020, in respect of your patient and/or client Adele Camarera-Eichinger, you and/or your practice and/or associates were touting, in that text messages were sent to your patient/client informing her that when she consults at Specsavers, she will acquire double clicks card points.'

Facts

[2] The facts relevant to this judgement are largely common cause and as follows:

[3] The charge(s) stem from a text message sent by Clicks to its customers, which reads:

'Clicks: Need an eye test? Earn DOUBLE Club Card points at Spec-Savers! Reply YES to Book & get FREE scripted sunnies up to R 3000. T&Cs Reply STOP to opt out'

and pertain to unprofessional conduct as prohibited by the *Health Professions Act 56 of 1974 (act)* and the *Ethical Rules of Conduct for Practitioners Registered Under the [act] (rules)*¹.

[4] Mr Dowley is a *non-practicing* optometrist and registered as such at the HPCSA.

[5] Mr Dowley is further a non-executive director of Spec-Savers SA and the CEO of its holding company KFML Holdings.

[6] Spec-Savers SA is the franchisor to a multiple of Spec-Savers franchisees who *practice* in the field of optometry and is *registered* with the HPCSA.

¹ *Ethical and Professional Rules of The Health Professions Council of South Africa* as contained in Booklet 2 dated September 2016

- [7] In essence, the unprofessional conduct pertains (more specifically) to 'touting' as prohibited by the rule 3, and as extended in terms of rule 8.4² to Mr Dowley in person – for being the face of Spec-Savers.

In limine

- [8] Mr Trengove SC (on behalf of the appellant) advanced 3 points in limine.

- [9] The first being that the offence of 'touting' requires, per the definition in the rules, that the 'offender' must be a 'practicing' optometrist with a practice – as only a person practicing (or a practice) can (per the said definition) entice people to his/her offer(s) (or practice). It being common cause that Mr Dowley is *non-practicing* it would mean the end of the matter.

- [10] The rules define 'touting' as:

'[C]onduct which draws attention, either verbally or by means of printed or electronic media, to one's offers, guarantees or material benefits that do not fall in the categories of professional services or items, but are *linked to* the rendering of a professional service or designed to entice the public to the professional practice. Emphasis added.

- [11] The argument goes further that this understanding, is re-enforced by rule 3(2) which provide that:

'A practitioner shall not canvass or tout or allow canvassing or touting to be done for patients on his or her behalf.' Emphasis added.

– which conduct again necessitates a 'practitioner' (i.e. a practicing optometrist) and (his/her) 'patients'.

- [12] This Court finds that the suggested interpretation does not just hold water on a plain reading of the quoted definition and rule as argued, but also from a reading of rule 8.4 which provides that:

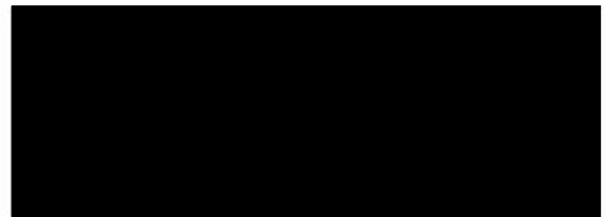
² Para 23 and 80 of the judgement of the Appeal Committee

'A practitioner *shall not practise* in any other form of practice which has inherent requirements or conditions that violate or potentially may violate one or more of these rules or an annexure to these rules. Emphasis added.

– which, again, necessitates conduct by a 'practicing' practitioner.

[13] It being common cause that Mr Dowley is *non practicing* with *no patients* and registered at the HPCSA as such – he should never even have faced a charge under any one of the aforementioned rules.

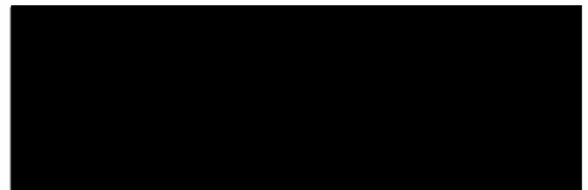
[14] In the premises, the appeal must succeed on the first hurdle.



A.J. LE GRANGE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered



SELBY BAQWA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the appellant: Mr W Trengove SC on instruction of Pierre Marais
Attorneys, Pretoria

For the respondent: Mr L Mgwetyana on instruction of Mfinci Bahlmann
Inc, Pretoria

Heard: 19 March 2024

Delivered: ■ March 2024