
Powers of the Registrar of the Health Professions Council to institute investigations under the Health Professions Act 56 of 1974

1 Introduction

The Health Professions Council of South Africa (the HPCSA) is a statutory body established in terms of section 2 of the Health Professions Act 56 of 1974 (hereafter “the Act”). One of the objects of the HPCSA is “to ensure the investigation of complaints concerning persons registered in terms of the Act and to ensure that appropriate disciplinary action is taken against such persons in accordance with the Act” (s 3(n)). The powers to institute an inquiry into a complaint, charge or allegation of unprofessional conduct against registered practitioners are vested with the professional boards established in terms of section 15 of the Act (s 41(1) of the Act). The procedure to be followed by the professional board in instituting an inquiry is prescribed in the Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct Under the Health Professions Act, 1974 (GNR102 in GG31859 of 6 February 2009, hereafter “the Regulations”).

While the powers to institute an inquiry of alleged unprofessional conduct is primarily vested with the professional board concerned, the Act (s 41A) and the Regulations (in reg 2) *also* confer certain powers to the Registrar to institute investigations. The questions thus arising are, when and under which conditions may the Registrar institute investigations under section 41A of the Act, and how should the Registrar conduct such investigations?

The purpose of this note is to address these questions, as well as to comment on the lack of understanding by the HPCSA and the courts about who can exercise the provisions of section 41A.

2 Conditions under which the Registrar may institute an investigation

There are three conditions in terms of section 41A(5) of the Act under which the Registrar may institute or have an investigation be instituted with the purpose of establishing more facts on a matter at hand. The first condition is when there is an alleged contravention of, or failure to comply with any provision of the Act by *any* person, irrespective of whether they are registered under the Act or not. This may be triggered by a complaint or by information available to the Registrar only. The second condition is that the Registrar may conduct an investigation if he or she has to determine if any provision of the Act applies to or has been contravened by a *registered* person. Thus, unlike the previous condition,

in this case, the person who is or will be investigated must be registered under the Act. The Registrar will check whether any of the provisions of the Act in relation to the issue has been contravened. This may also be triggered by a complaint or by information available to the Registrar. The third condition is where there is a charge, complaint, or allegation of unprofessional conduct by a registered person. This condition is the only one that is triggered by a complaint against the conduct of a person registered under the Act.

The Registrar needs to specify the condition under which an investigation is being instituted as each condition determines a different course of action to be undertaken by the Registrar, as will be demonstrated below.

Section 41A does not confer any power to the professional board to institute an investigation under this section. This fact seems to have been misunderstood, not only by the Professional Boards under the ambit of the HPCSA but also by the courts. For example, in the case of *Emergency Medical Supplies v Health Professions Council of South Africa* 2011 JDR (WCC) paras 30-31), the court tacitly acknowledged that the Professional Board for Emergency Care had this power regarding the appellant whose training the Education Committee of this Board had found to extend beyond the Board's accreditation. The Education Committee of the Board further resolved that an inspection team be appointed in terms of section 41A(2) of the Act. This resolution by the Education Committee not only demonstrates the lack of understanding within the HPCSA that section 41A may not be exercised by the Board, but further points to the failure by the HPCSA (as regulator) to understand that section 41A falls under the ambit of Chapter 4 of the Act, which deals with the disciplinary powers of the Board and not with an investigation into matters related to education and training, which is governed by section 60 of the Act.

In another case, *Haeck v Health Professions Council of South Africa* (2021/11449 2022 ZAGPJHC 690), the court erred by assuming that section 41A may be exercised by the preliminary committee of inquiry when it stated that "the Act entitled the preliminary committee to glean such further information as was required by it, in terms of [section] 41A". Moreover, the court was confused as to how the report compiled by the expert should be dealt with in terms of sections 41A(8)(b)(i)-(iii) (*Haeck v Health Professions Council of South Africa* paras 40 and 47). If the court had understood that section 41A may not be exercised by the preliminary committee of inquiry, it would have known that by engaging the expert, the committee was seeking further information in terms of section 41(2), discussed below.

3 How to conduct the investigation

3 1 Appointment of investigating officers

The Registrar may appoint investigators to assist him or her. Two categories of investigators may be appointed by the Registrar for the purpose of section 41A of the Act. The first category is a person who is an officer in full-time employment of the professional board. Such a person is appointed by the Registrar for carrying out the functions specified under section 41A(1) of the Act. It is important to note that a person referred to here is appointed for the purpose of the whole section in the Act and not for the purpose of a particular investigation, meaning that a person so appointed may conduct *any* investigation in terms of section 41A of the Act.

The second category of investigators refers to a person who is not in the full-time employment of the professional board who may also not be a member of the professional board. This person is appointed for either of the following purposes: (a) as an investigating officer for a particular investigation; or (b) to render assistance to the investigating officer who is in full-time employment of the professional board, as stated above (s 41A(2)). Both categories of investigators are issued with appointment certificates by the Registrar. The certificate states the details of the investigating officer, the details of the matter under investigation and the date of appointment. The certificate must be produced on demand (s 41A(4)). As alluded to above, the investigators appointed in terms of this section are appointed under Chapter 4 of the Act, which deals with the disciplinary powers of the board, and *not* an investigation on matters related to education and training, as referred to in the *Emergency Medical Supplies* case.

3 2 Ways to obtain any book, document, electronic data or thing under section 41A

There are two ways through which an investigating officer investigating a matter in terms of section 41A may obtain any book, document, electronic data, or thing (hereafter referred to as “information”) relating to the allegation under investigation: first, by making a request for information from any person who owns any premises, is in possession of, or is in control of such information needed by giving an explanation why he or she requires such information, and secondly, by applying to a magistrate or a judge for a search warrant for any premises or person regarding which the investigating officer on reasonable grounds believes information required for the investigation may be located (s 41(6)). In executing a search warrant and seizure, the investigating officer must have regard to the right to privacy enshrined in section 14 of the Constitution of the Republic of South Africa, 1996, which provides in section 14 that everyone has a right to privacy, as was well as for the right not to have one’s person or property searched, nor a person’s possessions seized, or the privacy of a one’s communication infringed.

Section 41A(6)(h) of the Act provides for a warrantless search and seizure on any of three grounds: (a) where the person concerned consents to such search and the seizure of the article in question; (b) where the person who may consent to the search of the premises consents to such search for and seizure of the article in question and (c) where the investigating officer on reasonable grounds believes that a search warrant will be issued to him or her if she applies for such warrant and that the delay in obtaining such warrant would defeat the object of the search.

In both the cases of *Gaertner v Minister of Finance* CCT 56/13 2013 ZACC 38 and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* CCT 94/13 2014 ZACC 3, the Constitutional Court held that warrantless inspections or search operations, in the absence of consent or demonstrable urgency in private dwellings and/or based on a suspicion of criminal wrongdoing, constitute an unjustifiable violation of the right to privacy of natural and juristic persons alike. This should be contrasted with warrantless inspections aimed at promoting industry-wide compliance with regulatory requirements and not based on any particular suspicion that the inspected party has contravened a law (whether criminal or otherwise), which would constitute a justifiable limit on privacy.

Considering the conditions under which the Registrar may institute an investigation in terms of section 41A of the Act, described above, which excludes the promotion of industry-wide compliance with regulatory requirements, one may conclude that any warrantless search of any premises and seizure of any article in the absence of consent or demonstrable urgency, and any other warrantless search to fulfil the conditions of section 41A(5), will constitute a violation of a right to privacy and therefore be unconstitutional.

3 3 Report compilation

Upon completion of any investigation in terms of section 41A(8) of the Act, a report must be compiled by the Registrar or the investigating officer who carried out the investigation. Where the investigation was not carried out by the Registrar, such a report should be submitted to the Registrar. If the report reveals *prima facie* evidence of unprofessional conduct, it should be added to the original complaint if there was a complaint, and where no complaint or charge has been lodged or laid or allegations made regarding the conduct in question, such a report is deemed to be a complaint for the purpose of an inquiry and the Registrar should serve a copy of the report on the registered person or persons concerned. Where the report does not reveal *prima facie* evidence of unprofessional conduct, the registered person or persons concerned should still be served with a copy of the report.

The issue of a report revealing *prima facie* evidence of unprofessional conduct where a complaint has already been lodged was dealt with in the

Haeck case. In this case, the preliminary committee of inquiry deferred the matter after consulting with the respondent for an expert opinion. The opinion was obtained, and the matter was referred for a professional conduct inquiry, but the respondent was not served with a copy of the expert's opinion and could therefore not respond to the allegations made in it. The judge frowned upon the HPCSA's conduct which was regarded as tantamount to violating the principle of *audi alteram partem* (to hear the other side). The HPCSA was found to be in breach of sections 41A(8)(b)(i) and 41A(8)(b)(iii) of the Act. However, in the *Haeck* case, the court incorrectly assumed that the expert opinion constituted a *report* in terms of section 41A(8)(a) of the Act, whereas it was in actual fact *information* obtained by the committee in terms of section 41(2) of the Act, which provides that:

A professional board may, whenever it is in doubt as to whether an inquiry should be held, in connection with the complaint, charge or allegation in question consult with or seek information from any person, including the person against whom the complaint, charge or allegation has been lodged.

If the opinion obtained reveals *prima facie* evidence of an impairment in respect of the registered person concerned, the Registrar should serve a copy of the report to the health committee of the relevant professional board to further investigate and deal with the matter in terms of the regulations relating to investigations in respect of impaired persons registered in terms of section 51 of the Act.

In preparing the report of an investigation, section 41A(8)(c) of the Act also becomes relevant. This subsection stipulates that the provisions of section 213 of the Criminal Procedure Act 51 of 1977 (hereafter the CPA) shall apply *mutatis mutandis* in respect of statements of witnesses contained in a report which would have been admissible as oral evidence at an inquiry in terms of section 41, or an investigation in terms of section 51 of the Act. Thus, the investigating officer must acquaint him- or herself with the provisions of section 213 of the CPA, and ensure: (a) that information gathered from any person during the investigation is obtained as a written statement which will be admissible as evidence to the same extent as oral evidence in a court case; (b) that the statement contains a declaration by such person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he would be guilty of an offence and liable to a fine or to imprisonment for a period not exceeding twelve months or to both a fine and such imprisonment, if he or she wilfully stated in it anything which he or she knew to be false or which he or she did not believe to be true; (c) that if the person who makes a statement cannot read it, that it is read to him or her before he or she signs it, and that an endorsement is made thereon by the person who so read the statement to the effect that it was so read; and (d) that when the written statement together with any document referred to in the statement are served on the respondent, they are accompanied by a written notification in which the respondent is informed that the

statement in question will be tendered as evidence at an inquiry *in lieu* of the HPCSA calling him or her as a witness in person, should the matter proceed to an inquiry. This should be done with the provision that should the matter proceed to an inquiry, such statement shall not be tendered in evidence without the consent of the respondent if he or she notifies the pro forma complainant concerned, at least two days before the commencement of the inquiry proceedings, that he or she objects to the statement being tendered as evidence.

3 4 Preservation of confidentiality or confidential Information

Section 41A(9) of the Act also protects the confidentiality of the information gathered by the Registrar or investigating officer in connection with alleged unprofessional conduct. The section states that “[a] person who carries out or assists with the carrying out of an investigation in terms of section 41A, should keep or assist in preserving confidentiality in respect of all facts which come to his or her notice in the performance of his or her functions.”

Facts regarding the investigation considered to be confidential can only be made available to the Registrar, the President, the chairperson of a relevant professional board or the public prosecutor concerned in the case of an offence in terms of the Act, or by order of a court. The practical effect of these provisions is that information which came to the notice of the investigation officer during an investigation in terms of section 41A of the Act may be privileged and confidential and may not be part of the information served on the respondent and/or members of the preliminary committee of inquiry during the preliminary inquiry process. Returning to the *Haack* case above, the HPCSA acted technically correctly by not serving the expert’s opinion on the respondent.

A person carrying out an investigation in terms of section 41A of the Act should exercise extra caution in dealing with confidential information, as non-compliance with the provisions of section 41A(9) of the Act constitutes a statutory offence in terms of subsection 11, outlined below.

3 5 Statutory offences under section 41A of the Act

There are four statutory offences created in section 41A(11) of the Act, three of which relate to any person except the Registrar or investigating officer, with the fourth applying specifically to the Registrar, investigating officer or any other person who deals with confidential information obtained in terms of section 41A of the Act. It is a statutory offence to: (a) refuse or neglect to produce information to any person who is in terms of the Act authorised to ask for it; (b) to hinder or obstruct the Registrar or an investigating officer in the exercise of his or her powers or the carrying out of his or her duties; (c) to pretend to be the Registrar

or an investigating officer and (d) be involved in any form of contravention of section 41A(9) of the Act.

The prescribed penalties for the first three statutory offences are more lenient than those for the statutory offence relating to a breach of confidentiality. For example, while a fine is one of the penalties, the maximum period of imprisonment for the first three statutory offences is only a year, compared to the maximum period of imprisonment for the statutory offence relating to a breach of confidentiality, which is two years.

4 Conclusion

The discussion has illustrated a lack of understanding within the HPCSA and the courts regarding the application of section 41A of the Act, namely that section 41A applies to the Registrar only and may not be exercised by the professional boards under any circumstance.

The enactment of section 41A of the Act which provides the Registrar with certain powers to conduct investigations should be exercised with caution and in consideration of the rest of the provisions of this section, the Constitution, as well as relevant case law referred to in this note. Any person involved in the execution or implementation of the provisions of this section should acquaint him- or herself with its prescripts, as a failure to do so may render the process irregular or unlawful, and in the worst scenario, make such persons susceptible to being charged with a statutory offence and being liable to any of the prescribed penalties.

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