



# Disciplinary proceedings against healthcare practitioners facing criminal charges: The role of the Health Professions Council of South Africa

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The purpose of this article is to address the questions as to whether a criminal conviction of a healthcare practitioner should affect his or her professional standing, and whether such conviction constitutes 'unprofessional conduct' in terms of the Health Professions Act. The article also explores a related matter, namely whether the Health Professions Council of South Africa (HPCSA) has a legal duty to refer complaints regarding unprofessional conduct that displays criminal elements for criminal prosecution. After considering relevant case law on these issues, the article concludes that a practitioner, after being convicted of an offence, should be afforded an opportunity to explain him- or herself to the board, not only in extenuation of the conduct in question, but also in response to the question of whether the conduct constitutes improper or disgraceful conduct. Moreover, the article explains why the HPCSA and professional boards have a legal duty to refer matters of unprofessional conduct with criminal elements in terms of section 34 of the Prevention and Combating of Corrupt Activities Act to law enforcement agencies.

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Health professionals registered with the Health Professions Council of South Africa (HPCSA)<sup>[1,2]</sup> (hereafter referred to as 'practitioners') are members of society and are therefore subject to the rule of law. It follows, therefore, that practitioners may be prosecuted for any offence, and in certain circumstances be convicted of an offence. It is for this reason that in the recent case of *Van der Walt v S*,<sup>[3]</sup> the apex court held that the notion that doctors must receive special penal treatment to protect their right to freedom and security of a person, which includes the right to not be treated or punished in a cruel, inhuman or degrading way, is without basis. There is hence no reason for an exception to be made where doctors are found, by competent courts, criminally guilty of intentionally or negligently causing the death of patients whose care they were entrusted with.<sup>[3]</sup>

The main questions thus arising are: how does a conviction of a practitioner for an offence by a court of law affect his or her professional status or standing, and does such a conviction constitute unprofessional conduct in terms of section 2 of the Health Professions Act No. 56 of 1974 (hereafter referred to as 'the Act')? The aim of this article is to answer these two questions, and to further examine whether the HPCSA (hereafter 'the council') or a professional board,<sup>[4]</sup> for that matter, has a duty to refer complaints regarding unprofessional conduct that displays criminal elements for criminal prosecution.

## Definition of unprofessional conduct

Unprofessional conduct is defined as 'improper or disgraceful or dishonourable or unworthy conduct or conduct which, when regard is had to the profession of a person who is registered in terms of this

Act, is improper or disgraceful or dishonourable or unworthy.'<sup>[5]</sup> In the case of the Health Professions Council of South Africa and Others v Grieve<sup>[6]</sup> (hereafter referred to as the Grieve case), the definition of unprofessional conduct was seen to be broad, and consequently, the definition does not limit the council's jurisdiction to conduct relating to the provision of healthcare services in a doctor-patient relationship.<sup>[7]</sup> In the Grieve case, the relevant practitioner was charged with contravening the norms and standards of his profession, and 'alternatively, [for] bringing the good name of his profession into disrepute by:

- a) persuading some of his patients and former patients to invest in a company of which he was a director when he knew that the company was in financial distress; and/or
- b) transferring funds invested in his company into his private bank account; and/or
- c) causing financial prejudice to the persons concerned who were persuaded to deposit large sums of money into bank accounts of companies that were subsequently liquidated.<sup>[8]</sup>

The case followed after Dr Grieve's objection to the relevant professional board's institution of disciplinary proceedings against him in terms of section 41 of the Act, on the ground that the factual allegations that informed the charges on which the disciplinary hearing was instituted did not constitute 'unprofessional conduct' as these were unrelated to the health profession.<sup>[9]</sup> Upon dismissal of this point in limine by the disciplinary committee, Dr Grieve approached the High Court, which ruled in his favour and confirmed

that Dr Grieve's conduct had nothing to do with the treatment of his patients or the health profession.<sup>[10]</sup> This decision of the High Court was subsequently successfully appealed by the council in the Supreme Court of Appeal (SCA), which concurred with the council's argument that the allegations against Dr Grieve, if proved, would in fact constitute unprofessional conduct. The council's decision to institute disciplinary proceedings against Dr Grieve was held to be rational and within the council's powers.<sup>[11]</sup>

The SCA decision above means that a professional board may institute disciplinary proceedings into any allegation of unprofessional conduct by a registered healthcare professional, as long as such conduct is deemed to be improper, disgraceful, dishonourable or unworthy with regard to the health profession, irrespective of whether such conduct relates to a practitioner-patient relationship or not.

### Practitioners facing criminal prosecution in court

In terms of section 45(2) of the Act, if there is a legal action against a practitioner in any court in South Africa and it appears to the court that there is *prima facie* proof of unprofessional conduct, or conduct relating to such person's profession that is deemed unprofessional, the court has an obligation to direct that a copy of the court's record of such proceedings, or a part thereof that may be material to the issue, be provided to the relevant professional board.<sup>[12]</sup> It is important to note that the provision of the Act is peremptory and only requires *prima facie* proof of unprofessional conduct. In other words, there is no need to wait for a conviction before the relevant professional board is notified of the unprofessional conduct by the practitioner. This may be explained with reference to the social contract that exists between health professionals and society. Society expects practitioners to demonstrate morality and integrity in their day-to-day lives, whereas non-compliant practitioners not only compromise society's trust in them, but also bring the health profession into disrepute.<sup>[13]</sup> Courts need to be cognisant of their role in ensuring that the health professions maintain the standards expected of their professions, by referring matters with *prima facie* proof of unprofessional conduct to the relevant professional boards. Unfortunately, at the time of writing of this article, the authors did not have adequate information to establish if courts can be said to generally comply with this peremptory provision.

So, to summarise: it is not necessary for a professional board to wait for the finalisation of a criminal case in order to investigate a matter as *prima facie* proof of unprofessional conduct by a healthcare professional in terms of the Act, and disciplinary proceedings may be initiated without the finalisation of a court case. In the Grieve case referred to above, the court observed that the council's disciplinary functions are not confined to instances where there has been a criminal conviction, and that the council has a duty to act against any conduct that is improper, unethical, dishonourable, disgraceful and unworthy.<sup>[14]</sup> Moreover, the court also stated that conduct by a practitioner may be unethical without being criminal or even unlawful. The court described the council as the moral compass of the health professions, with the duty to discharge its duties with regard to improper, unethical or unprofessional conduct by healthcare professionals.<sup>[14]</sup>

In terms of section 41A(5)(a) of the Act, the registrar of the council has the authority to institute an investigation into an alleged contravention of, or failure to comply with, any provision of the Act, including to establish if any provision of the Act applies to a registered healthcare professional, or whether there has been a contravention of any such provision of the Act.<sup>[15]</sup> Furthermore, the council may investigate any charge, complaint or allegation of unprofessional conduct by a registered healthcare professional.<sup>[16]</sup> This was confirmed in the Grieve case (referring to the case of *De Beer v Health Professions Council of South Africa 2007(2) SA 502 (SCA)*), where the court confirmed that the council's decision to institute disciplinary proceedings was not dependent upon a criminal conviction of a registered person, but was part and parcel of the council's fulfilment of its *custos morum* responsibility, as bestowed on the council in accordance with section 41A of the Act.<sup>[14,17]</sup>

In the matter of Dr Van der Walt, whose criminal case was referred to above,<sup>[3]</sup> the council's preliminary committee of inquiry made a determination that there was *prima facie* evidence of unprofessional conduct of a serious manner, after which the matter was referred to an inquiry with an option to pay an admission of guilt fine of ZAR10 000 without appearing at an inquiry as is provided for in terms of section 42(8) and 42(9) of the Act. In terms of these sections, if a respondent is alleged to be guilty of unprofessional conduct and the professional board, on reasonable grounds, is of the opinion that a fine on conviction will be imposed after an inquiry, the professional board may issue a summons, with an endorsement by the same professional board or the registrar, such that the respondent is permitted to admit that (s)he is guilty of the said conduct and that (s)he may pay the stipulated fine without appearing at the said inquiry.<sup>[18]</sup> In this matter, the mother of the deceased patient lodged a complaint with the council and also with the South African Police Service. The council's inquiry process and the criminal justice process ran concurrently, with the council's process being concluded first. The criminal trials were concluded in 2020, with the doctor succeeding in having his conviction of culpable homicide and his sentence of 5 years' imprisonment set aside by the Constitutional Court.<sup>[19]</sup>

It is therefore clear that a professional board can and should institute disciplinary proceedings against a practitioner facing criminal charges without waiting for a criminal conviction by the court. Such proceedings can be initiated through a court referral by virtue of section 45(2) of the Act, or through the council's own initiative in terms of sections 41 and 41A of the Act.

### Practitioners convicted of an offence in a criminal court

Every person who intends to be registered as a practitioner is required to submit to the registrar, among other things, proof of identity and good character.<sup>[20]</sup> The registrar considers the supporting documents of good character, as well as the qualifications of the applicant.<sup>[21]</sup> The registrar then submits the documents to the relevant board where the practitioner wants to be registered. Where a practitioner, either before or after registration, has been convicted of an offence by a court, the relevant professional board may decide if such offence constitutes unprofessional conduct or whether such offence would constitute 'good character' or not.<sup>[22]</sup> The Act, however, provides that before the professional board imposes a penalty or penalties by virtue of section 42(1) of the Act, the practitioner

should be afforded an opportunity to explain himself to the board in extenuation of the conduct in question. In the case of *Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad v Strauss en Andere*,<sup>[23]</sup> the court interpreted section 45(1) as affording the accused, following proof of his conviction in a court of law, with an opportunity to state his case with regard to the issue of whether his conduct constituted improper or disgraceful conduct. A strictly literal interpretation of section 45(1), according to the court, would nullify the disciplinary inquiry by the professional board to such an extent that its function would be reduced to that of a rubber stamp, which would clearly fly in the face of the obvious intention of the legislature with regard to section 45(1) of the Act.<sup>[24]</sup>

In this case, three medical doctors practising in partnership as general practitioners were convicted in a magistrate's court on several charges of contravening section 22A of the (then) Drugs Control Act No. 101 of 1965, specifically in that they were not authorised to allow their receptionists to sell listed substances to clients. Despite not agreeing that they were guilty, the three paid acknowledgment of guilt fines in respect of the charges. Subsequent to the court case, a disciplinary committee of the board in terms of section 45(1) of the Act also found them guilty. They then brought an application to the Orange Free State Provincial Division of the High Court to have the conviction and penalty imposed by the disciplinary committee set aside, which was granted. The council hereafter appealed the decision of the High Court, but the appeal was dismissed.

What is the conclusion to be drawn from this case? It is that a practitioner who has been convicted of an offence in a court should be given an opportunity at an inquiry to give an explanation in extenuation of his conduct. This may include an attempt by him or her to show that his or her conduct should not be regarded as either improper, disgraceful, dishonourable or unworthy. This, by implication, means that an inquiry under section 45(1) of the Act should be treated like an inquiry under section 41, and therefore subject to section 42(2) of the Act, which makes it obligatory that every person whose conduct is the subject of an inquiry under section 41 should be afforded the chance, either personally or through a legal representative, of responding to the charge and of being heard in his or her defence.<sup>[25]</sup> In such matters, the board may dispose of the preliminary inquiry process and have the matter dealt with by the professional conduct committee of the professional board concerned.

## Does the council have a legal duty to refer a matter being considered for unprofessional conduct for criminal prosecution?

There is no provision of the Act that authorises or imposes a duty on the council and/or professional board to refer a matter (containing criminal elements) being considered for unprofessional conduct to the relevant law enforcement authorities, except in cases where a person fails to comply with the inquiry procedure of the relevant professional board concerned.<sup>[26]</sup>

In terms of section 34(1) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PCCA Act):<sup>[27]</sup>

'Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any person has committed – (a) an offence under part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter

2, or (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.'

In instances where the council considers matters relating to fraud, the council hence has, in accordance with the PCCA Act, a legal duty to report any complaint relating to fraud involving an amount of ZAR100 000 or more to the law enforcement agencies.

Failure to report such cases in terms of section 34(2) of the PCCA Act would constitute an offence in terms of the PCCA Act.

The council and/or a professional board is subject to a statutory requirement that requires them to refer matters of unprofessional conduct with criminal elements for criminal prosecution. This includes cases of non-compliance by any person, including the respondent, with the professional board's inquiry procedures or processes.

## Conclusion

The *Ethical and Professional Rules of the Health Professions Council of South Africa*<sup>[28]</sup> require in ethical rule 27A that practitioners registered under the Act, and those intending to be registered, maintain the highest standards of personal conduct and integrity. Failure to do so may lead them to be prosecuted in terms of the Criminal Procedure Act No. 51 of 1977. In addition, they may also be referred to the relevant professional board to be subjected to the board's inquiry process. Both society and the profession have a duty to ensure that practitioners maintain the highest standards of personal conduct and integrity in their day-to-day lives. Similarly, the professional boards have a legal duty to refer matters of unprofessional conduct with criminal elements in terms of section 34 of the PCCA Act to law enforcement agencies. In the final instance, courts need to recognise their role by referring matters to the relevant professional board when there is *prima facie* proof of unprofessional conduct by a registered healthcare professional.

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