

## 'No deals' for unlucky few strikers – HPCSA



Health Professions Council of South Africa (HPCSA) legal manager, Advocate Tshepo Boikanyo.

**Any political bargains struck before this August's preliminary enquiry into the professional conduct of 256 KwaZulu-Natal (KZN) public sector doctor strikers will not stop proceedings against them.**

The 'no bargains' assertion was made by the Health Professions Council of South Africa (HPCSA)'s legal manager, Advocate Tshepo Boikanyo, last month when *Izindaba* asked about the implications of extensive political manoeuvring.

The 256 are among thousands of public sector doctors who downed tools across the nation last April in protest at what they saw as woefully inadequate Occupation Specific Dispensation (OSD) pay hikes offered by government. A political 'deal' would have mitigated the potential fall-out among public sector doctors who have expressed strong solidarity around difficult working conditions, dysfunctional administrations and relatively low professional salaries.

A punitive outcome at an HPCSA hearing could prove a watershed event in public health care delivery as disgruntled doctors, already dissatisfied with OSD career path-related salary hikes, leave in ever-growing numbers.

In a tactical move, most of the 256 KZN strikers asked by the HPCSA for official written explanations withheld

letters of apology to their Health MEC Sibongiseni Dlomo and Premier Dr Zweli Mkhize (also the country's longest serving former Health MEC). This was after strong concerns were raised that the apologies could be used against them as admissions of guilt.

### 'We're sorry, now drop the stick!'

SAMA management had hoped for a *quid pro quo* deal in which the KZN political leadership would drop the complaints against them. However, as Boikanyo confirmed to *Izindaba*, because of its role 'as custodian of professional morals', the HPCSA could proceed against them regardless of any complaint withdrawal.

Dlomo this February suggested that the doctors write official letters of apology to him and his leadership after his health director-general, Nonhlanhla Ngidi (an attorney) met with the KZN President of the South African Medical Association (SAMA), Professor Cyril Naidoo.

Sources close to the proposed deal said Dlomo and his colleagues were still smarting from Facebook caricatures by the angry doctors last June. SAMA national chairman, Dr Norman Mabasa, also tried to get an apparently willing national health minister, Dr Aaron Motsoaledi, to intervene on behalf of the threatened doctors, but the HPCSA's stand-alone status snookered this initiative.

***A punitive outcome at an HPCSA hearing could prove a watershed event in public health care delivery as disgruntled doctors, already dissatisfied with OSD career path-related salary hikes, leave in ever-growing numbers.***

Said Boikanyo: 'Our position is simple; we can't say what will happen with the (preliminary hearing) committee. As things are, we can only operate on the basis of what we have. We cannot have conditions set for us

***SAMA management had hoped for a quid pro quo deal in which the KZN political leadership would drop the complaints against them. However, as Boikanyo confirmed to Izindaba, because of its role 'as custodian of professional morals', the HPCSA could proceed against them regardless of any complaint withdrawal.***

before this goes to prelim – it would create a precedent.'

He said the preliminary enquiry committee appointed by the Medical and Dental Professions Board (MDPB) would look at all the evidence presented, including any interactions with the national minister and the relevant MEC, plus any alleged wrongdoing on the part of government.

### At best, an apology could mitigate

Boikanyo added that any written apology presented might be viewed as mitigation, but the issue of ethical transgression remained. 'It's a very complex case ... there are a lot of things happening behind the scenes that we're not worried about as a council. We operate on the basis of the Act and the regulations that govern us. The (preliminary enquiry) committee cannot operate with a conditional apology; it takes away their autonomy,' he stressed.

He confirmed that the committee (whose powers were recently increased to rule on and impose penalties in matters it deems to be 'less serious') would almost certainly deal with the matter this August. Boikanyo said that unless the enquiry was provided with reliable information about which doctors were present or absent from their work stations during the strike, the HPCSA would be 'at pains to prove things'.

The KZN health authorities are relying mainly on doctor duty lists compiled by individual hospital

**Boikanyo said that unless the enquiry was provided with reliable information about which doctors were present or absent from their work stations during the strike, the HPCSA would be 'at pains to prove things'.**

supervisors to prosecute their complaint. The first duty lists to emerge were shot to shreds by SAMA lawyers, who had scores of names removed because the doctors were, among other things, on holiday, working in other hospitals or on sick leave.

One scenario, if it comes to a full-blown professional conduct hearing, is that the doctors take some responsibility for the strike on condition the health department takes an equal amount of responsibility for how they've treated doctors. For any preliminary enquiry finding to be binding, the respondents must accept it, otherwise it escalates to a professional conduct hearing.

*Izindaba* sources said the HPCSA would have to show that patients actually suffered impairment or death

as a direct consequence of the strike, not simply prove that the doctors participated in a strike. Written argument at the preliminary hearing (conducted in camera and on paper only) is expected to centre on the strikers bringing the dignity of the profession into disrepute and whether it is unprofessional *per se* to strike.

**Dickey duty rosters strikers' best hope**

The doctors will almost certainly question allegedly incomplete and unreliable doctor duty lists upon which the charge sheet relies and highlight the 'randomness' of the names chosen.

Boikanyo confirmed that the preliminary enquiry would focus on 256 doctors. As of 18 June this year, 77 had provided written explanations (mostly represented by MacRobert Inc.), with 176 others having failed to do so. Of these 176, SAMA represented 65 while the other 111 had no representation. The failure to respond by the 65 was after three extensions to the statutory 40-day response period (i.e. 120 days) were granted. Letters requesting explanation were first posted to the individual

doctors in August and September last year. The extensions were filed consecutively on behalf of the doctors by Dr Trevor Terblanche (Secretary General of SAMA at the time), Dr Mabasa and Professor Naidoo.

**As of 18 June this year, 77 had provided written explanations (mostly represented by MacRobert Inc.), with 176 others having failed to do so.**

Two extra matters had been 'closed' when it was found that the one doctor had been in private practice and the other had been working for the University of KwaZulu-Natal, the health department having provided 'incorrect' names. The file of one doctor had gone missing, 'but we'll find it', an HPCSA legal officer said, adding that there was 'no rule or regulation' preventing the doctors from submitting written explanations right up until the committee sat.

Professor Naidoo asked why only 256 doctors were singled out for action

A floorcovering that leaves absolutely no room for bacteria?



www.forbo-flooring.fr



when well over a thousand KZN doctors took to the streets. He said he was 'deeply disappointed' that a strategic deal struck with SAMA at the KZN legislative assembly at the height of the strike was 'broken'. The deal was that doctors call off the strike and return to work in return for a conditional guarantee that nobody be penalised (unless their actions or omissions impacted on patient care) and that a provincial task team be set up to address grievances. The task team never materialised.

Doctors also signed an undertaking not to strike again without first going through 'proper channels' or any structure formed as a result of the strike ending. Naidoo added: 'Clearly the bond of trust has been broken and doctors have become increasingly suspicious and will therefore not fall prey to any offers'.

'Non-striker' doctors spoken to by *Izindaba* (on condition of anonymity) were divided on the ethics of striking in the dysfunctional vortex that is public health care in South Africa. Said one: 'This (the HPCSA action) is an abuse of process; it belongs in the labour domain. It's outrageous the lengths the DoH will go to waste taxpayers' money and demotivate its employees. The tragic and sad part is that they don't seem to appreciate who they're dealing with ... it's not as if these people are dispensable. If they want to end up with health care delivered by third-rate practitioners who don't speak English, this is the right way to go.'

### Racial component of respondents questioned

Another alluded to the predominantly white and Indian composition of the doctors singled out for potential censure when the strikers were 'actually 50% black, 30% Indian and 20% white'.

*'Non-striker' doctors spoken to by Izindaba (on condition of anonymity) were divided on the ethics of striking in the dysfunctional vortex that is public health care in South Africa.*

'It smacks of vindictiveness, why pick some and leave out others? Some instigators were left out while others coerced into striking were named,' he claimed. He questioned why KZN's political leadership had complained to the HPCSA when the strike was national and embraced several other provinces where court interdicts were used to break the strike. 'The whole things smacks of a political shot across the bows to prevent future strikes instead of addressing the real issues and retaining doctors,' he said.

*'The whole things smacks of a political shot across the bows to prevent future strikes instead of addressing the real issues and retaining doctors,' he said.*

A third doctor said he was certain the strikers would be found guilty of misconduct, based purely on ethical grounds, and that they would pay hefty fines to ensure their HPCSA certificates of good standing remained intact. 'Let's not kid ourselves; this was about money (salaries), not about patient care, so the latter is what needs to be adjudicated on,' he added.

### OSD supplementary negotiations end

Meanwhile SAMA was gauging public sector member sentiment afresh after the employer signed off their final OSD supplementary offer on 4 June. SAMA negotiator, Poppie Ramathuba, said it averaged out at 1.5% extra.

*Izindaba* health department sources in the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) said it was part of a R358 million package of which 77% would go to mid-level sector doctors (medical officers, senior medical officers and specialists), 22% to pharmacists and 1% to emergency medical service staffers. They emphasised that this was 'R7 million over budget', and cautioned against 'reducing overall doctor hikes to a single percentage'.

'The model takes into account pay and grade progression and a reasonable increment between notches to retain

professionals. You have to look at each in terms of the model. When our technical team looked at it that was the process followed. To reduce it to percentages takes away from the intention and may have the wrong impact as to what it is we're trying to do,' a top source said.

Unions usually have 21 days to respond, although the PHSDSBC constitution is silent on a response period. If accepted by SAMA, which has a seat on the bargaining council only by courtesy of the Democratic Nursing Union of South Africa (DENOSA), the supplementary hikes will be backdated to 1 April 2010.

If rejected, a country-wide 'work to rule' with public sector doctors taking tea breaks, lunches and knocking off at 16h30 while refusing to work overtime, is probable, with the more militant junior doctors threatening a repeat strike.

### Judasa lays battle plans

A Junior Doctors Association of South Africa (Judasa) conference in Limpopo this June resolved to move out of the 'unfavourable' bargaining chamber and to take their fight for a minimum service level agreement to the Constitutional Court. Chairperson, Dr Mahlane Phalane, said Judasa planned to transform SAMA into an effective, mass-based union. They did not want doctors to be 'reduced to soft targets of blame and ridicule' when there were medical disasters beyond their control. They also wanted to develop effective referrals to management and political leaders to deal with chronic shortages of medication and equipment. Phalane said Judasa intended devising a 'fight-back strategy' to what he termed 'the killing of a doctor in a quest to save a life' and wanted an end to the parachuting of leaders into the department and profession. 'Our profession is capable of producing its own leaders,' he added.

The conference near Lebowakgomo was the first in a series of provincial Judasa meetings to obtain a mandate. Phalane said if mandated, a strike was on the cards.

**Chris Bateman**