# SCA opens the door to curbing malicious HPCSA complainants -Medical Brief 9 December 2020

A recent **South African Supreme Court of Appeal** judgment, in the case of a clinical psychologist against a mining company, may open the door for medical practitioners — and their insurers — to institute claims for malicious prosecution against complainants, write Deon Francis and Tarryn Venter of **Clyde & Co**.

Often times when responding to complaints submitted against them at the **Health Professions Council of South Africa** (HPCSA), medical practitioners feel that patients (and the public in general) have free reign to submit any complaint they so choose, leaving the medical practitioner with the arduous task of responding to the complaint and with the possibility of being exposed to a serious sanction being imposed upon them.

Furthermore, the medical practitioner finds further frustration in that they have no right of recourse against the person who complained about them.

However, the recent SCA judgment of **Holden v Assmang Limited** may change this landscape and open a door to medical practitioners (and perhaps even to their insurers) to institute a claim for malicious prosecution against the complainant.

**Background: Holden v Assmang Limited**

The matter of Holden v Assmang Limited has been an on-going argument for a number of years. Ms Linda Jane Holden, a clinical psychologist, received referrals of patients who were employees of Assmang Limited, from the medical practitioners in the employ of Assmang Limited, from February 2007.

Ms Holden diagnosed certain employees of Assmang Limited with manganism (manganese poisoning, a toxic condition resulting from chronic exposure to manganese). At the time, Assmang Limited was responsible for payment of her fees. Payment of her fees seized, her contract was terminated and Assmang Limited lodged a complaint against Ms Holden with the HPCSA during June 2008, wherein it was alleged that Ms Holden had been in gross breach of her professional ethics by acting outside of the scope of her practice by diagnosing the Assmang Limited employees with manganism.

With the assistance of her legal representative, Ms Holden submitted a comprehensive response on 29 September 2008 and a further response on 26 November 2008. After being summoned to appear before the Committee of Preliminary Inquiry on 30 October 2009, in what can only be assumed to be a consultation, as provided for in section 41(2) of the Health Professions Act, Ms Holden was formally notified on 13 November 2009 that she had been

found not guilty of any unprofessional conduct and that no further action would be taken against her.

Thereafter, Ms Holden instituted action against Assmang Limited on 6 August 2012 for malicious prosecution.

As part of its defence Assmang Limited raised a special plea of prescription and argued that Ms Holden became aware of the claim she had against Assmang Limited on 30 June 2008 when the letter of complaint was submitted to the HPCSA alternatively on 29 September 2008 when Ms Holden responded to the complaint. As Ms Holden only instituted her claim against Assmang on 6 August 2012, her claim had been instituted outside the three-year time period allowed for by the Prescription Act 68 of 1969, as amended, and therefore her claim against Assmang Limited had prescribed. Ms Holden argued that prescription in respect of her claim against Assmang Limited only began to run when the complaint against her was dismissed by the HPCSA.

When considering the matter the SCA had regard to the fact that a claim for malicious prosecution has four very clear and defined requirements, as stipulated in the matter of Minister of Justice and Constitutional Development and Others v Moleko [2008] 3 All SA 47 (SCA). These four requirements are that the:

1. defendant had set the law in motion by instigating or instituting the proceedings;
2. defendant acted without reasonable or probable cause;
3. defendant acted with malice; and
4. prosecution failed.

Whilst the SCA acknowledged the four requirements as set out in the Moleko matter, the judges only concerned themselves with the fourth requirement. It was expressly stated by the Court that “the claim can only arise if the proceedings were terminated in the plaintiff’s favour. That is so because a claim for malicious proceedings cannot anticipate the outcome of proceedings yet to be finalised.”

What is of interest in this instance, is that the SCA recognised that malicious prosecution claims are ordinarily seen in respect of criminal prosecutions, however, it can also include civil proceedings as is evident from the judgment where it is expressly stated that

“There is no discernible distinction between pending criminal proceedings and proceedings before statutorily created professional tribunals. The HPCSA is such a tribunal. The cause of action applies to both civil and criminal proceedings and not only the latter.”

The SCA recognised that the decisions that the HPCSA makes in respect of disciplinary proceedings can have far reaching consequences for the medical practitioners involved. In the

instance of Ms Holden, the SCA noted that she could have lost her licence to practice should she have been found guilty of gross professional misconduct. Furthermore, the Court noted that the HPCSA utilises a system which has all the same characteristics of a criminal proceeding, including punitive sanctions. As such, a disciplinary action by the HPCSA against its members is viewed by the court as a prosecution.

On this basis, it was held that the prosecution against Ms Holden had only failed once she was formally advised by the HPCSA on 13 November 2009, that there were no findings of professional misconduct against her and as such, Ms Holden's claim has not prescribed.

However, what remains to be seen is whether Ms Holden's claim for damages as a result of the malicious prosecution against Assmang Limited, will be successful.

**What does this mean for medical practitioners?**

From the SCA judgment it has been established that the Court considers disciplinary proceedings instituted against a medical practitioner at the HPCSA to be akin to a criminal prosecution, and that, in order for a claim for malicious prosecution by way of the submission of a complaint to the HPCSA to be successful, it would have to meet the four requirements as set out in the Moleko matter.

It should be borne in mind, that the SCA has only pronounced on the fact that a claim for malicious prosecution as a result of a malicious complaint submitted to the HPCSA is technically correct and that prescription only begins to run when the claimant is aware that prosecution has failed.

What the judgment demonstrates is that there is a right of recourse available to medical practitioners who feel like they have been needlessly persecuted by patients or members of the public. In this regard, it must be understood that receiving a complaint, especially from a statutory body such as the HPCSA, is often very stressful for the practitioner and responding thereto and dealing with a complaint can be a costly exercise.

Ordinarily, when a medical practitioner is required to respond to a HPCSA complaint, if they are insured, they make payment of their excess to their insurer who then appoints an attorney to assist in preparing the response. Should the practitioner not be insured, they will either prepare the response themselves (which takes time out of his or her practice) or he or she will appoint an attorney to assist them. Once the response is submitted, the practitioner often has a lengthy wait to determine whether there is an adverse finding against them (as can be seen from Ms Holden's matter, where the delay was over a year). Thereafter, if no adverse finding is made, the matter is resolved and the prosecution has failed.

However, if there is an adverse finding together with a sanction, the practitioner can either accept it or reject the finding and proceed to a disciplinary hearing, if the practitioner is not referred to a disciplinary hearing directly. Should the matter proceed to a disciplinary hearing, the medical practitioner will be represented by an attorney and, if they so choose, an advocate as well. There is a significant amount of preparation that is done in the lead up to a disciplinary inquiry, that not only incurs significant legal costs but also time out of the practitioner's practice. Then at the disciplinary hearing, which proceeds like a criminal prosecution, the practitioner is also required to be present. If the practitioner is found not guilty at a disciplinary inquiry, the prosecution would also have failed.

In Ms Holden's case, she only reached the stage where the Committee of Preliminary Inquiry found her not guilty and she did not have to undergo the process of a disciplinary inquiry. However, she has still instituted a claim against Assmang Limited for legal costs, loss of income and contumelia. If the prosecution continued for a longer period of time and if Ms Holden had been required to appear at a disciplinary hearing, it is assumed that her claim would be even greater than it already is.

Whilst Ms Holden's claim has been instituted against a company (juristic person), having regard to claims for malicious prosecution, in South African law, there is no restriction as to who the claim for malicious prosecution can be instituted against. As can be seen in matters such as Heyns v Venter [2003] 3 All SA 176 (T) and Magwabeni v Liomba (198/2013) [2015] ZASCA 117, a claim for malicious prosecution can also be instituted against private individuals. As such, a medical practitioner could proceed with an action against a complainant who is a private person or a juristic person.

**Conclusion**

Patients, members of the public, companies and, in some instances, disgruntled family members, complain about medical professionals to the HPCSA with impunity whilst being of the understanding that whatever the outcome of the complaint, it will have no negative consequences for the complainant. However, it would appear that Ms Holden's matter may change the status quo.