

Dentist bringing malicious prosecution proceedings against patient

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SADA Legal and Corporate Services

The improper use of the complaints process or legal proceedings by patients has been an ongoing issue for practitioners for several years and fast becoming more acute. Any member of the public may lay a complaint against a treating dental professional. Sometimes, these complaints are without merit, vexatious and frivolous or they strangely arise outstanding fees are claimed and the patient seeks to find some fault with the treatment rendered by the practitioner.

Nevertheless, the dental professional is expected to respond to such complaints, in writing, and to address the cause of the complaint or prepare reports for their indemnity organization in an effort to defend summons claiming damages or criminal prosecution and complaints lodged with the regulator.

The powers of the HPCSA are wide, and can include fines and a complete prohibition from practicing, should a dental professional found to have acted unprofessionally. We all appreciate the day-to-day pressures of working in dentistry, so imagine the additional stress for any doctor going through a complaints process (regardless of the final outcome). This must have an impact, not just on their current job, but on their career and their personal life.

Doctors are under immense pressure in the workplace - hours worked, antisocial work times, variety of patients, fear of complaints, and the stigma of "confessing" to errors. When doctors do slip up or are thought to be acting unprofessionally, the process of going through fitness-to-practise-style proceedings will take a further psychological toll. The process is not assisted when the regulator is not particularly efficient in conducting and finalizing proceedings, which in most cases can take two years or more sometimes at the end of the process finding the practitioner not guilty.

Furthermore, the Preliminary Committee of inquiry is not particularly efficient in their consideration and dismissal of frivolous and vexatious complaints. If they are happy with the practitioner's explanation, no further action is taken and the registrar will advise the patient accordingly. In such circumstances, doctors may not sue patients unless they can show that the patient acted by malice or an improper motive.

On the other hand, if the Preliminary Committee is not satisfied with the practitioner's explanation, they may recommend that matter may be referred to the Committee. However, if the preliminary committee is not satisfied with the doctor's explanation, it may ask the

doctor to appear before it to give evidence or decide to refer the case to a professional conduct inquiry which can take an inordinate of time to conclude.

Practitioners suing their patients

The question often raised by practitioners is whether it is ever justified for doctors to sue their patients (or for their lawyers to advise them to do so), where they have successfully defended allegations made against them in criminal or civil cases, or in disciplinary hearings by the Health Professions Council of South Africa (HPCSA). Sometimes doctors were advised to be cautious about suing their patients because this may generate more bad publicity than occurred when the patient originally complained about or sued the doctor.

Doctors against whom a criminal or civil case or complaint to the HPCSA has been withdrawn or dismissed may not sue a patient who instituted such a case or complaint for defamation unless it can be proven that the patient's conduct was based on malice. 'Malice' means that the person making the report did not have an honest belief when making it, but acted out of spite or an improper motive.

Doctors who wish to sue patients for malicious prosecution or abuse of civil proceedings must show that such patients acted intentionally with 'malice' and 'without reasonable and probable cause'. The courts will usually award costs to doctors who successfully defend cases against their patients.

Often times when responding to complaints submitted against them at the Health Professions Council of South Africa (HPCSA), dental practitioners feel that patients (and the public in general) have free reign to submit any complaint they so choose, leaving the dental 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. The practitioner is then required to comply with the terms of cover provided by their professional indemnity provider or insurer and satisfy the conditions of cover. Furthermore, the dental practitioner finds further frustration in that they have no right of recourse against the person that complained about them.

Supreme Court of Appeal decision

A recent Supreme Court of Appeal judgment of *Holden v. Assmang Limited* may change this landscape and open a door to dental practitioners (and perhaps even

to their insurers) to institute a claim for malicious prosecution against the complainant.

The complaint was against a clinical psychologist with the HPCSA which matter had been an ongoing argument for a number of years. A complaint was lodged in June 2008 for gross breach of her professional ethics by acting out the scope of her practice.

A comprehensive response was submitted 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, for a consultation, on 13 November 2009, she had been found not guilty of any unprofessional conduct and that no further action would be taken against her. She instituted action against her former employers for malicious prosecution.

Although there were four requirements of malicious prosecution, the court look at one requirement "prosecution failed".

What is of interest is that the recognition by the Court that malicious prosecution claims are ordinarily seen in respect of criminal prosecutions, it can also include civil proceedings and proceedings before statutorily created professional tribunals. The HPCSA is such a tribunal.

The SCA recognized 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 the practitioner, 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 utilizes a system that has all the same characteristics of a criminal proceeding, including punitive sanctions.

As such, disciplinary action by the HPCSA against its members is viewed by the court as a prosecution. However, what remains to be seen is whether the practitioner's claim for damages as a result of the malicious prosecution against her former employers will be successful.

What does this mean for dental practitioners?

From the SCA judgment it has been established that the Court considers disciplinary proceedings instituted against a practitioner at the HPCSA to be akin to 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 of malice, namely:

- a). that the defendant set the law in motion (instigated or instituted the proceedings);
- b). that the defendant acted without reasonable and probable cause;
- c). that the defendant acted with 'malice or animus iniuriandi'; and
- d). that the prosecution has failed.

What the judgment demonstrates is that there is a right of recourse available to dental 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 dental practitioner is required to respond to a HPCSA complaint, if they are indemnified, 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 at a cost.

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 the above case, 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 dental 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.

Whilst in the above case the practitioner's claim was against a company, there is no restriction as to who the claim for malicious prosecution can be instituted against including private individuals.

Patients, members of the public, companies, and, in some instances, disgruntled family members, complain about dental 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 the above case may change the status quo.

Kind regards,

SADA Legal and Corporate Services

References

1. Holden v. Assmang Limited (1277/2019). ZASCA. 2020; 145.