

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2012/HK/339

BETWEEN:

DR. ZHEN QING WANG

APPELLANT

AND

THE HEALTH PROFESSIONS COUNCIL
RESPONDENT
OF ZAMBIA

In the matter of the Health Professions Act

And

**In the matter of an appeal against the decision of the
Disciplinary Committee made on 13th June, 2012 (Section
68)**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Chambers at
Kitwe this 11th day of September, 2013

For the Appellant: Mr. M. Masengu - Michael Masengu & Co.

For the Respondent: Ms. I. Kapelembi - Theotis Mataka and Sampa

J U D G M E N T

Cases referred to:

1. Cooper v Wilson (1937) 2 ALL E.R. 726
2. Bernard and Ors v National Dock Labour Board and Anr (1953) 1 ALL E.R. 1113
3. Mobil Oil Zambia Limited v Malawi Petroleum Control Commission (2004) Z.R. 227
4. Council of Legal Education v Sokoni (1986) Z.R. 41
5. Liyongile Muzanolo v The People (1986) Z.R. 46,47
6. Andrews v Mitchell (1904-7) ALL E.R. 599
7. Attorney General v Ndhlovu (1986) Z.R. 12
8. The Minister of Home Affairs and Another v Habasonda (2007) Z.R. 207
9. Kunda v The People (1980) Z.R. 105

10. Attorney General v Roy Clarke (2008) Z.R. Vol. 1, 38
11. Zambia Railways Limited v Pauline S. Mundia and Anr (2008) Z.R. Vol. 1, 287
12. Galaunia Farms Limited v National Milling Company and Anr (2004) Z.R. 1
13. Isaac Tantameni C. Chali (Executor of the will of the late Mwala Mwala) v Liseli Mwala v Liseli Mwala (1995/97) Z.R. 199
14. Jederzejewski v Medical Council of Zambia - 2006/HP/A.30
15. Nkumbula v Attorney General (1972) Z.R. 204
16. JZ Car Hire Ltd v Chala Scirocco and Enterprises Ltd-SCZ Judgment 26/2002
17. Zambia National Provident Fund v Chirwa (1986) Z.R. 70
18. National Breweries Limited v Philip Mwenya (2002) Z.R. 118
19. Hapeeza v Zambia Oxygen Limited (1988-89) Z.R. 202
20. Zambia Airways v Musengule (2008) Z.R. Vol. 1, 154

Acts and other works referred to:

1. The Health Professions Act No. 24 of 2009
2. Medical and Allied Professions (Disciplinary Proceedings) Rules 1982
3. Medical and Allied Professions (Professional Misconduct) Rules 2003
4. Halsbury's Laws of England, Fourth Edition Vol. 1 paras 84 and 95
5. Muhammad Saad Khan-Yahoo Contributor Network May 3, 2011 MLA
6. Nordqvist, Christian "What is Medical Malpractice" MNT July 24, 2012
7. B. Sonny Bal, MD, MBA-An Introduction to Medical Malpractice in the United States, US National Library of Medicine National Institute of Health

The appellant has appealed pursuant to s. 68(1) of the Health Professions Act No. 24 of 2009 against the judgment of the Disciplinary Committee made on 13th June, 2012, in which it made a decision to erase and deregister him from the Council on the grounds of professional misconduct. The facts leading to this appeal are that the appellant is a medical practitioner and practices with Dr. Win Li under the name and style of Dr. Li's Surgery with branches in Parklands and Town Centre in Kitwe. On 1st October, 2011 Mr. Joseph Mutale a registered member of Dr. Li's surgery made a complaint against Dr. Li alleging that on 10th May, 2011 he woke up with a swollen right testicle and that the swelling grew and hardened rapidly. On 16th May, 2011, Dr. Li put him on a daily ceftriaxone sodium 1.0g injection/drip regime to prevent infection and advised that he would surgically remove the

testicle on 19th May, 2011 as he believed, without any histology or tissue examination that it was cancer.

On 19th May, 2011 the testicle was removed. The doctor believed that he suffered from carcinoma (membrane cancer) and put him on compound cyclophosphamide and esomerprazadole 20g daily for life. Throughout the medication Mr. Mutale kept on complaining to Dr. Li that the medicine was causing chills, shivers, malaria like effects, migraine headache, abnormal urine output, sleeplessness, weakness, general sweat shutdown and constipation. However, the doctor insisted that his medication was alright. Mr. Mutale could no longer handle the side effects. Consequently, on 4th July and 31st July, 2011 respectively he stopped the injections/drip and taking the cancer drugs. After the operation Dr. Li had insisted that he rushes to UTH to have his cancer finally determined. On 30th June, 2011 he saw Dr. Li for any histological/pathological/laboratory test report for the cancer that he would have to show Dr. Filinov the consultant at UTH Urology Department, but was informed that the doctor had no such report. On 1st July, 2011 he saw Dr. Filinov, whom he had seen on the right testicle since 2009, for a possible referral to the UTH Cancer Centre. Dr. Filinov advised that he could not see any cancer, but a properly healing wound and could not cancel another doctor's cancer prescription; he would review progress on the wound on 5th August, 2011. On 10th August, 2011 Mr. Mutale woke up again to see his left testicle swell in the same way as the right one had. Upon advice on 18th August, 2011 he returned to Lusaka's Coptic

Church Hospital where epididymis TB was diagnosed. He was immediately admitted to Lusaka Trust Hospital for the TB and the cancer drug effects treatment.

Upon receipt of Mr. Joseph Mutale's complainant, on 11th October, 2011 the Council through the Registrar wrote to Dr. Li notifying him of the complaint made against him and requiring him to exculpate himself as to why disciplinary action should not be taken against him. In addition letter Dr. Li was informed that his conduct was contrary to rule 3(1) (p) of the Medical and Allied Professions (Professional Misconduct) Rules, 2003 and s. 61(e) of the Health Professions Act No. 24 of 2009 which prohibits:

“The performing, except in an emergency, of a professional act for which the practitioner is inadequately trained or is insufficiently experienced or which is not within such practitioner’s professional competence” and “engaging in any conduct that is prejudicial to the health profession or is likely to bring it into disrepute.”

Thereafter, the appellant responded to the Registrar's letter through an undated letter. He explained the chain of events that led to the complaint. On 26th October, 2011 the Registrar once again wrote to Dr. Li Min informing him that instead of exculpating himself, Dr. Wang Zhenqing wrote to the Council indicating that the medical practitioner who operated on Mr. Mutale was Dr. Cheng Zhiquiang. Dr. Li was reminded to

exculpate himself as to why disciplinary action should not be taken against him by 11th November, 2011. On 30th January, 2012 the Registrar wrote to Dr. Li Min giving him notice that an inquiry would be held into the charge against him.

The appellant was further notified that on Friday the 2nd of March, 2012 a meeting of the Disciplinary Committee would be held at 09:00hrs to consider the charge against him and determine whether or not it should impose any of the penalties provided by section 66(5) of the Health Professions Act. On 11th May, 2012, summons to appear before the Disciplinary Committee meeting were served on Dr. Li Min and the appellant. At the hearing Dr. Li pleaded not guilty. After he was questioned it was established that the appellant and not Dr. Li actually attended to Mr. Mutale and that the complaint lodged by Mr. Mutale was actually against him. The charge was redirected to the appellant who under oath accepted that half of what he did was wrong. A plea of not guilty was entered. He was questioned by the Chairman and Committee members. He stated, inter alia, that it was Dr. Cheng who actually carried out the operation; and that all he did was to examine Mr. Mutale and give him antibiotics. The Committee resolved that there was no professional misconduct on the part of Dr. Li Min. However, the Committee found the appellant and Dr. Zhiqiang Cheng guilty of professional misconduct and ordered the cancellation of the appellant's certificate of registration from the register pursuant to s. 66(5)(a) of the Health Professions Act. It further resolved to seek guidance from the Permanent Secretary's office, Ministry of Health, with regard to Dr. Zhiqiang Cheng who came under Government to Government arrangement. The Committee also found Dr. Cheng's competence questionable and

that he was also found in private practice which was in breach of his work permit.

The Committee also imposed a fine of KR8, 500.00 on the clinic to be paid to the Mr. Mutale, through the Council as total costs incurred for wrongly operating on him and for travels. The fine has since been paid by the clinic. Dissatisfied with the decision of the Committee on 19th July, 2012, the appellant lodged a Notice of Appeal and affidavit in support exhibiting a number of documents citing seven grounds. On 14th August, 2012 the respondent filed an affidavit in opposition exhibiting the minutes of the disciplinary committee meeting held on 13th June, 2012. On 17th October, 2012 the appellant was granted leave to amend the notice of appeal as prayed in the notice of motion filed on 11th September, 2012, but the amended notice was never filed. The main seven grounds of appeal advanced are:

- 1. Section 63 of the Health Professions Act provides that the Council shall establish a Disciplinary Committee which shall comprise the Chairperson, the Vice Chairperson, the Chairperson of the Council, a peer of the accused practitioner and a lay member of the Council. The action of the Council of constituting a Disciplinary Committee of 9 members was ultra vires the said section. The act also violated the letter and spirit of Article 18(9) of the Republican Constitution.**
- 2. The Committee of 9 was guilty of pre-trial irregularities. The irregularities went to the root of the jurisdiction and consequently rendered the proceedings and the purported decisions null and void.**
- 3. The conclusion by the Committee that the appellant was guilty of professional misconduct was perverse, made in the absence of any relevant evidence and was upon a misapprehension of the facts.**
- 4. The proceedings were conducted in total violation of the rules of natural justice.**

- 5. The resolution of the committee deregistering the appellant was in name only but void in law as there was no debate, no vote taken and no judgment rendered.**
- 6. The appellant also prays for a mandatory injunction directing the Council its servants or agents or whom so ever and however to reverse and cancel the implementation of the purported decisions of the Committee.**
- 7. The appellant claims damages at the average rate of ZMK10,000.00 per month from the Respondent for breach of statutory duty by prematurely effecting the purported decisions of the Committee.**

The appellant also claims interest on any sums found due to him at short term deposit from date of writ to date of judgment and thereafter at commercial bank lending rate to date of full payment, the costs of the proceedings and further or other relief. On 11th September and 1st October, 2012 the appellant had filed heads of argument. On 17th October, 2012 the respondent also filed written heads of argument. Both parties have cited a plethora of authorities to support their arguments. I am grateful to counsel on both sides.

In brief counsel for the appellant argued on ground one that the conduct of the Committee that sat to hear the complaint lodged by Mr. Mutale offended the underlying principle of Article 18(1) of the Republican Constitution and was therefore void; that s. 63 of the Health Professions Act specifies the number of members of the Disciplinary Committee to be established by the Council as five only and also lays down the qualifications of the members to be appointed; and that there is no provision for the Council to delegate this power to any other body or person or power to co-opt members and that a usurper has never been recognised by

the law and his actions and decisions have always been declared null and void. It is the appellant's contention that the Committee of 9 usurped the powers and functions of a Committee of 5. To strengthen this argument counsel referred me **Cooper v Wilson (1) and Bernard and Others v National Dock Labour Board and Another (2)**.

In arguing ground two counsel for the appellant referred to s. 64 of the Act and rule 6 of the Medical and Allied Professions (Disciplinary Proceedings) Rules 1982. The gist of his argument is that there was no complaint filed against the appellant in line with the above section; the only complaint before the Committee by Mr. Mutale was against Dr. Li Min alone, which complaint was dismissed after full inquiry. That in addition there was no notice served upon the appellant in accordance with the Rules. That the Committee never gave the appellant time to prepare his defence, but dealt with the matter against him summarily. That it is settled that mere irregularity in procedure or action is generally not fatal but curable, however, other failures to comply with statutory requirements or other improprieties may go to the root of jurisdiction or render the proceedings a nullity. Counsel has also cited **Mobil Oil (Z) Limited v Malawi Petroleum Control Commission (3)**, **Council of Legal Education v Maris Sokoni (4)** **Liyongile Muzanolo v The People (5)** and **Andrews v Mitchell (6)**.

On ground three, counsel cited **Libman v General Medical Council (1977) 1 All. E.R 798, 800** and urged that the Privy

Council held that the decision of the disciplinary committee can only be upset on appeal if it can be shown that something was clearly wrong either in the conduct of the trial or in the legal principles applied or unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. Unfortunately the case cited does not appear in that particular law report or any 1977 volume.

Counsel also cited **Attorney General v Ndhlovu** (7) to support the argument that The Supreme Court has also held that an appeal court will only reverse findings of fact if the findings are perverse and unsupported by evidence. He submitted that there were a number of misdirections by the Committee; that the finding of professional misconduct appear to be based on the charge read out to the appellant relating to the Medical and Allied Professions (Professional Misconduct) Rules 2003 and s. 61(e) of the Act; and that the charge read out alleged that the appellant removed the right testicle of Mr. Mutale and put him on cancer drugs for life when it was in fact Dr. Cheng (who also performed the surgery). He contended that the charge was the same preferred against Dr. Li for which he was acquitted and that two people cannot be said to have each performed the surgery on the same patient.

Counsel urged that by inviting a surgeon to attend to the patient he was avoiding doing something outside his competence; and that if the Committee had maturely and objectively analysed the

evidence, it would have come to the conclusion that in examining the patient and prescribing antibiotics to cure the swollen testicle and prevent infection, the appellant acted within his competence. Counsel further argued that the opinion of the surgeon that this was an emergency requiring immediate surgery due to torsion of the testis and suspected cancer was at worst an error of judgment rather than professional misconduct.

On ground four counsel for the appellant argued that since s. 66(4) of the Act provides that a hearing before the Disciplinary Committee shall for all purposes, and in particular for purposes of Chapter XI of the Penal Code, be deemed to be a judicial proceeding, there is an obligation on the part of the Committee to comply with all relevant law including rules of natural justice. He noted that the composition of a committee outside the provisions of the statutes could not make the committee independent and impartial. He again cited **Cooper v Wilson** (1) and urged that the illegal composition of the Committee in this case was deliberately intended to influence the course of justice in favour of the respondent and that the summary way in which the appellant was dealt with in breach of statutory requirements could not be said to have been fair.

Counsel urged that comments such as “Dr. Wang may not be a well-trained doctor. How do you miss something suggestive of TB and give to the doctor that did the surgery. That is professional misconduct. We should cancel his practicing certificate” suggest that a doctor must be perfect and it was also malicious to say that the appellant may not be a well-trained doctor, when the Council itself screened and registered him as a qualified medical doctor; that the comment another member that the aim in conducting the operation was just to maximize on money showed bias as there was no evidence for that outrageous position; and that the committee found the appellant and Dr. Cheng who conducted the

surgery guilty of professional misconduct, but only the appellant has been punished.

He contended that discriminatory treatment is bias which vitiates the decision. He also cited **General Medical Council v Spaulman** (without any citation), where he said Lord Wright stated that if principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice; that the decision must be declared to be no decision. He urged that the decision of the Committee should be quashed for being contrary to natural justice.

On ground 5, counsel for the appellant submitted that the Committee was in breach of s. 65(2) and (6) of the Act which provide for the manner in which any question at a sitting or meeting of the Committee shall be decided by majority vote, meaning that after deliberation a vote must be taken and a reasoned judgment given and a copy supplied to the appellant to enable him to prepare his appeal. He urged that the rationale is transparency in decision making which eliminates suspicions of bias and prejudice. He cited **Minister of Home Affairs and Another v Habsonda** (8), **Kunda v The People** (9) and **The Attorney General v Roy Clarke** (10).

In addition he contended that the fine of KR8, 500.00 imposed on the clinic was a mere proposal by one member and was never part of the “resolution” of the Committee; that s. 66(5) of the Act

gives no power to the Committee or the Council to impose a fine on a clinic for the misconduct of a practitioner; and that the fine is not tenable at law it should be refunded to the clinic.

On ground six, counsel contended that s. 68(1) of the Act allows a person aggrieved with a decision of the Committee, within thirty days of receiving the decision, to appeal to the High Court while s. 68(3) provides that a decision of the Committee shall not take effect until the expiration of the time for lodging an appeal or if an appeal is lodged, until it is disposed of, withdrawn or struck out for want of prosecution. He submitted that the letter by the Registrar informing the appellant of the decision of the Committee dated 15th June, 2012 was only received on 20th June, 2012; that the Council could effect the decision only on 21st July at the earliest, that the appeal lodged on 19th July was yet to be determined; and that in total violation of statute, the Council prematurely recovered the illegal fine imposed on the clinic on 27th June and implemented the deregistration by 16th July. He prayed for a mandatory injunction and retraction of the deregistration notice.

With regard to ground seven, counsel submitted that the appellant was a duly registered bona fide medical practitioner with the Council, he was in good standing holding a practicing certificate expiring on 31st December, 2012 and was a partner with Dr. Li, managing the town centre branch of Dr. Li's surgery which was a thriving business and was making an average net monthly income of KR10, 000.00. That upon deregistration he

ceased to practice and so claims damages at KR10, 000.00 per month from 19th June, 2012, to the date of judgment with interest at short term deposit rate from date of notice of appeal to date of judgment and thereafter at commercial bank lending rate until full payment and costs.

On the other hand counsel for the respondent submitted, on ground one that the Disciplinary Committee that sat was properly constituted in line with s. 63 of the Act; that the respondent concedes that 9 persons sat at the hearing as opposed to the 5 stipulated by the law, however the 5 persons who are required to sit in a disciplinary hearing in accordance with the Act were present at the hearing of the appellant's case and therefore, the required quorum was formed; and that the respondent requested the presence of four other members who had the requisite expertise in relation to the matter to be determined, and this was done to achieve justice of all interested parties. He urged that the Council does on a case by case basis 'co-opt' additional members with specialized training/knowledge in particular areas of medicine to sit on the Committee, but in effect the decision to deregister the appellant was arrived at by the five members in line with s. 63 of the Act.

Counsel further submitted that the required quorum of three members as laid down by s. 65(1) of the Act was formed simply by the presence of the Chairperson, a Member and the Registrar alone. He stated that the respondent did not violate the spirit of Article 18(9) of the Constitution; that it acted independently,

impartially and adjudicated on the matter with fairness and within reasonable time. Counsel further stated that he who alleges must prove and he referred to **Zambia Railways Limited v Pauline S. Mundia and Another** (11) and **Galaunia Farms Limited v National Milling Company and Another** (12).

Further and in the alternative, counsel contended that s. 68(5) of the Act provides that proceedings of the Disciplinary Committee shall not be set aside on account only of some irregularity in those proceedings if such irregularity did not occasion a substantial miscarriage of justice. Counsel urged that if there was any irregularity on account of the presence of the 4 other members, no substantial miscarriage of justice was occasioned to warrant the setting aside of the decision and the onus is on the appellant to prove that such miscarriage of justice was occasioned.

It is also counsel's argument that **Cooper v Wilson** (1) and **Bernard & Others v National Labour Board & Another** (2) are not applicable to this case as the respondent acted within the confines of its authority and mandate to discipline the appellant who misconducted himself professionally and actually admitted to the wrong doing and the requisite 5 members were present whilst the other 4 were present to guide the 5 members professionally in respect of the complaint before them.

On ground two, counsel for the respondent submitted that a complaint was made by Mr. Mutale, a lay person, against Dr. Li's

surgery where he was treated and operated on and that s. 4 of the Act empowers the Council, among other things, to investigate allegations of professional misconduct and impose such sanctions as may be necessary; and to protect and assist the public in all matters relating to the practice of the health profession.

He contended that as a regulator of the professional conduct of medical practitioners, the respondent through the admission of the appellant himself and confirmation by the complainant, found that it was in fact the appellant who the complaint was against and not Dr. Li and the Committee proceeded to hear the complainant and the appellant and subsequently meted out the punishment for his misconduct. He stated that the respondent in disciplining the appellant was merely discharging its statutory functions conferred on it by the Act; and that it was the appellant himself who responded to the notice of complaint which had initially been sent to Dr. Li as it was him who had attended to the complainant, therefore he was fully aware of the complaint and what transpired with the patient and cannot now claim that he was not given notice of the same. Counsel urged that **Mobil Oil (Z) Limited v Malawi Petroleum Control Commission** (3) is irrelevant as nothing was done here by a person who had no authority to act and that the facts are different.

In addition counsel argued that in disciplining the appellant the respondent was exercising its powers under s. 4(1)(h) of the Act, the appellant was duly charged following his own admission and confirmation by the complainant and the mere fact that there was no complaint directly against him does not negate the respondent's power to discipline him. Counsel conceded that the procedure relating the charge was not religiously followed, but he urged that the respondent finds solace in the provisions of s. 68(5) of the Act.

Further and in the alternative counsel for the respondent referred to rule 10 of the Medical and Allied Professions (Disciplinary Proceedings) Rules 1982 and contended that this provision clearly empowers the Committee or the Chairperson to amend a notice of inquiry or a defective charge, where the same appears necessary looking at the circumstances of the case, as was done in this case. He stated that the appellant was well aware of the complaint (as shown in exhibits 'ZQW9' and 'ZQW10') and the circumstances from which the same arose as early as 11th May, 2012, so his claim that he was not given sufficient notice of the complaint or time to prepare his defence fly in the teeth of his own evidence and that there was no miscarriage of justice in the amendment. Counsel submitted that the **Liyongile case** (5) is also not applicable

In response to grounds 3 and 4, counsel for the respondent submitted that the decision of the Committee was properly arrived at taking into consideration the evidence against the appellant and did not violate the rules of natural justice as he was given an opportunity to be heard; and that the conclusion by the Committee that the appellant was guilty of professional misconduct was arrived at following proper analysis of the evidence against him. He stated that the appellant failed to explain how he concluded that Mr. Mutale's illness was cancerous and decided to conduct an operation on him; that he admitted his wrong doing; and that the Committee established professional

misconduct as set out by rule 3 (1) (h) (iv) of the Medical and Allied professions (Professional Misconduct) Rules 2003.

It is also counsel's submission that the committee had a case before it where a member of the public had one of his testicles removed, this was not a small operation and same is irreversible and it came to light later that the alleged cancer was not a correct diagnosis. He urged that the appellant failed to act in the best interest of his patient and handled him in a manner likely to bring the profession into disrepute; therefore the action taken against him was appropriate and necessary to protect the integrity of the profession and the well being of the public and that the rule of natural justice were complied with in terms of s. 66(4) of the Act. He cited Halsbury's Laws of England, 4th Ed Vol. 1, paras 84 and 95.

It is also counsel's argument that the comments by a member that the appellant may not be well trained do not suggest that a doctor must be perfect, but the comments were made having in mind the standard of a practitioner of his standing. It is also contended that both the appellant and Dr. Cheng were found guilty of professional misconduct, but the Committees decided to seek guidance from the Ministry since Dr. Cheng came on a Government to Government arrangement, so there was no discrimination in the manner the Committee dealt with the two of them.

On ground 5, counsel for the respondent argued that the resolution of the Committee was unanimous following the deliberations of the members; that it was unanimously decided that the appellant was guilty of professional misconduct and he be deregistered as he fell below what is expected from a medical practitioner of his standing.

He stated that the argument by the appellant that s. 65(2) of the Act was not complied with is misconceived; and in light of the **Roy Clarke case** (10) the respondent gave its reason for its decision.

In addition it is counsel's contention that the appellant is challenging the decision of the Committee to impose a fine on the clinic which is a non party. He drew the attention of this Court to **Isaac Tantameni C. Chali (Executor of the will of the late Mwala Mwala) v Liseli Mwala** (13). Counsel further submitted that s. 53(1)(g) of the Act creates offences relating to health facilities and endows on the respondent power to impose a fine on a person who contravenes the provisions of the Act and that this includes a clinic if at all it is a body corporate.

On ground 6, he argued that the appellant is not entitled to a mandatory injunction as he has not demonstrated the need for such an order the standard of which is higher than that of an ordinary injunction. He conceded that the respondent effected the decision of the committee before the 30 days appeal period lapsed, and the appeal should automatically apply as a stay of

execution, but urged me to follow the decision of Kakusa, J in **Jederzejewski v Medical Council of Zambia** (14) (unreported) and not allow the appeal to operate as a stay as the role of the Committee is to safe guard the public interest and its decisions made for public benefit. He cited **Nkumbula v Attorney General** (15) and urged that there is need to strike a balance between the need to protect the public and the granting of the mandatory injunction.

Lastly on ground seven, counsel submitted that the appellant's claim for damages at the rate of KR10, 000.00 per month cannot stand as he has not proved the damage claimed to have been suffered. He referred me to **JZ Car Hire Limited v Chala Scirocco and Enterprises Limited** (16) where the Supreme Court reiterated that it is for the party claiming the damages to prove the damage, never mind the opponent's case. Further and in the alternative he urged that it is not tenable at law for the appellant to quantify his damages; if I consider that he is entitled to any damages, the matter will have to be sent for assessment.

Counsel also drew my attention to s. 68(4) of the Act which gives guidance as to what the Court may, on appeal do. Counsel prays that the appeal should be dismissed with costs and the Committee's decision be confirmed or if I am of the view that there was some miscarriage of justice in the way the case was handled; remit the matter back to the Committee for further consideration in accordance with such direction as I may give.

In determining this appeal I propose to start with the third ground alleging that the conclusion by the Committee that the appellant was guilty of professional misconduct was perverse, made in the absence of any relevant evidence and was upon a misapprehension of the facts. It is imperative to first take into consideration what kind of conduct amounts to professional misconduct under the Act and the medical profession generally. In s. 2 of the Act professional misconduct is said to have the meaning assigned to it in s. 61.

S. 61 states that a health practitioner commits professional misconduct if the health practitioner:

- a) **Contravenes the provisions of the Act;**
- b) **Unlawfully discloses or uses to the health practitioner's advantage any information acquired in the health practitioner's practice;**
- c) **Engages in conduct that is dishonest, fraudulent or deceitful;**
- d) **Commits an offence under any other law;**
- e) **Engages in any conduct that is prejudicial to the health profession or is likely to bring it into disrepute; or**
- f) **Breaches the Code of Ethics or encourages another health practitioner to breach or disregard the principles of the Code of Ethics.**

Generally professional misconduct is defined as behaviour by a professional that implies an intentional compromise of ethical standards or behaviour outside the bounds of what is considered acceptable or worthy of its membership by the governing body of a profession. Jonas: Mosby's Dictionary of Complementary and Alternative Medicine (c) 2005, Elsevier defines professional misconduct as conduct inappropriate to the practice of health care.

Muhammad Saad Khan in a Google Extract from Yahoo Contributor Network May 3, 2011 stated as follows:

“Professional misconduct is a legal term in health care as it is closely related to a bigger crime known as medical malpractice. When a health care provider such as doctor, nurse, physician etc, shows behavior outside the bounds of what is considered acceptable or worthy of its membership by the health care regulatory bodies and standards of profession. There are many people affected each year due to carelessness or incompetence of a health care provider.

In terms of law, professional misconduct is an important aspect. Professional misconduct and negligence is also termed as medical malpractice. People who have been victims of medical malpractice can hold the health provider accountable for his actions by suing the individual or the hospital....”

MLA Nordqvist, Christian “What is Medical Malpractice” on Medical News Today July 24, 2012 in a Google extract also writes:

“Medical malpractice refers to professional negligence by a health care professional or provider in which treatment provided was substandard and caused harm, injury or death to a patient. In the majority of cases, the medical malpractice or negligence involved a medical error, possibly in diagnosis, medication dosage, health management, treatment or aftercare. The error may have been because nothing was done (an act of omission), or a negligent act. A hospital, doctor or other health care professional is not liable for all the harms a patient might suffer. They are only legally responsible for harm or injuries that resulted from their deviating from the quality of care that a competent doctor would normally provide in similar situations, and which resulted in harm or injury for the patient”.

B. Sonny Bal, MD, MBA in An Introduction to Medical Malpractice in the United States, US National Library of Medicine National Institute of Health also defines medical malpractice as:

“Any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes an injury to the patient. Medical malpractice is a specific subset of tort law that deals with professional negligence....Negligence is generally defined as conduct that falls short of a standard; the most commonly used standard... is that of a so-called “reasonable person.” The reasonable person standard is a legal fiction, created so the law can have a reference standard of reasoned conduct that a person in similar circumstances would do, or not do, in order to protect another person from a foreseeable risk of harm.”

It is clear from these learned authors that law and the medical profession recognise medical standards by which a health care professional should adhere to when providing care for patients. Patients have the right to expect to receive these standards when being treated. If the standard of care is seen to be violated, there may have been negligence.

First is the existence of a legal duty on the part of the doctor to provide care or treatment to the patient. This comes into play whenever a professional relationship is established between the patient and health care provider. Where a doctor provides service to a patient, the doctor is said to owe a duty of reasonable professional care to the patient. Second is a breach of this duty by a failure of the treating doctor or hospital to adhere to the expected standards of the profession. While the precise definition of “standard of care” can differ among jurisdictions this generally refers to that care which a reasonable, similarly situated professional would have provided to the patient. Third, is that the breach resulted in an injury. What this means is that a claim cannot be made if the patient feels the doctor or hospital was

negligent if it resulted in no harm or injury. If the patient is not happy with his or her outcome that in itself is not malpractice. It is only malpractice when it is proven that the negligence caused the harm or injury. And fourth the patient's injury must have very damaging consequences or resulted in considerable damage (physical, emotional or pecuniary), such as suffering, enduring hardship, having to live in constant pain, loss of income, and injury that disabled the patient.

From all the foregoing, although this is an appeal from the decision of the Disciplinary Committee and not a civil suit for damages for negligence or medical malpractice, it is vital for this Court to consider whether a reasonable doctor in similar circumstances; with the same competence and skill as the appellant, would have acted in the manner that the appellant did. It is important to bear in mind that the appellant as a registered medical practitioner owed to the complainant who was his patient a professional duty of care, to act diligently and with competence and to adhere to the standard of care of his profession. From the Minutes of the Disciplinary Committee, it seems to me that there was sufficient evidence on which the Committee could reach a conclusion that the appellant was guilty of professional misconduct. I do not agree with counsel for the appellant that the conclusion was perverse, made in the absence of relevant evidence and upon a misapprehension of facts. I believe that the Committee did consider the statements from both sides, and the

duty and standard of care that was owed to the complainant, and was satisfied that the duty was breached, and that the complainant suffered substantial damage that was a consequence of the breach.

I have no difficulty myself in accepting that the appellant failed to provide the proper standard of care in treating the complainant which resulted in substantial injury which is irreparable. The appellant admitted that he did something wrong. When he was asked as to who made the decision that the operation should go ahead he remained silent. From the complainant's statement he was told that upon payment, they would arrange for someone to come and operate on him and it was in fact the appellant who pronounced the cancer. The appellant also admitted that he did not do any tests nor do anything else to take to the laboratory to establish why the right testis was swollen nor do full blood count.

He admitted that he was a general doctor and that this was his first patient. Further, he and Dr. Cheng left it to the patient to take the specimen for histological examination and no histology report was obtained because the specimen was not sent for examination. I have no doubt that the appellant did not properly examine the complainant and hastily concluded that the swelling of his right testicle was cancerous. He acted with incompetence by wrongly diagnosing the patient and acting on a professional responsibility that he knew he was incapable of. It was clear that he lacked the requisite skill and experience to handle such a medical problem. Although he called Dr. Cheng, the alleged

specialist, to conduct the surgery, he was the one who diagnosed the cancer and made the complainant pay for the surgery before he was even seen by the surgeon.

I should say a word also about cyclophosphamide 50mg to be taken orally for a period of 1 month administered to the complainant. My research did not yield any results on esomeprazole also prescribed to the complainant at 20g daily for life. What I discovered is esomeprazole used in the treatment of dyspepsia, peptic ulcer disease, and gastroesophageal reflux disease. But my research from Wikipedia the Free Encyclopedia, Macmillan Cancer Support in the U.K and MedicineNet.com reveals that cyclophosphamide is a chemotherapy drug usually given to treat lymphomas, leukemias, lung cancer and breast cancer. It may also be used to treat many other types of cancer. It interferes with the growth of cancer cells, which are then destroyed by the body.

Since the growth of normal body cells may also be affected other effects will also occur. Some may be serious and must be reported to the doctor. Severe and life threatening adverse effects include myeloid leukemia, bladder cancer, kidney failure and permanent infertility. It also may affect the heart and lungs. Other side effects include, vomiting, diarrhoea, mouth sores, weight loss and jaundice. It is clear to me that before one begins treatment with this drug, he and his doctor should talk about the benefits of this medicine and the risks of using it. It is important that the doctor knows, for instance, if the patient has an infection

or feel unwell; has kidney or liver problems; has *diabetes mellitus* (sugar diabetes); has *porphyria* (a rare inherited blood disorder); is using any other medicines (such as herbal and complementary medicines); and if he has ever had an allergic reaction to any medicine. In addition, the patient will need to have regular blood tests during treatment with cyclophosphamide; if he is passing urine less than he would expect, or if his ankles begin to swell, he should let his doctor know as soon as possible and he may need to take another medicine to help with this. It is also important that the patient does not get pregnant or father a child while taking cyclophosphamide. If the patient intends to have children in the future, she/he should ask the doctor for advice about family planning. This is particularly important if it is a man, as there is a risk of reduced fertility after cyclophosphamide treatment. Further, while taking cyclophosphamide and for a while after stopping treatment, the patient should not have any immunisations (vaccinations) without talking to the doctor first.

Cyclophosphamide lowers the body's resistance and there is a chance that the patient may get an infection from some vaccines.

In my judgment the appellant did not carry out any tests on the complainant to ensure that he was in an acceptable position to take cyclophosphamide. The record will also show that the appellant did not advise the complainant on the pros and cons of the drug; neither did he carry out regular blood tests while the complainant was on treatment with cyclophosphamide. It is on

record that the complainant notified the appellant of the side effects of the prescribed drugs on him, but the appellant did not do anything about it except to insist that the drugs were okay. This was a clear failure to provide the proper standard of care. I find that the appellant breached the professional duty of care that he owed to the complainant.

With that said I accept that the appellant's conduct fell within the ambits of section 61(e) of the Act which provides that:

“A health practitioner commits professional misconduct if the health practitioner engages in any conduct that is prejudicial to the health profession or is likely to bring it into disrepute”.

Clearly the appellant was guilty of professional misconduct or malpractice. I have no doubt that such conduct by the appellant as a professional brought about sufficient discredit to the medical profession to damage its reputation and to reduce the trust that the public places in the medical profession. This settles ground three.

Having established that the conduct of the appellant amounted to professional misconduct, I will now consider ground one and the consequences of the Disciplinary Committee not fully complying with statutory provisions. Counsel for the appellant has urged that the Disciplinary Committee did not comply with s. 63(1) of the Act. The said section reads:

“s.63(1). The Council shall establish a Disciplinary Committee which shall comprise the following members.

- (a) a Chairperson;**
- (b) a Vice-Chairperson;**
- (c) the Chairperson of the Council;**
- (d) a peer of the health practitioner against whom a compliant of professional misconduct is made; and**
- (e) a lay member of the Council.”**

From the record I observe that the Chairperson of the Council was not present at the meeting of the Disciplinary Committee. He was represented by Dr. W. Chilangwe. I accept the argument by counsel for the appellant that the Act does not give express authority to the Chairperson of the Council to delegate his obligation to attend a disciplinary hearing. But neither does the Act stop the Chairman of the Council from delegating that responsibility. S. 65(1) of the Act **provides that three members of the Disciplinary Committee shall form a quorum.** Counsel for the respondent contended that a quorum was formed by the presence of the Registrar. In my view the said section does not include the Registrar as a member of the Committee. In addition nine members instead of five were present at the disciplinary hearing albeit the Act does not give authority to the Committee to co-opt members.

It seems to be a practice by the Council, on a case by case basis to ‘co-opt’ additional members with specialized training/knowledge in particular areas of medicine to sit on the Committee to guide the five members professionally in respect of the complaint before them. I agree with the appellant that this is

contrary to s. 63 of the Act. Be that as it may, I believe that a proper quorum pursuant to s. 65(1) of the Act was formed which specifies the number of members of the disciplinary committee. In my judgment, since there is no express prohibition against the chairman of the council delegating his responsibility, and a quorum was formed as required by the Act, I decline to hold that the action of the respondent of constituting a disciplinary committee of nine members violated the letter and spirit of Article 18(9) of the Constitution or that the Committee usurped the powers of the real committee. I agree also with the argument by counsel for the respondent that **Cooper v Wilson** (1) and **Bernard & Others v National Dock Labour & Another** (2) are distinguishable as the respondent had the authority to act and acted within the confines of its authority and mandate by disciplining the appellant who was found guilty of professional misconduct. This settles the first ground of appeal.

Coming to the second and fourth grounds of appeal alleging pre-trial irregularities and failure to give the appellant a notice of inquiry and enough time to prepare his defence, and breach of rules of natural justice, the functions of the Committee as provided in s. 64 of the Act are not in dispute. Neither is s. 66(4) which provides that:

“A hearing before the Disciplinary Committee shall, for all purposes, and in particular for the purposes of Chapter XI of the Penal Code, be deemed to be a judicial proceeding”.

I agree that as the Disciplinary Committee that sat to hear the complaint of Mr. Mutale was deemed to be a judicial proceeding, the respondent was bound to comply with the law. However, as noted by counsel on both sides, s. 68(5) provides that:

“Proceedings of the Disciplinary Committee shall not be set aside by reason only of some irregularity in those proceedings if such irregularity did not occasion a substantial miscarriage of justice”.

Counsel for the appellant is right that there was no complaint filed against the appellant or notice served upon him as required by rule 6 of the Medical and Allied Professions (Disciplinary Proceedings) Rules 1982. However, the argument by counsel for the respondent that the appellant was fully aware of the nature of the complaint made by Mr. Mutale has a lot of force. First, the appellant was the one who attended to the complainant. As deposed by Dr. Mary Zulu in para. 9 of the affidavit in opposition the patient’s medical record “ZQW3” to the appellant’s affidavit in support revealed that the appellant did suggest cancer of the testis. This was confirmed by Mr. Mutale. Second, he was actually the one who responded to the letter which required Dr. Li to exculpate himself and give reasons why disciplinary action should not be taken against him. Third, the appellant was notified of the inquiry against Dr. Li as a witness. What this implies is that he was aware of the charge especially that he was the attending doctor.

Fourth, he admitted before the charge was amended that the complaint was against him. For these reasons, I find that the respondent acted within the authority conferred on it by rule 10 of the Medical and Allied Professions (Disciplinary Proceedings) Rules 1982 which states:

“10(1) Where before the hearing, it appears to the Chairman, or at any stage of the hearing it appears to the Disciplinary Committee that a notice of inquiry or charge is defective, the Chairman or the Disciplinary Committee as the case maybe shall give such directions for the amendment of the notice or charge as he or it may think necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice”.

I do not agree that the illegal composition of the Committee was deliberately intended to influence the course of justice in favour of the respondent. The explanation by the respondent was that the other members were co-opted as experts in that specific field. Furthermore, I agree with the respondent that comments by members of the Committee like the appellant may not be a well trained doctor or that the aim in conducting the operation was just to maximise on money, did not suggest that a doctor must be perfect or show bias. These were made in light of the facts and the standard of care expected of the appellant towards his patient. As I have said if the patient is not happy with his outcome that in itself is not malpractice. It is only malpractice when it is proven that the negligence caused the harm or injury which was shown in this case.

Further still, it is clear that both the appellant and Dr. Cheng were found guilty of professional misconduct.

The fact that Dr. Cheng's case was referred to the Permanent Secretary of the Ministry of Health for guidance as he came on Government to Government arrangement does not establish discrimination. Furthermore, I am convinced that the appellant was afforded a chance to be heard on a charge of which he had prior notice, he had sufficient time within which to prepare his defence, and the record does not show that he attempted to have the hearing adjourned to have time to prepare his defence, if the notice was short and was refused. I find that there were no pre-trial irregularities or breach of the rules of natural justice.

I turn now to the fifth ground of appeal alleging that subsections 65(2) and (6) of the Act were not complied with by the Committee. The subsections read:

“65(2) Any question at a sitting or meeting of the Disciplinary Committee shall be decided by a majority of the votes of the members of the Disciplinary Committee at the sitting or meeting and in the event of an equality of votes, the person presiding at the sitting or meeting shall have a casting vote in addition to that person's deliberative vote.

65(6) A decision of the Disciplinary Committee shall be in the form of a reasoned judgment and a copy thereof shall be supplied to each party to the proceedings and to every person affected by the decision”.

Truly the record does not show how the Committee voted, but as urged by counsel for the respondent, it was a unanimous decision

of the Committee that the appellant was guilty of professional misconduct and must be deregistered.

I do not think that this decision was watered down because there were co-opted members who may not be allowed to vote. Since the decision of the Committee was unanimous, s. 65(2) of the Act was complied with. Furthermore, though the respondent did not avail the appellant a copy of the judgment as required by s. 65(6) of the Act, I do not think that there was substantial miscarriage of justice to warrant this court to declare the decision null and void. I am satisfied that the appellant fully understood why and how the respondent found him guilty of professional misconduct and made the unanimous decision to deregister him. The decision was communicated to him in the letter of 15th June, 2012. On the basis of that letter he was able to frame his grounds of appeal.

The Supreme Court has on a number of occasions decided on matters where a disciplinary committee did not comply with the laid down procedure in a contract of service, but there was misconduct on the part of the employee. Thus in **Zambia National Provident Fund v Chirwa** (17), and **National Breweries Limited v Mwenya** (18), it was held that **procedural rules are part of conditions of services and not statutory and that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee**

has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.

It is quite clear that the above cases show that what were breached were procedural rules which were part of the employees' contracts of service. The rules were not statutory like in this case. However, I have further considered **Hapeeza v Zambia Oxygen Limited** (19) and **Zambia Airways v Musengule** (20) and **Council of Legal Education v Maris Sokoni** (4) cited by counsel for the appellant. In the first of these cases the appellant was dismissed from his employment for misconduct and was given the reason for dismissal. He issued a writ in the High Court alleging breaches of the Employment (Special Provisions) Regulations in that he had been dismissed without approval of a proper officer or that the proper officer had not been informed and that his dismissal was null and void. It was agreed no notice of the dismissal had been given to the proper officer. The court found there had been misconduct and dismissed the claim. On appeal it was argued that under reg. 4 (1)(b) it was necessary for notice to be given to the proper officer when he had been dismissed for misconduct and that without such notice the dismissal was null and void. It was held that **failure to notify the proper officer of dismissal for misconduct would render the employer liable to prosecution but would not affect the validity of the dismissal.**

In the second case the Industrial Relations Court granted judgment to the respondent against the appellant for declaring him redundant. On appeal it was again held that **failure to notify the proper officer after dismissing an employee as required by the Employment Act did not render the dismissal null and void.**

In the third case the respondent was enrolled as a student with the Council of Legal Education. During the currency of his enrollment, the council was called upon on three separate occasions to consider disciplinary complaints against him, after due inquiry his certificate of enrollment was revoked. The High Court granted an order for certiorari on the ground that as the complaint had been brought by the secretary who was not competent there was no complaint before the Council and accordingly its proceedings and decision were nullities. On appeal it was held that there was nothing in the Student Rules which prevented the secretary from presenting a complaint received by him or the council from being the direct complainant, and that having lodged a complaint, the council was entitled to regulate its own procedure.

Although counsel for the appellant submitted that this authority does not impugn the principle that an act done in contravention of law is null and void, the three cases I have referred to show that the Supreme Court's position is that where the dismissal of an employee or a decision was justified on the facts, failure to

comply with the law would be met by a penalty against the employer and not a declaration that the dismissal or decision was null and void. It is important to note that in all the three cases the breach related to a statutory provision, but the Supreme Court refused to declare the dismissals or decision taken null and void.

I agree that this Court has power under s. 68(4) of the Act, on any appeal under this section to:

- a) Confirm, vary or set aside any finding made, penalty imposed or direction given by the Disciplinary Committee; or**
- b) Remit the matter to the Disciplinary Committee for further consideration in accordance with such directions as the High Court may give;**

But I conclude, having regard to the facts and circumstances of this case, that the Disciplinary Committee correctly established professional misconduct on the part of the appellant and made the decision to deregister him. As urged by counsel for the appellant himself the decision of the disciplinary committee can only be upset on appeal if it can be shown that something was clearly wrong either in the conduct of the trial or in the legal principles applied or unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread.

In this case the appellant fell far below the professional standards expected of him as a medical practitioner and cannot be allowed to continue to practice in the face of clear evidence of

professional misconduct on the ground that statutory provisions were flouted. This Court has a duty to protect the interests of the public. Despite non-compliance with some statutory provisions, I am satisfied that the proceedings were properly conducted, and legal principles applied and that the decision to deregister the appellant was justifiable; and that there was no violation of rules of natural justice or substantial miscarriage of justice.

In my view, even if the matter was sent back to the respondent under s. 68(4)(b) of the Act and a committee of five members was constituted, I do not believe that the decision would be different on the facts of this case. Counsel for the appellant had submitted that if principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice; that the decision must be declared to be no decision. I reiterate that in this case there was no breach of the principles of natural justice. Therefore, I decline to hold and find that the decision of the respondent was null and void. Instead I confirm the decision of the committee and the penalty imposed in accordance with s. 68(4)(a) of the Act.

I find it unnecessary to deal with ground six of the notice of appeal. Suffice to add that the issue of the injunction was adequately dealt with in my ruling of 17th October, 2012. However, because of the position I have taken and it is clear that the appeal must fail the mandatory injunction I granted earlier must also fall away.

With regard to ground seven, the appellant wants damages at the average of K10 million (odd currency), per month. He alleges that he was a partner with Dr. Li and earning that much, but he has provided no proof of his earnings or proof that he was a partner.

According to his evidence at the disciplinary hearing the complainant was his first patient.

Exhibits "ZQW1", "ZQW2", and "ZQW3" attached to the appellant's affidavit in support do not help at all. It is trite that special damages must be strictly proof. In this case this proof is lacking. Therefore, this claim too fails and is dismissed.

I also find and hold that the fine of K8.5 million was properly imposed on the clinic and was justified. Accordingly, I decline to set aside the fine especially that the clinic is not a party to this appeal. It the follows that this appeal fails and is dismissed. Costs are for the respondent to be taxed if not agreed. Leave to appeal is not granted.

Delivered in Chambers at Kitwe this 11th day of September, 2013

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R.M.C. Kaoma
JUDGE