

**IN THE MATTER OF THE MEDICAL PROFESSION ACT, 1981,
S.S. 1980-81, C. M-10.1 AND**

DR. AUGUSTINE TSHABALALA

**DECISION OF THE DISCIPLINARY HEARING COMMITTEE
OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF SASKATCHEWAN**

**Saskatoon, Saskatchewan
November 18, 2010**

**Before: Beth Bilson, Q.C., Deputy Chair
Dr. Joan Baldwin
Dr. Margaret Bartsch
Dr. David Johnston**

**Appearances: Bryan Salte, Q.C. for the College of Physicians and Surgeons
No one appearing on behalf of Dr. Tshabalala**

Decision

This decision concerns the following charges brought by the College of Physicians and Surgeons against Dr. Augustine Tshabalala, who, prior to February of 2009, was a medical practitioner in Leader, Saskatchewan:

The Council of the College of Physicians and Surgeons directs that, pursuant to section 47.6 of *The Medical Profession Act, 1981*, the Discipline Committee hear the following charges against Dr. Augustine Tshabalala, namely:

1. You Dr. Augustine Tshabalala are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of section 46(o) and/or section 46(p) of *The Medical Profession Act, 1981*, S.S. 1980-81, c. M-10.1, and/or bylaw 21(4)(k) of the bylaws of the College of Physicians and Surgeons.

The evidence that will be led in support of this charge will include one or more of the following:

- a) In an application dated September 26, 2007, you agreed to the following terms:
"I am aware of and agree to the conditions of registration for a provisional license, which include the requirement that I must practice in the community which I am in for three years from the date of registration on a provisional license, and can only move before that time with the permission of the Council."
- b) You did not complete that commitment.

2. You Dr. Augustine Tshabalala are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of section 46(o) and/or section 46(p) of *The Medical Profession Act, 1981*, S.S. 1980-81, c. M-10.1, and/or paragraph 19 of the *Code of Ethics*, bylaw 44(6), and/or bylaw 51(2)(1) of the bylaws of the College of Physicians and Surgeons.

The evidence that will be led in support of this charge will include one or more of the following:

- a) You left your practice in Leader in or about the month of February, 2009;
- b) You failed to make appropriate arrangements for follow up care for your patients;
- c) You failed to provide information in a timely fashion to your medical practice and/or the Cypress Health Region about your continued practice in Leader.

Bryan Salte, Q.C. represented the College of Physicians and Surgeons at this hearing. Dr. Tshabalala was not represented and did not attend the hearing.

The first witness called by the College was Carol Bowkowsky, senior registration officer of the College of Physicians and Surgeons. Ms. Bowkowsky testified that her first contact with Dr. Tshabalala was on October 11, 2005, when he was still in South Africa. He was inquiring about the requirements for licensure as a physician in Saskatchewan. On November 7, 2005, having received further information from Dr. Tshabalala, Ms. Bowkowsky informed him that he was eligible for a temporary license. This form of license is valid for a maximum of 365 days. She informed him that in order to be eligible for a provisional license, he would have to write examinations set by the Medical Council of Canada, subject himself to an evaluation of his skills by CAPE [?], and commit himself to serve in one location for three years. He was sent a package of material providing further information.

Dr. Tshabalala was given a temporary license in November, 2006. In a letter dated September 21, 2007, the Manager, Physician Registration, of the College of Physicians and Surgeons outlined the remaining steps Dr. Tshabalala would have to take to receive a provisional license. Dr. Tshabalala provided further information, including a number of signed undertakings, among them an acknowledgment that he understood he was to remain in the same community for a period of three years from the date of the provisional license.

Dr. Tshabalala was granted a provisional license on October 1, 2007. Ms. Bowkowsky testified that at the time the license was issued, Dr. Tshabalala would have been sent orientation materials, including a document setting out the circumstances under which a provisionally-licensed physician could move to a different community, and the process for making such a request.

In a letter dated June 25, 2008, Mr. Salte indicated to Dr. Tshabalala that he had received a communication from the Privacy Commissioner for the province which gave the impression that Dr. Tshabalala was intending to leave Leader. Mr. Salte reminded Dr. Tshabalala of the commitment to remain in Leader for three years, and also outlined the process for making a request to move elsewhere.

The letter emphasized the importance of making proper arrangements for patients in the event Dr. Tshabalala did decide to request a move,

Dr. Tshabalala replied in a letter dated July 14, 2008, stating that he had given appropriate notice to the health region, and was making arrangements for the care of his patients in Leader. He stated that he was under stress because his family had been unable to join him in Saskatchewan, and he had concerns about the health of members of his family in South Africa.

On July 24, 2008, Mr. Salte responded to this letter, telling Dr. Tshabalala that he would have to provide more information, but that arrangements could probably be made to have him serve out his commitment elsewhere – including South Africa – if there were convincing reasons for the change.

On September 3, 2008, Dr. Tshabalala sent the following letter to Mr. Salte:

After much consideration and in view of the physician shortage in Leader, I have decided to remain in Leader until October 2010. Please consider this my formal notification,

In an e-mail dated February 17, 2009, Dr. Tshabalala communicated to Nancy Allan (a co-ordinator in the Continuing Professional Learning unit of the College of Medicine at the University of Saskatchewan) that he was on a break in South Africa, and that he was prepared to return to Saskatchewan for six months to sort out the arrangements in Leader provided his wife was able to come with him. This message was passed on to Dr. Karen Shaw, Deputy Registrar of the College of Physicians and Surgeons, who replied at some length to Dr. Tshabalala on February 25, 2009. She emphasized the importance of making appropriate arrangements for the patients under his care in Leader, gave advice about how to deal with the outstanding training requirements, and suggested resources to support him and his family. She indicated that a further six-month period in Leader would be satisfactory from the point of view of the College, though suggested he would also have to satisfy any expectations from the health region.

Dr. Shaw followed up this letter with an e-mail message dated March 20, 2009. In it she reminded Dr. Tshabalala of the importance of informing the health region of his plans, and outlined the possible consequences of "patient abandonment."

Ms. Bowkowsky testified that the College of Physicians and Surgeons had received no response from Dr. Tshabalala to either of the communications from Dr. Shaw.

The second witness for the College was Sherry Schmunk, the office manager of the Leader Medical Clinic. She testified that Dr. Tshabalala arrived at the clinic in October 2007 and remained there until January 2009. In January of 2009 he went on a vacation to Cuba, and then went to South Africa "for a couple of weeks." He was expected to come back on February 10 or 11 but did not return.

Ms. Schmunk said that she was away from the office on vacation the week of February 10, but she understood that the office assistant tried to reach Dr. Tshabalala in South Africa to find out why he had not arrived. The office assistant was unable to make contact with him, though she spoke to his wife at one point, who said Dr. Tshabalala was ill.

Ms. Schmunk said there was no indication prior to his departure that Dr. Tshabalala was not intending to return, though she was aware that there had been problems obtaining visas for his family to join him in Canada. Indeed, for some time they did expect him to return. It was not until April that they accepted

that he would not be coming back, and moved to make permanent arrangements for Dr. Tshabalala's patients. In the interim, Ms. Schmunk said it was difficult to know what to tell the patients. The clinic had good locum coverage at the time, but the other doctors at the clinic were worried about the workload for the locum. Dr. Tshabalala's appointments were booked with the locum and with a new doctor who had just started at the clinic, but the uncertainty made it difficult to know how to manage the patients. She believed that the departure of Dr. Tshabalala shook the faith of the community in the system of contracts with physicians. The people she spoke to wished him well, but they were very disappointed that he had left.

Mr. Salte referred the panel to the two charges made against Dr. Tshabalala. The first charge related to the fact that he had not honoured the commitment, made as a condition of receiving a provisional license, to remain in Leader for a period of three years. Mr. Salte argued that the failure to comply with this obligation was a form of unprofessional conduct. The nature of this commitment had been specified to Dr. Tshabalala a number of times, and he had acknowledged the commitment in the documents he signed when he registered with the College of Physicians and Surgeons.

Section 46(o) and (p) of *The Medical Profession Act, 1981* read as follows:

46 Without in any way restricting the generality of "unbecoming, improper, unprofessional or discreditable conduct," a person whose name is entered on the register, the education register or the temporary register is guilty of unbecoming, improper, unprofessional or discreditable conduct, where he:

- (o) does or fails to do any act or thing where the discipline hearing committee considers that action or failure to be unbecoming, improper, unprofessional or discreditable;
- (p) does or fails to do any act or thing where the council has, by bylaw, defined that act or failure to be unbecoming, improper, unprofessional or discreditable.

Mr. Salte pointed out that the bylaws of the College of Physicians and Surgeons explicitly characterizes a breach of the three-year commitment as unbecoming, improper, unprofessional or discreditable, in bylaw 21(4)(f) and (k):

- 21(4) (f) Provisionally registered physicians must comply with the following conditions: ...
 - (ix) the registrant must practice in the community for which they are registered for three (3) years, and can only move before that time with the permission of Council.
- (k) It is unbecoming, improper, unprofessional or discreditable conduct for a physician who has signed a commitment to practice in a community in accordance with this section not to complete that commitment.

The second charge against Dr. Tshabalala is related to the allegations that he failed to make appropriate arrangements for his patients prior to his departure from Leader and that he did not provide adequate information to the clinic or the health region to permit them to provide for this event. Mr. Salte said that the charge is that these constituted breaches of the Code of Ethics and the bylaws of the College of Physicians and Surgeons, and were thus instances of unbecoming, improper, unprofessional or discreditable conduct pursuant to section 46(o) and (p) of the *Medical Profession Act, 1981*, reproduced earlier. Mr. Salte referred us to section 44 of the College bylaws, which provides as follows:

- 44(1) No person who is registered under the Act shall contravene or fail to comply with the Code of Ethics.
- (2) Contravention of or failure to comply with the Code of Ethics is unbecoming, improper, unprofessional or discreditable conduct for the purpose of the Act.
- (3) Every person who applies for registration under *The Medical Profession Act, 1981* shall subscribe to the Code of Ethics, as adopted by the College of Physicians and Surgeons from time to time, as a condition of registration.
- (4) Every person who is registered under *The Medical Profession Act, 1981* shall observe the Code of Ethics, as adopted by the College of Physicians and Surgeons from time to time, as a condition of maintaining his or her registration. ...
- (6) The Code of Ethics adopted by the College of Physicians and Surgeons is as follows: ...
 - (19) Having accepted professional responsibility for a patient, continue to provide services until they are no longer required or wanted, until another suitable physician has assumed responsibility for the patient, or until the patient has been given adequate notice that you intend to terminate the relationship.

Mr. Salte also referred us to the following section from the bylaws:

51. Bylaws Defining Unbecoming, Improper, Unprofessional or Discreditable Conduct

- (2) The following acts or failures are defined to be unbecoming, improper, unprofessional or discreditable conduct for the purpose of Section 46(p) of *The Medical Profession Act, 1981*. The enumeration of this conduct does not limit the ability of Discipline Hearing Committees to determine that conduct of a physician is unbecoming, improper, unprofessional or discreditable conduct pursuant to Section 46(o): ...
 - (l) Failing to continue to provide professional services to a patient until the services are no longer required or until the patient has had a reasonable opportunity to arrange for the services of another physician.

Mr. Salte argued that the allegations against Dr. Tshabalala in connection with the second charge are clearly caught by these definitions of what constitutes unbecoming, improper, unprofessional or discreditable conduct. He pointed out that the obligations resting on Dr. Tshabalala to make appropriate arrangements for patients and to inform the clinic and the health region had been brought to his attention, particularly by Dr. Shaw in her communications to him.

At one time, the onus of proof the College of Physicians and Surgeons was required to meet in establishing allegations of misconduct against members was characterized as a more demanding one than the ordinary balance of probabilities, being described in terms of “clear and cogent” or “compelling” evidence. The idea that there is something like a second standard of proof applicable in cases involving professional discipline was laid to rest by the Supreme Court of Canada in the recent decision in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, in the following terms:

...I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on the balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof...

It is, of course, important that the decision-maker – in our case a disciplinary tribunal – be quite satisfied that the evidence supports the claim being made, but the Supreme Court was clear that this proposition is true in all cases, and does not result in a distinct standard of proof saved for some kinds of cases. The ruling of the Supreme Court in *McDougall* concerning the single standard of proof have subsequently been applied to discipline proceedings in a number of jurisdictions; see *Osif v. College of Physicians and Surgeons of Nova Scotia*, [2009] N.S.J. No. 111 (Q.B.) (QL); *Rassouli-Rashti v. College of Physicians and Surgeons of Ontario*, [2009] O.J. No. 4762 (Div. Ct.) (QL); *Newton v. Criminal Trial Lawyers Association*, 2008 ABCA 404, (2008), 446 A.R. 1 (C.A.); *Walsh v. Council for Licensed Practical Nurses*, [2010] N.J. No. 61 (N. & L. C.A.) (QL).

The classic description of the role of a discipline hearing committee of the College of Physicians and Surgeons is found in *Green v. College of Physicians and Surgeons of Saskatchewan* (1987), 51 Sask.R. 241 (C.A.):

The standard of conduct required by members of the medical profession is that which is required by medical opinion of members of the profession. It had further been recognized by this Court that whether this standard had been met was a question best left to responsible members of the profession.

Similar language is found in the decision of the Saskatchewan Court of Queen's Bench in *Huerto v. College of Physicians and Surgeons of Saskatchewan*, (1994), 124 Sask. R. 33 (Q.B.); 117 D.L.R. (4th) 129 at 147 Sask. R.:

By not interfering with reasonable parameters which the committee set for the exercise of its jurisdiction under section 46(o), the Court is adhering to jurisprudence which appreciates that doctors know best what amounts to misconduct in their profession.

Decision-makers in professional disciplinary proceedings must, of course, make their decisions in a way that is consistent with legal rules concerning such things as the onus of proof – mentioned above – and procedure. On the other hand, as the language in these decisions suggests, the courts have supported the idea that decision-making bodies determining issues of professional discipline may draw on their own knowledge of the profession in assessing the conduct of a professional colleague. It also suggests that the way in which a self-governing profession chooses to define professional misconduct is worthy of deference because these definitions, in the form of bylaws or codes of conduct, represent considered statements capturing a broad agreement on what is expected of members of the profession.

In assessing the evidence to determine whether Dr. Tshabalala has been guilty of unbecoming, improper, unprofessional or discreditable conduct, the medical members of this panel are thus entitled to make use of their own knowledge of the profession in interpreting the bylaws and code of ethics adopted by the College of Physicians and Surgeons.

In this case, no evidence was put forward by or on behalf of Dr. Tshabalala, and no representations were made on his behalf, although there was evidence that the College took steps to give him appropriate notice of these proceedings.

In our view, the evidence does establish that Dr. Tshabalala is guilty on the first charge of unbecoming, improper, unprofessional or discreditable conduct under *The Medical Profession Act, 1981* and bylaw 21(4)(k) of the bylaws of the College of Physicians and Surgeons. This relates to the breach of his commitment to remain in Leader for a period of three years.

We are satisfied that the nature of this commitment was spelled out to Dr. Tshabalala and acknowledged by him in the documentation surrounding the grant of the provisional license in October 2007. There is further evidence that Dr. Tshabalala understood this commitment in the exchange of correspondence between June and September 2008 starting with the inquiry from Mr. Salte of whether Dr. Tshabalala was planning to leave Leader; in the final letter of this series in September, Dr. Tshabalala stated his intention to remain in Leader until October 2010, which would have been the end of the three-year commitment.

The communications Mr. Salte and later Dr. Shaw made with Dr. Tshabalala, far from foreclosing the possibility that he would be permitted to leave Leader, laid out a clear path which would allow him to serve out the three-year commitment in other locations, including South Africa, if he did not wish to remain in Leader. Despite these clear messages that there was some flexibility in how the commitment was met, Dr. Tshabalala chose to leave Leader in February 2009, although he had in September 2008 stated in writing that he had decided to stay until October 2010.

We also find that the evidence supports a finding that Dr. Tshabalala is guilty on the second charge of unbecoming, improper, unprofessional or discreditable conduct under *The Medical Profession Act, 1981*, paragraph 19 of the Code of Ethics and bylaw 51(2)(l) of the College of Physicians and Surgeons. This charge concerned his failure to make appropriate arrangements for his patients when he left Leader, and his failure to provide timely information to the Leader Medical Clinic and the Cypress Health Region about his departure.

Ms. Schmunk testified that, though she knew Dr. Tshabalala was experiencing some frustration because his family could not join him, she was not aware that he ever communicated to anyone in the clinic that he intended to depart. Once he was back in South Africa, and had decided to stay there, he never communicated his plans, which created considerable uncertainty about whether he would return or not, and delayed the prompt reassignment of his patients. Ms. Schmunk also testified that the health region seemed unaware of his departure, and indicated that he would not be allowed to return.

The evidence of Ms. Schmunk, as well as the letter Dr. Tshabalala wrote in July 2008 to the College describing his situation, indicated that Dr. Tshabalala was having a difficult time in Leader. His family was absent, and he felt socially isolated. He was also suffering stress because he had not been able to provide medical care to his mother in South Africa in the period leading up to her death, and he was worried about the health of another relative. His circumstances make it understandable to some extent that he would wish to return to his family in South Africa.

The correspondence from Dr. Tshabalala in the summer of 2008, when he appears to have been contemplating a move from Leader, also indicates that he did take into account the presence of other physicians in the community who would be available to his patients.

On the other hand, representatives of the College clearly laid out Dr. Tshabalala's obligations and outlined a process by which he could seek to alter his situation; he did not take advantage of the flexibility held out as a possibility by the College. Whatever the stresses Dr. Tshabalala was under, he is a member of a profession from which high standards are expected, and he failed to provide even minimal information to his colleagues in leader and to the health region.

We have concluded that Dr. Tshabalala is guilty of both charges of unbecoming, improper, unprofessional or discreditable conduct.

In his submissions to us, Mr. Salte asked that this committee make no recommendation as to the appropriate penalty. He argued that since we have had no opportunity to hear from Dr. Tshabalala, the usefulness of our advice to Council on this issue would not be helpful. We are inclined to agree, so we make no recommendation as to the penalty.

Dated at Saskatoon, Saskatchewan the 14th day of February, 2011.



Beth Bilson, Q.C., Chair

Dr. Joan Baldwin



Dr. Margaret Bartsch



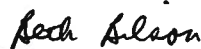
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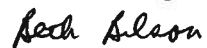
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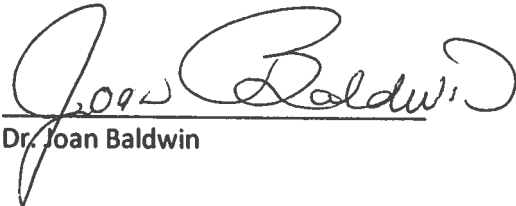
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