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G.P.-S.59968—1970-71—2 500 J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~Provincial~~ Division)
(~~Provinsiale~~ Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

POLPARK DISPENSARY (PROP) LTD Appellant,

versus

S. A. PHARMACY BOARD Respondent

Appellant's Attorney / Prokureur vir Appellant Claude, Reid & Hazlett

Respondent's Attorney / Prokureur vir Respondent Reitz, Barry & Barry

Appellant's Advocate / Advokaat vir Appellant C.W.H. Ackermann S.C. / B. M. Venaber

Respondent's Advocate / Advokaat vir Respondent J.P. Roux, S.C. / C E Aucamp

Set down for hearing on / Op die rol geplaas vir verhoor op [illegible]

(T.P.D)

Coram: Jansen, Trollip, Corbett, Joubert, Trengove

Appellant: Ackermann 9h45 - 11h00. 11h15 - 12h35 / 15h10 - 15h35.

Respondent: Roux 12h35 - 12h45. 14h15 - 15h10.

CAV

The Court dismisses the said appeal with costs including the costs attendant upon the employment of two counsel.

[signatures]

Bills taxed—Kosterekeninge getakseer

Writ issued / Lasbrief uitgereik	Date / Datum	Amount / Bedrag	Initials / Paraaf

Date and initials / Datum en paraaf 78 : 3 : 30

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

POLPARK DISPENSARY (PROPRIETARY) LIMITED .... Appellant

AND

THE SOUTH AFRICAN PHARMACY BOARD .... Respondent.

Coram: JANSEN, TROLLIP, CORBETT, JOUBERT, JJ.A. *et* TRENGOVE, A.J.A.

Heard: 2 March 1978.

Delivered: 30 March 1978.

J U D G M E N T

TROLLIP, J.A. :

This is an appeal against the decision of HIEMSTRA, A.J.P., with PAGE, A.J. concurring, in the Transvaal

Provincial .... /2

Provincial Division ("TPD"). The judgment is reported in 1977 (1) S.A. 115.

As appears from that report the crisp question in issue is whether the business that appellant, a body corporate, wants to conduct on certain premises in Springs is that of "a retail pharmacist" within the meaning of section 22(1)(e) of the Pharmacy Act, No. 53 of 1974 ("the Act"). If it is, it cannot be carried on, for appellant is then not entitled to be registered as a pharmacist under the Act and hence cannot practise as such. It then follows too that the respondent, the South African Pharmacy Board ("the Board"), correctly declined appellant's application for registration under the Act; that the TPD rightly dismissed the appellant's appeal to it under section 24; and that appellant's present appeal to this Court must be dismissed. The converse

applies if the answer to the above question is in the negative: appellant's present appeal must then succeed and its registration as a pharmacist be ordered. That all appears from the relevant provisions of the Act about to be set out.

(I should interpolate here that the Act was amended by the Health Laws Amendment Act, No. 36 of 1977, in certain respects; it was, however, common cause that the issue in this appeal must be governed by the unamended Act since the dispute arose prior to the enactment of the amending Act; hence the unamended provisions only are referred to.)

Section 13 says that no one is entitled to practise as a pharmacist unless he holds a registration certificate. Section 29 renders any contravention of that provision a criminal offence. The certificate is granted either by the Registrar of

the Board, if he is himself satisfied that the requirements of the Act are satisfied, or by the Board if he refers it to the latter for decision. Section 14 provides for the keeping of registers, one of which is of registered bodies corporate

> "carrying on business as a pharmacist in terms of this Act" (sub-section (1)(e)).

Section 22(1) reads -

> "Notwithstanding anything to the contrary contained in this Act, a body corporate may carry on business in the Republic as a pharmacist on the following conditions, but not otherwise -
>
> (a) ....
>
> (b) the board may cancel any registration referred to in section 14(1)(e) and any certificate issued in respect thereof - .... (iii) if the body corporate in terms of paragraph (c) ceases to be entitled to carry on business as a pharmacist; ...
>
> (c) a body corporate shall not carry on business as a pharmacist unless it holds a valid certificate, referred to in paragraph (b), of its registration ....
>
> (d) ....

(e) .... /5

(e) the body corporate, if it carries on business as a retail pharmacist, shall have been carrying on business as such immediately prior to the commencement of the Act."

The appellant did not carry on business as a retail pharmacist prior to the commencement of the Act; indeed it did not previously carry on any business at all, only having been incorporated as a private limited liability company on 7 May 1975. Hence appellant is not, in terms of the Act, entitled to carry on business as a retail pharmacist. The Board, to whom appellant's application for registration was referred for decision, had therefore to be satisfied, before granting the application, that appellant did not propose to carry on such a business, for otherwise its registration would not accord with the above requirements of the Act. After affording the appellant and its legal representatives a hearing, the Board was not so satisfied, and it

refused the application. Appellant then "appealed" under section 24 against that decision to the TPD by way of motion proceedings. Affidavits were filed on both sides. They canvassed the relevant facts fully, including those relating to the proceedings before the Board. The TPD upheld the decision of the Board. It will be observed from the report of the TPD's judgment that some of the aspects about the nature of the "appeal" under section 24 were debated before the TPD and were dealt with by it - see 1977 (1) at p. 116 C to H. Those problems were not raised before us, and no view need be expressed about them. In the circumstances our approach, I think, should simply be to treat the present appeal as if it were one against a decision given by a court of first instance in motion proceedings, i.e., on all the facts that were placed before it on affidavit, irrespective of whether or not they

were .... /7

were also before the Board at its hearing. Counsel were not averse to that approach being adopted.

According to the facts that were either common cause or not disputed the appellant is the wholly owned subsidiary of a holding company that owns a nursing home in Springs, known as Parkland Clinic ("the Clinic"). The directors of appellant are a medical practitioner, the matron of the Clinic, and a qualified pharmacist. The last-mentioned is also appellant's managing director. The Clinic was built in 1974, replacing an old nursing home. The new building provides accommodation for a dispensary, located inside the Clinic's administrative section. This dispensary is to be used by the appellant under the personal supervision and control of its managing director. She is, as already mentioned, a qualified pharmacist. The dispensary has its own

entrance door, marked "private" in bold lettering. Neither the patients of the Clinic nor the public will have access to it or be allowed to enter it to purchase medicines. It will be conducted solely and exclusively for the Clinic and its patients in this way. From the dispensary appellant will supply the Clinic, for administration to its patients, such medicines, drugs, medical and surgical dressings and appliances as are prescribed for them by medical practitioners. These prescriptions will, of course, be made out in the names of and for the particular needs of the individual patients. The prices of these medicaments, i.e., their cost plus the normal dispensing fee and profit, will, however, be charged to and be paid by the Clinic, who in turn will recover them from the patients concerned. In addition appellant will supply the Clinic with its own medical requirements, i.e.,

medicines .... /9

medicines, dressings, bandages, and other items, which are generally regarded as "ward stock". These are kept by the Clinic and in turn supplied by it to its patients when needed. Furthermore, the dispensary will not sell or offer for sale any of the articles or goods usually traded in by the ordinary retail pharmacist in addition to its dispensing prescribed medicines, such as patent medicines, cosmetics, toiletries, fancy goods, photographic articles.

The facts or inferences alleged by appellant and put in issue by the Board were these. Appellant averred that it will have no dealings whatsoever with the patients of the Clinic, that all medicines dispensed and supplied by it on prescriptions for patients in the Clinic will be sold and supplied to the Clinic and not to the patients, that the Clinic and not the patients will pay appellant for them, and that therefore there

will be no legal or other nexus between the appellant and the patients in the Clinic. The Board disputed these averments. It maintained that the medicines to be dispensed and supplied by appellant on prescriptions for the patients will not be required by the Clinic in its own right or for its own purposes, that the Clinic, not being registered as a pharmacist under the Act, is not itself entitled in law to sell or dispense medicines to the patients, that its function will merely be to act as the vehicle or channel between appellant and each patient by means of which the latter obtains the medicines prescribed for him or her and pays for them, and that appellant will therefore in that way deal with and have a nexus with the patients.

The Board's approach is in substance undoubtedly correct for these reasons. In answer to the allegation by the

Board that the Clinic is not in law entitled itself to dispense and sell medicines to its patients, appellant stated that the Clinic will not in fact dispense or re-sell the prescribed medicines to the patients for whom they were prescribed. In argument appellant's counsel affirmed that statement. Despite section 29(3)(e) of the Act (to be dealt with presently), the Clinic, not being itself a registered pharmacist or a medical practitioner, is possibly not lawfully entitled to dispense or sell prescribed medicines to patients - see section 13 of the Act, and sections 14(1) and (4) and 22A(1) of the Medicines and Related Substances Control Act, No. 101 of 1965, as amended. But be that as it may, the irresistible and only inference from the above cardinal statement by appellant is that the Clinic will in fact merely act as the vehicle or channel between appellant and each patient in

respect of the ordering, delivering and payment of the prescribed medicines. (It is unnecessary to determine whether the Clinic, in performing that function, will be the agent of appellant or of the patient concerned.)

Appellant's counsel, however, relied on section 29(3)(e) of the Act to negate that inference. This section penalizes any unregistered person for practising or professing to practise as a pharmacist. But, according to sub-section (3)(e), that does not prohibit

> "the keeping of medicines and its supply to patients in hospitals or other institutions for the treatment of sick persons, under the direction of a medical practitioner and in accordance with the provisions of the Medicines and Related Substances Control Act, 1965, by any person registered or enrolled under the Nursing Act, 1957 (Act No. 69 of 1959)."

This provision may refer only to ward stock. But assuming

without deciding in favour of appellant that it can also refer to prescribed medicines to be dispensed by appellant for patients in the Clinic, I do not think that it is in any way inconsistent with the Clinic being merely the abovementioned channel or vehicle for keeping the prescribed medicines for and supplying them to the patients for whom they were prescribed. Consequently it must be accepted that appellant will deal with the patients in the Clinic by supplying them with the medicines prescribed for them. The TPD correctly reached the same conclusion - see 1977 (1) at p. 117 F and *in fin*.

That clears the factual way to the consideration of the legal problem: the meaning of "carry on business as a retail pharmacist" in section 22(1)(e) of the Act. The Act itself does not define "retail" or "retail pharmacist". As will

presently appear the ordinary meaning of "retail" is not precise.

Counsel were agreed that the preceding legislation relating to the pharmaceutical profession does not indicate whether or not the legislature used the word in the Act in any special sense or with any particular connotation. Even the object in enacting this particular provision is obscure. Counsel did tentatively suggest some possible objects that the legislature might have had in mind, but they are so uncertain that it would be unsafe, I think, to rely on them in construing the word. The correct approach therefore is to confine our inquiry to the ordinary meaning of the word and its proper adaptation so as to conform to its context.

According to the <u>Oxford English Dictionary</u> ("O.E.D.") "retail" means "the sale of commodities in small

quantities". Webster's Third New International Dictionary defines it as "the sale of commodities or goods in small quantities to ultimate consumers - opposed to WHOLESALE." The Afrikaans text of the Act uses "kleinhandel". In the Afrikaanse Woordeboek ("A.W."), by Terblanche and Odendaal, this means -

> "Winkelbedryf of handel wat klein benodigde hoeveelhede regstreeks aan die verbruiker of publiek verkoop."

The Handwoordeboek van die Afrikaanse Taal ("H.A.T.") defines it as

> "Verkoop van goedere regstreeks aan die publiek in klein hoeveelhede op 'n keer, gewoonlik uit winkels, op die mark of straat".

The common, essential factor in all these definitions is the selling of commodities in small quantities. That is the widest connotation of "retail". Webster and the A.W. introduce the additional concept of selling directly to the

ultimate consumer; while A.W. and H.A.T. express the further element of selling them directly to the public. These definitions are less wide than the O.E.D.'s. I am prepared to assume in appellant's favour that "retail" in section 22(1)(e) of the Act is not used in its widest (the O.E.D.'s) sense. Appellant's counsel relied heavily on the above Afrikaans definitions, maintaining that selling directly to the public was an essential element of "retail". That the commodities are sold directly to the public is, of course, indicative of a retail trade, but it is not a <u>sine qua non</u>. After all, wholesalers sell directly to retailers who are often a large section of the public; and it is quite conceivable that a trader who sells his commodities in small quantities to only one consumer can nevertheless be regarded as a retailer. Hence, I think that the essence of "retail"

in its less wide sense is, as the above dictionaries show, selling commodities in small quantities to the ultimate consumers. In saying that I have not overlooked the difference between the above English and Afrikaans definitions. They are not material. The ultimate consumers are usually members of the public - hence the reference to this aspect in the Afrikaans definitions. But that that is not an essential element is evident from the omission of any reference thereto in the English definitions. A person may well carry on a retail business by selling commodities in small quantities to an exclusive or limited body of consumers, such as the passengers on a train or boat or the members of a society. "Regstreeks" ("directly") is also, I think, merely used to emphasize the exclusion from the connotation of "retail" of any selling to middlemen for resale to the ultimate consumers;

but it does not exclude selling to the ultimate consumers through agents of either the seller or consumers.

Now to look at the Act in order to apply and adapt that meaning of "retail" to a pharmacist. A good idea of what the profession of a pharmacist embraces is to be found in section 29. Sub-section (1) penalizes any unregistered person from practising or professing to practise as a pharmacist. Sub-section (2) says -

"29. (2) The following acts shall, for the purposes of subsection (1), be deemed to be acts specially pertaining to the profession of a pharmacist -

(a) the manipulation, preparation or compounding of any medicine or medicinal or chemical substance (whether it does or does not contain a poison) for sale or supply as a medicine;

(b) the compounding or sale or supply -

(i) of any medicine on the prescription of a medical practitioner or dentist; or

(ii) of any chemical substance on the prescription of a veterinarian;

(c) the manufacture or the supervision of the manufacture of any medicine."

From that it clearly appears that a "retail pharmacist" in section 22(1)(e) must include one who sells or supplies prescribed medicines to persons for whom they are prescribed. For manifestly such medicines are sold in small quantities - they being restricted to meet the particular needs of the persons for whom they are prescribed - and the latter are the ultimate consumers of them. The *prima facie* conclusion is, therefore, that appellant, in conducting its dispensary in the Clinic as proposed, will be a "retail pharmacist" in terms of section 22(1)(e). But before finally so concluding I must consider some further arguments submitted on behalf of the appellant.

It was argued that, according to the above dictionary definitions, the essence of "retail" is trading, i.e., the selling of commodities; that by merely supplying medicines to order on prescriptions a pharmacist, a professional man, does not sell and thus trade in them; that a "retail pharmacist" therefore can only connote one who, in addition to compounding and/or supplying prescribed medicines, trades by selling the other miscellaneous goods previously mentioned; and that, as appellant will not trade in such goods, it will not be a retail pharmacist. In support of that argument counsel relied on In re Medicaments (1970) 1 W.L.R. 1339, a decision in the English Restrictive Practices Court. There the learned President (BUCKLEY, J.) said at p. 1344 H:

"The business of retail chemist consists of: (a) dispensing in response to prescriptions from doctors or

dentists, (b) the sale of proprietary medicines, and (c) the sale over the counter of a large number of miscellaneous goods, such as cosmetics, photographic material, toiletries and so forth, which have become traditionally connected with the trade of a chemist."

The argument is untenable. To start with its major premises are fallacious. Where a pharmacist uses his own chemical substances in compounding a prescribed medicine and supplies the finished product for a price to the consumer, he undoubtedly, according to the law, sells it (see Tulloch v. Marsh 1910 T.P.D. 453; MacKeurtan on Sale, 4th ed. p. 55; Norman on Sale, 4th ed. p. 15). That also applies, of course, where he supplies the prescribed medicine from his stock. He thus trades in all such medicines. That he also trades or does not trade in the other miscellaneous goods mentioned above is irrelevant to the question whether or not he is a retail pharmacist in terms of the

Act. For the Act is concerned with the pharmacy profession, not with the extra-pharmaceutical or general dealer activities of pharmacists. Hence the question under consideration is to be answered by reference to a pharmacist's activities with medicines and not with the other miscellaneous goods. The fact therefore that appellant will not trade in the other miscellaneous goods is of no significance. The above-quoted dictum in the Medicaments case does not further counsel's argument at all. The learned President there was not construing the phrase "the business of retail chemst" as a matter of law; he was merely stating the kind of business that retail chemists in fact ordinarily carry on in the United Kingdom, as revealed by the evidence before the Court.

The element of selling to the public mentioned

in the definitions of "retail" in the above Afrikaans dictionaries, and the aspect of such selling usually occurring from a shop or a place otherwise accessible to the public, as mentioned above in the H.A.T. definition of "retail", were also relied on. Counsel argued that appellant, in selling the prescribed medicines only to the patients in the Clinic, will not be trading with the public; and that appellant's dispensary is not a shop or similar premises, but, on the contrary, they are private premises and not accessible to the public at all. Counsel also relied on Turpin v. Middlesbrough Assessment Committee 1931 A.C. 452 at p. 470 et seq., and other similar cases that all deal with the expression "a retail shop" in an English rating statute.

This argument is also untenable for these reasons. Selling to the public is not an essential ingredient

of a retail trade - see the reasons already given. In any event, the patients in the Clinic, to whom the appellant will sell the medicines prescribed for them , all come from the public; while in the Clinic they can thus be regarded as members of the public, albeit only an exclusive or limited section thereof; so this particular point made by appellant's counsel loses its force. Moreover, while a retail trade is usually conducted from a shop on a street or in a place open to the public, that too is not essential in respect of a retail pharmacist or pharmacy. According to section 1 of the Act, "pharmacy" means

> "any place where is performed any act specially pertaining to the profession of a pharmacist."

A retail pharmacist can therefore carry on his business at any place or premises and not necessarily in a shop. _Turpin_'s and

the other cases referred to _supra_ are therefore all inapplicable to the problem in hand. In _Turpin_'s case the question was whether for rating purposes under the English Rating and Valuation (Apportionment) Act, 1928, certain premises were primarily occupied and used for the purposes of "a retail shop". That expression was defined as including "any premises of a similar character" (i.e., similar to the character of a retail shop) "where retail trade or business .... is carried on". The premises in question were held to be "a retail shop" _inter alia_ because "the public can resort (to them) for the purpose of having particular wants supplied therein" (p. 474). On the other hand in _Toogood and Sons, Ltd. v. Green_ 1932 A.C. 663 the premises were held not to be "a retail shop" because the premises were not such that the public could resort to them for that purpose if they wanted to. See also _Dolton Bournes_

and Dolton Ltd. v. Osmond (1955) 1 W.L.R. 621 (C.A.), in which a similar conclusion was reached. But in these and other like cases that were quoted, an entirely different statutory provision was being construed and applied. There the inquiry was into both the character of the premises and the nature of the trade or business conducted on it. See especially Ritz Cleaners Ltd. v. West Middlesex Assessment Committee (1937) 2 K.B. 642 at p. 671, per GREENE, L.J., where this nature of the inquiry was emphasized. The basic consideration was whether or not the premises were those of a shop, which ordinarily means a place to which the public resort for their wants (ibid). In the present case the premises are of no materiality. It is the nature of the business to be conducted on them that is decisive, which is a different matter. It is for these reasons that I think those cases are inapplicable and the argument is

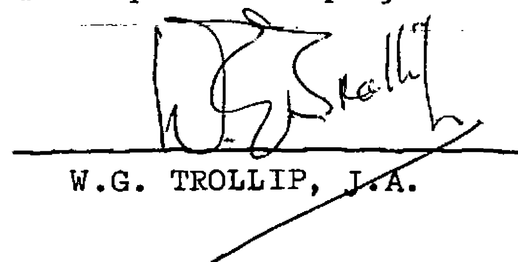
untenable.

Now it is true that appellant will also supply the Clinic direct with its own medical requirements, referred to above as ward stock. Some will be supplied on, and others without, prescriptions. The Clinic will keep them and will in turn supply them to its patients in terms of 29(3)(e) of the Act, quoted above. I shall assume without deciding in favour of appellant that the Clinic cannot be regarded as the ultimate consumer of these commodities, that this part of appellant's activities will not be negligible, and that it will not constitute retail trading. Nevertheless, that does not assist the appellant. For it is clear that a substantial, if not the main, part of its activities will be the selling of prescribed medicines to the patients in the Clinic. So long as it does that it will be a retail pharmacist for

reasons already given. That is the part of its proposed activities that offends against section 22(1) of the Act and precludes its being registered as a pharmacist. And that flaw in its application for registration is not remedied merely because it will also carry on other activities that are non-retail.

The final conclusion therefore is that appellant will be a retail pharmacist within the meaning of section 22(1)(e) of the Act, that the Board correctly so decided and correctly refused its application for registration, and that the TPD rightly dismissed its appeal.

This appeal is in consequence dismissed with costs, including the costs attendant upon the employment of two counsel.



W.G. TROLLIP, J.A.

JANSEN, J.A.)
CORBETT, J.A.) concur.
JOUBERT, J.A.)
TRENGOVE, A.J.A.)