

WHERE ARE WE GETTING IT WRONG REGARDING PHARMACY BUSINESS OWNERSHIP

Paper presented by James Prince Mutizwa to the Pharmaceutical Society of Zimbabwe
Mashonaland Branch at Bronte Hotel on 25th March 2017

Mr Chairman, Ladies and Gentlemen,

I start by thanking you for inviting the Pharmacists Council to be present with you at this continuing education meeting. When my Chairman nominated me to do the presentation, I asked whether there was no mistake on the date and time. The invitation intimated a Saturday meeting, and in the afternoon. The Registrar told me that I was not wrong in that observation as this exercise is indeed for Saturday, and yes, in the afternoon.

The reason Mr Chairman why I am mentioning the issue of day and time is to applaud you and your members for your commitment to the cause of continuing education. Saturdays have many uses, some quite useless, but that can be subject for comic relief later, if we get the chance.

2/ I consider

I considered very carefully what legal issues you needed me to discuss, because as you are all aware, everyone is presumed to know the law. So what is there to talk about, and with people who are supposed to know the law? People who know that ignorance of the law is no defence? (if you want the latin ignorantia juris non excusat)

Well, the invitation wanted a discussion on pharmacy business ownership, the legal framework, compliance, what is happening now as opposed to what should be happening, and of course issues around professionalism and ethics.

The definitions of ethics and professionalism are well travelled routes and I will not bore you by going there. What I think is important to note that it is necessary for professionals themselves to have a visible willingness and a large measure of enthusiasm to be compliant with standards. Further, professionals must always exceed the minimum legal requirements.

I think it is pertinent to note that on completion of training, pharmacists can do a variety of things. They can go into teaching, or research. They can go into manufacturing, or they can go into the public sector and work in government hospitals.

My Topic, I think, requires me to deal with the pharmacist who opens pharmacies or practises pharmacy as a business.

3/ As you....

As you are no doubt aware, there are a variety of business models, all which can be engaged in the business of pharmacy.

The simplest form is that of being a sole proprietor. Here, the Pharmacist is the owner of the business. You make all the decisions, you control everything and you are the responsible person.

Then you can have a body corporate which is incorporated by law. The constitution of a body corporate will be governed by the law incorporating it. If it is in the pharmacy business, the pharmacist's place and role will also be determined by the structure of the body corporate.

Then you have a private company or a business corporation incorporated in terms of the Companies Act (Chapter 24:03) If such entity decides to go into the pharmacy business the role of the pharmacist will also be determined by the structure of the company. The pharmacist can be an employee or a director.

Lastly (and very simplistically) you have a partnership. This is where a pharmacist or pharmacists alone or with a non pharmacist(s) enter into a partnership agreement to run a pharmacy business, sharing profits and losses.

There are other models like trusts, but I thought I could keep it simple.

4/ Since....

Since however trusts can be incorporated, they will in many ways mimick body corporates, companies and business corporations, so we can always refer to our earlier discussion on those, with the necessary changes where for example, Trustees become the equivalent of Directors, and shareholders being the equivalent of beneficiaries.

Where one runs a pharmacy business as a sole trader, there is absolutely no problem. This is the first prize. The pharmacist can call himself or herself a pharmacist, a chemist, a druggist, pharmaceutical chemist and the like, and trade as such. The law places no restriction whatsoever where the person is a pharmacist.

Problems begin when artificial persons enter the pharmacy trade. The cause of the problem is the failure or disregard by pharmacists and their associates to respect the law, which in my humble submission is simple and straight forward.

All that pharmacists and their associates who chose to engage in pharmacy business where the pharmacist is not a sole trader, is to study section 124 of the Health Professions Act (Chapter 27:19) (" hereinafter called "the Act".)

Sub section (1) of section 124 criminalises

5/ individuals.....

- (a) individuals practicing for gain or carrying on the business of a pharmacist, or pretending or holding himself or herself as pharmacist and
- (b) an unregistered person using the title pharmacist, chemist, pharmaceutical chemist or druggist or any name, title, description or symbol indicating or calculated to lead persons to infer that he or she possesses a degree, diploma or other qualification as a Pharmacist or he is registered as a pharmacist under this Act.

What section (1) (b) does is to disqualify persons, and that includes companies, partnerships, trusts, business corporation and indeed all artificial persons from using the title pharmacist, chemist, pharmaceutical chemist or chemist and druggist or to give the impression that they are registered in terms of the Act.

The only time that artificial persons are allowed to do so is

- (a) where you have a body corporate which
 - (i) is incorporated in terms of any law and (underlining mine for emphasis)
 - (ii) the majority of the directors are registered pharmacists and (underlining mine for emphasis)

6/ the

(iii) the majority in value of the shares are held by registered pharmacists

or

(b) with a private company or business corporation, the control and (underlining mine for emphasis) management of that company or corporation is held by one or more registered Pharmacists:

or

(c) a partnership, if the control and (underlining mine for emphasis) management of that partnership is held by one or more registered pharmacists.

So as you can see, the situation is quite simple – no business of pharmacy can operate without a pharmacist. Further, the pharmacist's seat and value is pre-determined – he or she must be the boss. This, Mr chairman is missed by many a pharmacist.

The words to underline are management and control. The definition of management is easy. It is the process of dealing with or arranging things or people.

It is control which creates problems, especially in companies and in economics. You control an undertaking if;

7/ you have.....

- (a) you have the ability to determine a majority of the votes that may be cast at a general meeting of the undertaking;
- (b) you are able to appoint or veto the appointment of a majority of the directors of the undertaking;
- (c) you have the ability to determine the appointment of senior management, strategic commercial policy, the budget or business plan of the undertaking or
- (d) you have controlling interest in an intermediary undertaking that in turn has a controlling interest in the undertaking.

What happens on the ground though is that James Prince Mutizwa, a lawyer, who has no clue about pharmacy, wishes to go into the pharmacy business.

He cannot go into the business because of section 124 (1). He registers a private company and looks for a pharmacist.

He explains exactly what he wants to do and why he needs a pharmacist – to defeat section 124 (1) (b).

This is how it works and this is what pharmacists are doing: James Prince Mutizwa will own the business as either the majority shareholder, or even as the sole shareholder. After all it is his money.

8 He gives....

He gives the pharmacist a fee or some token shares for the pharmacists to join the scam. The pharmacist will have sold his or her soul.

When the application for registration with Council is submitted, the papers will reflect that the pharmacist has the majority shareholding, as well as the management and control as required by section 124. The share certificates and all supporting documents will be falsified, and the application will be granted. Infact it will sail through all the processes, and the business will begin.

But as with most bad things, the truth cannot be hidden forever. Things go awry and these shenanigans will be exposed. The non pharmacists who is not a professional, and so does not have respect for the profession or ethics thereof will make or cause unprofessional and illegal things to happen in the pharmacy. After all he is driven only by commercial considerations. The pharmacist gets caught up in messy unprofessional conduct or disgraceful conduct, or conduct which, when regard is hard to the profession is improper or disgraceful. Then the unhappy and unpleasant process of disciplinary processes begins. In most cases, there is potential for criminal proceedings to be instituted.

Firstly, there is the crime of perjury, that is to say, lying under oath. This crime invariably invites a jail term. Remember Minister Fredrick Shava and the Willowgate scandal?

9/ Perjury.....

Perjury occurs when a person lies under oath. You will know that the processes involved in applying for permission to operate a pharmacy business may require that the pharmacist swears to an affidavit. If you are involved in the set up such as I have described, your affidavit will contain lies, and therein lies your problem, if you are caught. (Remember a crime occurs when you are found out).

Then there is section 140 of the Act which reads:

“Any person who makes any statement verbally or in writing to a Council or any committee thereof or in connection with any matter regulated by or under this Act which he knows to be false or does not have reasonable grounds for believing to be true shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year to both such fine and such imprisonment.” (Level six is three hundred (\$300.00) United States dollars. But there is also the criminal record

So as you can see these are very serious matters. It is not just a matter of acting unprofessionally or unethically, you will also be breaking the law.

The Disciplinary Committee of the Pharmacist Council has had to host many pharmacists regarding violations around this issue.

10/ The most

The most prevalent one relates to poor supervision. This is usually where unqualified persons are allowed to man pharmacies.

The problem which we have is that pharmacists are their own worst enemies, and are not helping Council. How can the Council tell that the pharmacist directors are there for window dressing and do not perform the functions of directors as required by law?

How can the Council tell that the share certificates, and the CR 2 forms are all subject to some warehousing agreements which tell the true story which is inconsistent with the requirements of section 124?

How can Council ever know that while the majority in value of the shares of a corporation are held by registered pharmacists, there is a voting pool which defeats the seeming advantage of being majority shareholders?

How can Council tell or decipher all the conditions regarding preference shares, and other classes of shares and the effect they have on management and control of the business?

How can the Council prove that control and management of a private

11/ company...

company or a partnership is not held by registered pharmacists.

Ultimately it is pharmacists themselves who must refuse to join these schemes. They are the experts in medicines and yet they are willing to surrender their sovereignty to people with no clue about their profession.

Is it economic considerations, lack of training, or a lack of business knowledge?

Looking at it another way, Let us assume that in the companies we in, we are doing the right thing, we are the pharmacists with the required majority, as well as the management and control.

But have we taken time to know the legal obligations of being a director? Then why is it that pharmacists express genuine surprise when as a Pharmacist director they are charged with misconduct when an employee opens the pharmacy where there is no continuous personal supervision of registered pharmacist? Why after being charged do you raise the defence that it was not you, forgetting or not knowing that the buck stops at you.

Why do Pharmacists get surprised when they are charged with misconduct

12/ when expired.....

when expired drugs or unregistered drugs are found in the pharmacy and they say it was not me?

Mr Chairman I could go on. We need to understand that as Pharmacist directors, the duty to be compliant rests with you, and not with your non pharmacist associates, employers or employees. The business of pharmacy is allowed to operate only because you are there. Without you, they cannot be in business. This is why Mr Chairman, it is disappointing that pharmacists devalue themselves, and allow the tail to wag the dog.

Lastly Mr Chairman, a few things. When pharmacists go into these fancy business models, they get to sign a lot of things. When these documents are shown to them, they will admit to signing, but will say that they were not aware of what the document mean. I have some latin for people like that caveat subscripto (let the signatory be aware)

I thank you.

Harare 25th March 2017

