

**Nursing and Midwifery Council**  
**Fitness to Practise Committee**  
**Substantive Order Review Hearing**  
**13 October 2020**  
Virtual Hearing

|                                       |  |
|---------------------------------------|--|
| <b>Name of registrant:</b>            | Bafana Mthombeni   |
| <b>NMC PIN:</b>                       | 93Y0025O   |
| <b>Part(s) of the register:</b>       | Registered Nurse (Sub Part 1)<br>Adult Nursing – February 1993   |
| <b>Area of Registered Address:</b>    | Kent   |
| <b>Type of Case:</b>                  | Misconduct   |
| <b>Panel Members:</b>                 | Gregory Hammond (Chair, Lay member)<br>Christine Somerville (Registrant member)<br>Alexandra Ingram (Lay member)                   |
| <b>Legal Assessor:</b>                | Breige Gilmore   |
| <b>Panel Secretary:</b>               | Caroline Pringle   |
| <b>Mr Mthombeni:</b>                  | Present and represented himself  |
| <b>Nursing and Midwifery Council:</b> | Represented by Jessica Bass, NMC Case<br>Presenter   |
| <b>Order being reviewed:</b>          | Suspension order (12 months)   |
| <b>Fitness to Practise:</b>           | Impaired   |
| <b>Outcome:</b>                       | Conditions of practice order (12 months) to<br>come into effect at the end of 21 November<br>2020 in accordance with Article 30(1) |

## **Decision and reasons on review of the current order**

The panel decided to make a 12 month conditions of practice order. This order will come into effect at the end of 21 November 2020 in accordance with Article 30(1) of the Nursing and Midwifery Order 2001 (as amended) (the Order).

This is the first review of a 12 month suspension order imposed by a Fitness to Practise panel on 23 October 2019. The current order is due to expire at the end of 21 November 2020.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved which resulted in the imposition of the substantive order were as follows:

*That you:*

1. *On 21 February 2016, issued 2 prescriptions to patients when not appropriately qualified to do so.*
2. *Between 26 and 27 February 2016, issued 16 prescriptions to patients when not appropriately qualified to do so.*
3. *[NOT PROVED]*
4. *On ... 23 and 28 February 2016, did not escalate patients with a respiratory score of 18 when it would have been clinically appropriate to do so.*

*AND in light of the above, your fitness to practise is impaired by reason of your misconduct.*

The original panel determined the following with regard to impairment:

*The panel then went on to consider whether Mr Mthombeni's fitness to practise is currently impaired by reason of his misconduct. In addressing the public protection aspect of impairment, the panel asked itself whether Mr Mthombeni is liable, now and in the future, to repeat misconduct of the kind found. In reaching its decision, the panel had particular regard to the issues of insight and remediation.*

*The panel noted that in the case of CHRE v NMC & Grant [2011] EWHC 927 (Admin) Mrs Justice Cox stated: "When considering whether or not fitness to practise is currently impaired, the level of insight shown by the practitioner is central to a proper determination of that issue."*

*The panel recognised that Mr Mthombeni had engaged with the regulatory process up to the point when he absented himself from the resumed hearing in this matter. In addition he had made a partial admission in relation to charge 2. Further, the panel accepted that he appears to have heeded the instruction on 28 February 2016 not to issue any further prescriptions. However, the panel received no evidence of reflection on the part of Mr Mthombeni, or indeed any remorse or insight as to why issuing the prescriptions had been wrong, why not escalating the patients with respiratory rates of 18 had been wrong, or what impact these failings could have had on his patients, colleagues or the reputation of the wider profession. In the circumstances, the panel concluded that Mr Mthombeni had demonstrated only minimal insight into his failings.*

*The panel had careful regard to Silber J's guidance in Cohen v GMC [2008] EWHC 581 (Admin) that panels should take account of:*

- whether the conduct which led to the charge is easily remediable;*
- whether it has been remedied; and*
- whether it is highly unlikely to be repeated.*

*The panel recognised that remediation of misconduct which involves purely clinical failings is likely to be easier than the remediation of failings which also involve attitudinal problems. In the panel's view, its finding that Mr Mthombeni*

*had deliberately issued prescriptions when he knew he was not qualified to do so indicated that there are attitudinal issues in this case. In any event, the panel received no evidence which might enable it to conclude that Mr Mthombeni's misconduct has been remedied or that it is highly unlikely to be repeated.*

*In light of its findings on the issues of insight and remediation, the panel was unable to conclude that Mr Mthombeni has learned from this experience to the extent that he would be unlikely to repeat misconduct of the kind found in this case. In the panel's view there is a significant risk of repetition of matters of the kind found proved and a finding of current impairment is required on public protection grounds.*

*The panel then went on to consider whether a finding of impairment is necessary on public interest grounds. In addressing this aspect of impairment, the panel had careful regard to the public interest issues identified by Silber J in the case of Cohen when he said: 'Any approach to the issue of whether .... fitness to practise should be regarded as impaired must take account of the need to protect the individual patient, and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour.*

*The panel asked itself whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment of fitness to practise was not made in the circumstances of this case. The panel had no doubt that it would.*

*In the panel's view, informed members of the public would be shocked to learn that Mr Mthombeni had deliberately issued prescriptions when he knew he was not qualified to do, and had also failed to escalate child patients when he should have done so. For these reasons, a finding of impairment on public interest grounds also is required.*

*Having regard to all the above, the panel concluded that Mr Mthombeni's fitness to practise is currently impaired by reason of his misconduct.*

The original panel determined the following with regard to sanction:

*The panel then considered whether placing conditions of practice on Mr Mthombeni's registration would be a sufficient and appropriate response. The panel was mindful that any conditions imposed must be proportionate, measurable and workable. It noted that the misconduct in this case was the result of deliberate decisions on the part of Mr Mthombeni, rather than clinical failings which could be addressed through retraining; and that his misconduct included attitudinal problems. The panel could not formulate any practical or workable conditions which could address this misconduct. It was also of the view that a conditions of practice order would be insufficient to address the seriousness of this case. For these reasons, the panel decided that a conditions of practice order would be neither appropriate nor proportionate.*

*The panel then went on to consider whether a suspension order would be an appropriate sanction...*

*The panel determined that Mr Mthombeni's misconduct was a serious departure from the standards expected of a registered nurse and required at least temporary removal from the register, in order to protect patients and mark the public interest. However, it also had regard to the mitigating factors in this case. The panel did not accept Ms Caslin's submission that Mr Mthombeni's misconduct was a repeated pattern of behaviour; it considered that it could be properly characterised as an isolated period of misconduct within a single service. Although the panel considered that Mr Mthombeni's actions were deliberate decisions on his part, rather than clinical "mistakes", it was not of the view that his attitudinal problem was deep-seated. For example, on 28 February 2016 when Mr Mthombeni was explicitly told to stop issuing prescriptions, he followed this instruction and did not persist at that time. Furthermore, Mr Mthombeni did initially engage with these proceedings and*

*made a partial admission to charge 2. The panel had no reason to believe that, had the hearing not adjourned in April 2019, that Mr Mthombeni would not have continued to engage.*

*The panel noted that the NMC's sanction bid was that of a striking-off order and gave consideration to this sanction. However it considered that while misconduct of an attitudinal nature is inherently difficult to remediate, Mr Mthombeni's particular misconduct could be capable of remediation through adequate reflection and demonstration of insight and remediation. The panel considered that his partial admission to charge 2 at the beginning of this hearing suggested to least some acceptance of his wrongdoing and it determined that to strike him off the register without affording him an opportunity to demonstrate his insight would be disproportionate. While the panel acknowledges that Mr Mthombeni's misconduct was very serious, it did not consider that his overall behaviour is fundamentally incompatible with ongoing registration at this time. The panel also bore in mind that it had heard some evidence that Mr Mthombeni was otherwise a good nurse and that there is a public interest in keeping such practitioners on the register.*

*Balancing all of these factors, the panel concluded that a striking-off order was disproportionate at this time and that the appropriate and proportionate sanction in this case is a suspension order.*

*The panel considered that this order would protect the public for the time it is in force, mark the importance of maintaining public confidence in the profession and send the public and the profession a clear message about the standard of behaviour required of a registered nurse. It would also give Mr Mthombeni an opportunity to remediate his misconduct, develop his insight and demonstrate a commitment to returning to the profession unrestricted.*

*The panel determined that a suspension order for 12 months was the appropriate and proportionate length of time. It noted that Mr Mthombeni is currently out of the country and had alluded to health issues which are*

*preventing him from returning (although the panel had no evidence to support this). In these circumstances, the panel considered that 12 months was necessary to allow Mr Mthombeni to return to the UK, re-establish himself here and prepare for the review hearing which will take place before the suspension order expires.*

*The panel noted the hardship such an order will inevitably cause Mr Mthombeni (although it had no specific information about this). However it determined that this was outweighed by the public interest.*

*Before the 12 month suspension order expires, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order, up to and including a striking-off order. Any future panel may be assisted by:*

- Mr Mthombeni's attendance at the review hearing;*
- A reflective piece focusing on (i) the impact of Mr Mthombeni's misconduct on patients, his colleagues and the reputation of the profession; and (ii) the importance of working within the scope of his competency and escalating to colleagues where appropriate;*
- Evidence of any courses or training he may have undertaken to keep his nursing skills and knowledge up-to-date, particularly in relation to escalation of patients, and the importance of working within one's own competencies.*
- References or testimonials from any employment he has undertaken, whether paid or unpaid, in any healthcare or non-healthcare role.*

### **Decision on current fitness to practise**

This reviewing panel considered carefully whether your fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined it as a registrant's suitability to remain on the register without restriction. In considering this case, the panel carried out a comprehensive review of the order in light of the current circumstances. It noted the decision of the last panel. However, it exercised its own judgment as to current impairment.

The panel had regard to all of the documentation before it, including the decision and reasons of the substantive panel and the information provided by you to the NMC which included references, testimonials and a reflective piece. It took account of your oral evidence as well as the submissions made by Ms Bass, on behalf of the NMC, and those made by you.

You gave evidence to the panel. You apologised for your mistake. You described this as your “biggest mistake” and said that you recognised that you had put the lives of your patients at risk. You also said that you recognised that your behaviour affected your colleagues and brought both the NMC and the nursing profession into disrepute.

You told the panel that you became “too confident” and believed that you could solve any problem for your patients. You said that you now recognise that this is not the case and that your false confidence put your patients at risk. You said that, in the future, if you were asked to perform a task that was outside the scope of your competence, you would explain that you could not do it because you were not appropriately qualified.

Since October 2019 you have been working as a health care assistant via agencies. This has included working in nursing homes and in patients’ own homes. You told the panel that, if you were allowed to return to nursing, then you would want to work as a general nurse, rather than as nurse practitioner, so that you could work as part of a team with supervision.

Ms Bass acknowledged that you have made good progress since the substantive hearing but submitted that, as you have not worked as a registered nurse since 2016, you have not been able to demonstrate that you have fully remediated your misconduct and are capable of safe unrestricted practice. She therefore submitted that your fitness to practise remains impaired. She submitted that sanction was a matter for the panel’s independent judgement, but invited the panel to consider imposing conditions of practice, which would protect the public and support your return to safe practice.

The panel accepted the advice of the legal assessor.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether your fitness to practise remains impaired. It noted that the substantive panel had found that you had demonstrated only “minimal” insight. However, this panel considered that your insight had developed significantly over the last 12 months. In your evidence you were able to identify why you had issued prescriptions for patients when not appropriately qualified, how you would avoid this in the future, and the effect that your misconduct could have had on patients, your colleagues and the wider nursing profession. You also demonstrated sincere remorse and a commitment to returning to the nursing profession, although you recognised that you would benefit from support and supervision in doing so.

As regards remediation, the panel noted that you have continued to work in the healthcare sector as a care assistant and you have provided positive references from your employers. You have provided evidence of your mandatory training and gave evidence regarding other training that you have completed in order to meet the needs of your patients. The panel noted that you have not completed any training regarding recognising and escalating deteriorating patients, but appreciated that accessing this type of training can be difficult when you are not working as a registered nurse.

The panel was encouraged by your engagement with the NMC since your substantive hearing. You have provided all of the information recommended by the last panel and your evidence demonstrated a significant level of insight and remorse. However, the panel was mindful that you have not worked as a registered nurse for four years. You have therefore not had an opportunity to put your learning into practice and demonstrate that you are capable of practising safely without restriction. In these circumstances, the panel determined that a finding of current impairment continued to be required on public protection grounds.

The panel also considered whether a finding of current impairment was required on public interest grounds. However, it was satisfied that the public interest has been served by the 12 month suspension order. The panel considered that, in light of your renewed engagement and progress towards remediation since the substantive hearing, a finding of current impairment on public interest grounds was no longer required.

For these reasons, the panel finds that your fitness to practise remains impaired on public protection grounds only.

### **Determination on sanction**

Having found your fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Articles 29 and 30 of the Order. The panel also took account of the NMC's Sanctions Guidance and bore in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel first considered whether to take no action but concluded that this would be inappropriate. Taking no further action would not restrict your practice and would therefore not protect patients from the potential risk of harm identified.

The panel next considered a caution order but decided that this would be inappropriate for the same reasons.

The panel then moved on to consider a conditions of practice order. It noted that the substantive panel had determined that this sanction was not appropriate at the time because of its concerns regarding your potential attitudinal problems. However, this panel has heard evidence from you at this hearing and is satisfied that you have now demonstrated a significant level of insight into your misconduct. The panel was therefore satisfied that any potential attitudinal problems identified by the substantive panel no longer exist. You have also expressed a commitment to returning to the nursing profession and a willingness to undergo retraining and work under supervision. In light of these developments, this panel considered that it would now be possible to

formulate practicable and workable conditions which would protect the public and support your return to safe practice.

The panel considered a suspension order but concluded that this would be disproportionate and serve no useful purpose. The panel was satisfied that the public interest had been marked by the original order, so there is no continuing need for a suspension order on these grounds. A suspension order would also be disproportionate in circumstances where the public could be adequately protected by conditions of practice and such an order would deny you an opportunity to put your learning into practice.

For all of these reasons, the panel determined that a conditions of practice order was the appropriate and proportionate sanction. It decided that the public would be protected by the following conditions:

For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.

1. You must ensure that you are supervised any time you are working as a registered nurse. Your supervision must consist of:
  - Working at all times on the same shift as, but not always directly observed by, another registered nurse.
2. You must work with your line manager, mentor or supervisor to create a personal development plan (PDP). Your PDP must address:
  - a. Recognising, escalating, and taking appropriate action in relation to a deteriorating patient.
  - b. Working within the scope of your competency.

3. You must undertake and successfully complete a training course regarding recognising, escalating and taking appropriate action in relation to a deteriorating patient.
4. You must meet with your line manager, mentor or supervisor at least once a month to discuss the standard of your performance and your progress towards achieving the aims set out in your PDP.
5. You must keep the NMC informed about anywhere you are working by:
  - a. Telling your case officer within seven days of accepting or leaving any employment.
  - b. Giving your case officer your employer's contact details.
6. You must keep the NMC informed about anywhere you are studying by:
  - a. Telling your case officer within seven days of accepting any course of study.
  - b. Giving your case officer the name and contact details of the organisation offering that course of study.
7. You must tell your case officer, within seven days of your becoming aware of:
  - a. Any clinical incident you are involved in.
  - b. Any investigation started against you.
  - c. Any disciplinary proceedings taken against you.
8. You must immediately give a copy of these conditions to:
  - a. Any organisation or person you work for.
  - b. Any agency you apply to or are registered with for work.
  - c. Any employers you apply to for work (at the time of application).
  - d. Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.
  - e. Any current or prospective patients or clients you intend to see or care for on a private basis when you are working in a self-employed capacity.

This conditions of practice order will come into effect on the expiry of the current suspension order, namely at the end of 21 November 2020, in accordance with Article 30(1)(c) of the Nursing and Midwifery Order 2001. The conditions of practice order will be for 12 months. The panel considered that this period of time would allow you to find a job as a registered nurse and demonstrate compliance with the conditions of practice.

Before the conditions of practice order expires, it will be reviewed by another panel. At that review, the panel may revoke the order or allow it to expire, it may confirm the order, it may vary any condition of the order, or it may replace the order with a different type of sanction. At that review, the panel would be assisted by:

- Your attendance.
- Evidence of compliance with the conditions of practice order.
- References and testimonials from any employer, including a report from your line manager, mentor or supervisor.
- Any evidence of training completed.

This decision will be confirmed to you in writing.

That concludes this determination.