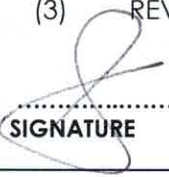


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
PRETORIA DIVISION
HELD VIRTUALLY

CASE NO: 8523/21

| | |
|--|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
|  | |
| SIGNATURE | DATE |
| | 18/6/2021 |

In the matter between:

KSENIA NICKOLAEVNA KHOLINA

APPLICANT

and

**HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

FIRST RESPONDENT

MINISTER OF HEALTH

SECOND RESPONDENT

J U D G M E N T

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by E-mail. The date and time for hand – down is deemed to be on 10h00 on 18 June 2021

MALI J

- [1] This unopposed application for review of the decision of the first respondent concerns the applicant; a then baby girl born on 30 April 1991 in the Soviet Union now known as Russian Federation ("*Russia*"). Three years later the toddler's family relocated to a new and exciting Republic of South Africa ("*SA*"). In the land of the Rainbow Nation as SA is sometimes informally referred to the child grew, embarked on her early education. She matriculated in 2009 and at the time her career choice had never been so assured; as she was raised in a family of medical doctors. She did not imagine any other profession but for medicine in particular dental studies.
- [2] Shortly after passing grade 12 or matriculating she and some of her family members including her mother; left the South African shores for Russia. Amongst other reasons; in order for her to study dentistry with the aim of becoming a Dental Practitioner. Her two brothers were left in South Africa. Following a yearlong preparatory course including Russian language at the People's Friendship University ("*University*") she commenced with the dentistry studies.
- [3] By July 2016, she had successfully completed all her studies and was awarded a Specialist Degree Diploma of Doctor of Dental Medicine. She was also awarded with a Russian Federation Specialist Accreditation Certificate ("*Accreditation*"). She is fully and completely accredited to carry out medical activities in respect of the dentistry in

the territory of Russia in accordance with the accreditation procedure for the Speciality of General Dentistry.

[4] She came back to Mzansi (Nguni translation for South); eager and enthusiastic to ply her trade. This is after her mother had sadly passed away in 2015. It is in Mzansi where she came back to join her brothers, that her career dreams get deferred. In the centre of the young Dentist's application is the Health Professions Council of South Africa. ("*HPCSA*"). HPCSA is a juristic body established in terms of section 2 of the Health Professions Act, 56 of 1974 ("*the Act*").

[5] Section 3 of the Act makes provision for the objects and functions of the council amongst others as follows:

(a) to co-ordinate the activities of the professional boards established in terms of this Act and to act as an advisory and communicatory body for such professional boards;

(b) to promote and to regulate interprofessional (sic) liaison between health professions in the interest of the public; [Para. (b) substituted by s. 3 of Act 29/2007] (c) to determine strategic policy in accordance with national health policy as determined..."

[6] The Minister of Health is cited in his capacity as the Minister with National Executive Authority for the administration of the Act.

REVIEW

[7] The applicant seeks an order to in the following terms:

“1.1. to review the decision of the first respondent for failure to have made any decision on the Applicant’s application to be exempted from Part III of the requisite examination for Foreign Qualified Medical Practitioners in accordance with paragraph 1.2, Part III of the Health Professions Council.

1.2. To furnish the Applicant with all necessary information to facilitate the Applicant’s Supervised Practice for a period of 12 (twelve) months, in terms of paragraph 1.3 of the Guidelines

2. Declaring that the Applicant be exempted from Part III of the requisite examination for Foreign Qualified Medical Practitioners in accordance with paragraph 1.2, Part III of the Guidelines;

3. Compelling the First Respondent to furnish the Applicant, within a period of no more than 30 (thirty) days from date of grant of this Order, with all necessary information to facilitate the Applicant’s Supervised Practice for a period of 12 (twelve) months, in terms of paragraph 1.3 of the Guidelines;

4. In the alternative to 2 and 3 above, directing the First Respondent to set a date for the undertaking of Part III of the requisite examination for Foreign Qualified Medical Practitioners, within 30 (thirty) days of this Order being granted;

5. Costs of this application;

6. Further and/ or alternative relief.”

[8] The law concerning the review of decisions is set out in the Promotion of Administration of Justice Act 3 of 2000 (PAJA). An action will fall to be reviewable under PAJA if it is an administrative action. Section 1 of PAJA defines an administrative action as "*.....any decision taken or any failure to take a decision by -*

(a) *An organ of state, when*

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) A natural or juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect".

[9] For an action to qualify as an administrative action and reviewable under PAJA it must meet three requisites, namely, action taken by an organ of state exercising power, the action must adversely affect the rights of another person, and must have a direct and external legal effect.

[10] Furthermore, section 6 (2) (g) of the Promotion of Administration of Justice Act 3 of 2000 (PAJA), provides that failure consider and to take a decision is susceptible to review.

[11] According to the averments in the applicant's founding affidavit her qualification as obtained from the University has been accepted by the first respondent as an accredited institution. The process of accreditation as detailed in the founding affidavit is not in dispute.

[12] The applicant, amongst others had annexed the following documentation to the founding affidavit;

12.1 The Certificate pertaining to the Specialist Degree Diploma and the translation thereof, marked "KK2"

12.2 The Specialist Degree Diploma Transcript and the translation thereof, marked "KK3"

12.3 The Certificate of Translation together with the duly translated Russian Federation Specialist Accreditation Certificate, marked "KK4".

[13] The chronicles of the applicant's pursuit commenced ruing January 2017. She submitted all the relevant documents and information to the first respondent for the purpose of registering as a Dental Practitioner, so that she may practice as such in South Africa. On 24 April 2018 the first respondent after a period of approximately 1 (one) year and 3 (three) months sent applicant correspondence accepting her application. It is apposite to refer to some of the contents of the correspondence as follows:

"We refer to your application for registration and wish to advise that it was considered by the Education, Training and Registration Committee (Dental) on 11 April 2018.

The Committee resolved that your application for registration in the category of Public Service (Dental Practitioner) be approved and that you could sit the Board Examination.

Detailed information of the Board examination, e.g. date, venue, time, etc. will be communicated to you in due course.

.....

The format of the examination will be:

- a. Part 1: Ethics/Theory examination (multiple choice questions)*
- b. Part 2: Clinical Examination*
- c. Part 3: Practical*

.....”

- [14] On 16 May 2018, the applicant received correspondence from the first respondent's officer, Ms Wood that she would be advised as to when the examination fee was due once the first respondent received the date for the examination. On 6 June 2018, Ms Wood further communicated that she had not received confirmation from the University regarding the date for the examination. On 7 June 2018, again through Ms Wood the applicant was informed that the first respondent was busy with negotiations with the University of the Witwatersrand to host the 2018 examination. On 25 June 2018, Ms Wood sent two letters to the applicant the first, that the examination would be held in Johannesburg. The second correspondence indicating that the examination may be held between August and September 2018.
- [15] On 20 July Ms Wood writes to the applicant again, stating that there was going to be a meeting in the beginning of August 018 and that she may have dates for the examination confirmed. On 23 August 2018, Ms Wood communicated that the examination would take place during the last quarter of 2018 or first quarter of 2019. From 23 August 2018 to 7 March 2019 a flow of correspondence from Ms Woods continued without any confirmation of dates for the

examination as the first respondent was waiting for details from the University.

- [16] Eventually on 8 April 2019 the applicant was informed by the respondent that various parts of the Examination had been scheduled to take place on 31 May 2019, 1 June 2019, and 13 and 14 June 2019 respectively. Finally, on 31 May 2019, and 1 June 2019 the applicant sat for Part 1 and Part 2 of the examination.
- [17] On or about 5 June 2019 the first respondent advised her that she had successfully passed both Part 1 and 2 and was invited to participate in Part 3 thereof. Part 3 Practical Assessment was to be held over two days on 13 and 14 June 2019. She participated in same and on or about 17 July 2019, the first respondent communicated to the applicant that she did not pass three of the four sections to the Practical Assessment. On 22 July 2019 she was advised that she would re-write Part 3 of the Examination.
- [18] From 17 July 2019 to 20 February 2020 the applicant found herself again faced with the same struggle pertaining to non-confirmation of dates for the Part 3 Examination. It was on 17 March 2020 when the first respondent's Ms Ndlala communicated that due the Corona Virus pandemic which resulted to closure of Universities the first respondent had no certainty as to whether the Examination would be put on hold. On or about 24 March 2020, the first respondent published a notice on its website, to the effect that no board examinations will be conducted during the "*Lockdown Period*".
- [19] Due to the ongoing uncertainties the applicant instructed her attorneys to send a letter of demand, that the first respondent set a

date for the examination during 2020. The first respondent did not comply with the demand and instead on 7 September 2020 the first respondent communicated as follows;

“the Board is not in a position to announce a date at the moment”.

[20] In the light of the aforesaid communication from the first respondent, on 5 October 2020, the applicant’s attorneys, transmitted a further letter to the first respondent demanding that the applicant be exempted from writing Part 3 of the Examination. This is because she had already completed the Russian Federation Specialist Accreditation and have been issued with a Certificate in respect thereof. The certificate is evidence that the applicant had been fully accredited to carry out medical activities in respect of dentistry territory of Russia, in accordance with the accreditation procedure for the Speciality of General Dentistry. True to the style of the first respondent, there was no reply to the above demand; hence this application.

[21] The issue to be determined is whether the failure of the first respondent to make a decision to set a date for examination and or exempt the applicant from writing Part 3 of the examination is reviewable.

[22] The preamble to the Health Professions Act of 1974, the Act states, amongst others as follows:

“To provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws...”

[23] Section 25 (1) of the Act provides that: -

“The Minister may, after consultation with the council by regulation provide that any person who holds a qualification which the council may accept by virtue of the fact that such qualification , in the opinion of the council, indicates a satisfactory standard of professional education and training , may be registered in terms of this section in the applicable prescribed registration category, and thereupon the relevant professional board may in its discretion, but subject to any regulations and national health policy and international protocols which the Minister may make or be subject to , register such person.”

[24] Section 25 of the Act, read with section 61 (1) (j), empowers the Minister to make regulations on the registration of foreign –qualified professionals. The Minister has accordingly published regulations concerning the Registration of Persons who hold qualifications not prescribed for registration. Regulation 2(2) of the Regulations empowers the Registrar to register a foreign –qualified person in the category of public service if such person holds a foreign qualification *“the education and training standard and the duration of study which are accepted by the HPCSA as being equivalent to the education and training standard and duration of study of a similar qualification awarded by accredited South African educational institutions.*

[25] Furthermore, the first respondent’s guidelines constitute the legal framework with respect to registration of Foreign Qualified Medical

Practitioner in South Africa. The process set out in the Guidelines include

- 25.1 acceptance of the Application for Registration in the category Public Service (Dental Practitioner) and the recognition and accreditation of the University Degree by the Education, Training and Registration Committee.
- 25.2 the passing of the requisite examination for Foreign Qualified Medical Practitioner and
- 25.3 the rendering of Supervised Practice for a period of 12 (twelve) months.

[26] Paragraph 1.2 of the Guidelines, provides, inter alia that:

“Unless otherwise stated, the examination will take place once a year, the time to be determined by the Board in collaboration with the dental school assisting the Board.”

[27] As seen above, the applicant began pursuing first respondent for the dates of examinations from 22 July 2019 when she was advised that she would re-write Part 3 of the Examination. This was long before Covid 19 pandemic hit the whole world. The court is placed in awkward position by the non-participation of the first respondent in these proceedings. The court is not enlightened as to the reason for non-communication of the Part 3 Examination dates. One is left reading between the lines; that the reason might be the failure of the University to set the examination and or issue dates of examination. This exercise is not legally permissible.

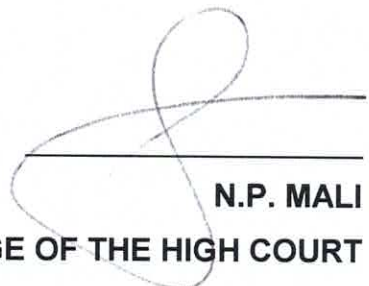
- [28] Even if one takes into account the instabilities brought about by the pandemic, there is no regulatory provision prohibiting the first respondent from setting a date for the Examination. Life goes on within the set parameters in relation to the State of National Disaster guidelines in the country.
- [29] From Paragraph 1.2 of the Guidelines referred to in paragraph 26 above it is clear that the board should take a lead in the setting of the dates. It is the responsibility of the first respondent to set the date of examination in collaboration with the relevant dental school. The first respondent should lead, and cannot shrug responsibility to the dental school.
- [30] The prejudice suffered by the applicant in the hands of a professional body founded in the constitution is despicable. It is common cause that South Africa has a shortage of medical practitioners. Here we have a young dentist eager to contribute her hard earned skills; sadly, the body tasked to assist her to ply her trade is nonchalant. One is left wondering whether the first respondent is fit for purpose.
- [31] From the above, it is concluded that the non-action of the first respondent to take a decision to set a date for the undertaking of Part III of the requisite examination for Foreign Qualified Medical Practitioners, should be reviewed and set aside. In the result the application succeeds.
- [32] Turning to the appropriate order, the doctrine of separation of powers precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. The courts cannot be seen not

observing the sacrosanct doctrine of separation of powers. It is therefore not permissible to grant the main prayer of the applicant, to declare that the Applicant be exempted from Part III of the requisite examination for Foreign Qualified Medical Practitioners in accordance with paragraph 1.2, Part III of the Guidelines. To do so the court would be encroaching on the domain of the functionary, the first respondent.

[33] The following order ensues;

ORDER

1. The First Respondent is ordered to set a date for the undertaking of Part III of the requisite examination for Foreign Qualified Medical Practitioners, within 30 (thirty) days of this Order being granted;
2. The First Respondent is ordered to pay Costs of this application.



N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant

Adv Solomon (SC)

Instructed by:

Leslie Cohen & Associates

Date of hearing 25 May 2021