

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No.: 1918/2018

Date Heard: 28 March 2019

Date Delivered: 2 April 2019

In the matter between:

DR HAMID MUNIR

Applicant

and

**THE CHAIRPERSON OF THE MEDICAL AND
DENTAL PROFESSIONS BOARD**

First Respondent

**THE HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH AND SOCIAL DEVELOPMENT OF THE
EASTERN CAPE**

Third Respondent

JUDGMENT

BEYLEVELD AJ:

[1] This is a review in which the Applicant seeks an order reviewing and setting aside the decision of the First Respondent acting under the auspices of the Second Respondent which decision was communicated to the Applicant in a letter dated 8 August 2017.

[2] The essence of such decision was that the First Respondent (*“the Board”*) accepted a resolution of the Education and Registration Committee of the Second Respondent (*“HPCSA”*) that the Applicant be placed under supervised practice for a period of 2 years and that the Applicant provide quarterly progress reports and be

directed to cease working in private practice until completion of the 2 years supervisory period.¹

[3] The Applicant in additional relief claimed, seeks an order directing HPCSA to issue the Applicant with an unqualified certificate of registration.

[4] Besides a customary claim for costs² the Applicant, in terms of the provisions of Section 7(1) read with Section 9 of the Promotion of Administrative Justice Act³ (“PAJA”) seeks an indulgence in the form of condonation for the late filing of the application and for an extension of the time period of 180 days as stipulated in PAJA.⁴

[5] The salient events leading up to the present review application are set out hereafter.

[6] The Applicant, who is a medical practitioner and who holds the position as Master of Medicine (“MMED”) in Cardiothoracic Surgery is registered as such by the HPCSA.

[7] In 2004 the Applicant was appointed as a Senior Specialist in the Department of Cardiothoracic Surgery at the Port Elizabeth Hospital Complex where he is still employed. The Applicant also practiced in private practice as a Thoracic Surgeon on an after-hour basis.

[8] During 2006 the Applicant was subjected to an internal departmental peer assessment and upon recommendation attended a one-year fellowship program⁵ at the National Heart Institute in Kuala Lumpur.⁶

[9] Upon his return to the Port Elizabeth Hospital Complex he continued to function in his position as a Senior Specialist.

¹ The written communication details additional information which is to be furnished by the Applicant.

² In this particular instance on the scale as between attorney and client

³ 3 of 2000

⁴ In terms of Section 7(1) of PAJA all proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the events listed in Section 7(1)(a) and (b) of PAJA. In terms of Section 9(1)(b) of PAJA the period of 180 days may be extended on application of an applicant in review proceedings.

⁵ For the period July 2007 to July 2008

⁶ After completing such program he received positive reviews from his peers

[10] During December 2012 the Applicant received a written communication from the Legal Department of HPCSA⁷.

[11] This written communication informs the Applicant, *inter alia*, as follows:

- (i) That a complaint had been received against him and that such complaint would be placed before the committee of preliminary inquiry for consideration⁸.
- (ii) That the matter would be dealt with in terms of the Regulations Relating to the Conduct of Inquiries into alleged Unprofessional Conduct under the Health Professions Act⁹.
- (iii) That the Applicant was called upon to furnish an explanation to the complaint alternatively he could exercise his right to remain silent.¹⁰

[12] The Applicant elected to exercise his right to remain silent.¹¹

[13] After receipt of the complaint, the hospital management directed that the Applicant cease performing open heart surgery as a principal surgeon, but he continued to perform thoracic surgeries.

[14] More than a year after receipt of the complaint, and in January 2014¹² the Applicant was called upon to attend a consultation with a committee of HPCSA in Durban on the 5th June 2014.¹³

[15] Shortly thereafter Applicant received a further communication from HPCSA on 29 April 2014 wherein he was informed that it had been resolved that the Sub-

⁷ Such letter is dated 18 December 2012

⁸ The complaint is said to have been contained in a letter dated 26 November 2012 which was not enclosed in the communication to the Applicant

⁹ Health Professions Act 56 of 1974 as amended ("*the Act*")

¹⁰ In terms of Regulation 4(1)(b)(ii) of the Regulations relating to the Conduct of Inquiries into alleged Unprofessional Conduct published under Government Notice R102 in Government Gazette 31859 of 6 February 2009. A proper response may consist of a written communication that the particular medical practitioner invokes the right to remain silent.

¹¹ In terms of Regulation 4(3)

¹² And after the Applicant had elected to remain silent

¹³ The committee was the Third Medical Committee of Preliminary Inquiry

Committee for Post-Graduate and Education and Training (Medical)¹⁴ intended to assess the Applicant's clinical competency and that this test would be conducted on 6 June 2014 at his place of employment.

[16] The Applicant retorted that he would be unable to attend the assessment as it was one day following the consultation with the Third Medical Committee referred to above and the Applicant, through his attorneys, once again requested details of the basis, under the particular circumstances, the Clinical Competency Assessment was required.

[17] Noteworthy, no response was forthcoming from the relevant committee of the HPCSA and the written communication by Applicant's attorney was followed by a further communication on 19 May 2014 recording that no response had been received.

[18] After the Applicant had attended the meeting with the Third Medical Committee he was informed, through his attorneys¹⁵, that "*the Preliminary Committee of Inquiry of the Medical and Dental Board resolved*" to refer Applicant's matter to the PTEM in order for his clinical competency to be assessed. He was further informed that the planned Clinical Competency would be conducted on 23 July at his place of employment and he was informed of the names and identity of the two specialists in Cardiothoracic Surgery who would undertake the assessment.

[19] The competency assessment referred to above resulted in a report which was prepared by the specialists, such report being prepared on the basis of a personal interview and not based on the observance by the specialists of the Applicant's surgical skills.¹⁶

[20] Such report is dated 1 August 2014.

[21] The contents of the report by the specialists was not conveyed to the Applicant at the relevant time which report ended off with the following recommendation: "*Finally my recommendation would be to appoint a surgeon to*

¹⁴ ("PTEM")

¹⁵ Via the HPCSA

¹⁶ Or lack thereof.

undertake a series of operations together with each of these surgeons¹⁷ and then make a final assessment on their clinical competence”.

[22] On 25 November the HPCSA informed the Applicant¹⁸ that the complaint was reconsidered by the Third Medical Committee of Preliminary Inquiry on 20 and 21 November 2014 and that the committee resolved that the matter be “closed” and that the recommendations of the PTEM be accepted.

[23] Thereafter, on 10 December, Applicant was advised that the PTEM had met in September 2014 and that the sub-committee noted that:

- (i) The peer review assessment of the Applicant was conducted on 24 July by the specialists who had submitted their report.¹⁹
- (ii) The specialists recommended that Applicant requires comprehensive remedial work and requires to work under supervision until a substantive competency assessment has been undertaken.
- (iii) Initially the report was only signed by one specialist but subsequently signed by both.
- (iv) A verbal report from the Chairperson that Applicant’s matter should not be treated in isolation to that of the other surgeon who was also subject to the interview assessment by the two specialists referred to.

[24] The PTEM, *inter alia*, resolved that a surgeon should be appointed to undertake a series of operations together with both the Applicant and the other doctor involved and then make a final assessment on their clinical competency.

[25] It was further resolved that the hospital management at the Port Elizabeth Provincial Hospital be requested to lift the suspension of the Applicant²⁰ and that the Applicant be allowed to conduct surgical procedures under supervision and keep a

¹⁷ The report also related to another surgeon

¹⁸ Once again through his attorneys

¹⁹ The report which was not made available to the Applicant and which was done on an interview basis only

²⁰ Which related to the conducting of surgical procedures

logbook for six months. The supervisory surgeon was to write a report and recommendations to be submitted to the HPCSA.²¹

[26] The PTEM sub-committee would then make a final ruling based on the report of the final assessment relating to clinical competency of the Applicant.

[27] During August 2015 the Applicant temporarily relocated to Johannesburg to complete six months supervised service and, on his return in February 2016 he resumed his position at the Port Elizabeth Hospital Complex as Senior Specialist and heard nothing further and received no feedbacks or any other communication for a period over of a year and a half.

[28] One of the specialists who had assessed the Applicant during this aforesaid six-month period, Dr Patel, prepared a report which is dated 19 February 2016. His report is complimentary and he concludes with the recommendation that the Applicant be allowed to operate independently without any supervision.

[29] A report²² was also prepared by Professor Chauke who recommends that Applicant needs to operate under supervision for six months to a year when undertaking major cardiac operations but that he is able to operate unaided in surgery related to major thoracic operations as well as minor cardiac and thoracic operations.

[30] A third report was prepared by a Professor Du Plessis which report, inexplicably, even at this stage, has not been made available to the Applicant.

[31] All three reports are alluded to in a written communication from the Acting Senior Manager Medical Services of the Department of Health Eastern Cape²³ in a written communication addressed to the Board on 26 October 2016.

²¹ It was also resolved that the registration category of the Applicant be changed to the category of Specialist Public Service and that the registration be revised in six months after the assessment report had been submitted. As previously indicated the recommendations by the two specialists which formed the subject matter of the above resolutions, were not made available to the Applicant who only received a copy of the report in November 2017

²² Undated

²³ Dr B Mbulawa-Hans

[32] The communication by Dr Mbulawa-Hans as well as the reports of the three assessors briefly summarised in such written communication were not at the relevant time made available to the Applicant for his comment or response.

[33] Dr Mbulawa-Hans summarises the opinions of the three assessors as follows:

“(1) One assessors (sic) has assessed Dr Munir as excellent.

(2) The other two assessors are not comfortable with Dr Munir (sic) competency as a Cardiothoracic Surgeon.”

[34] I already indicated that two of the reports, namely that of Dr Patel and Professor Chauke, differ substantially.²⁴

[35] Professor Du Plessis' views are summarised as follows:

“Knowledge – continuous reading and active participation in discussion forums is essential to ensure that decision making is good.

Interaction with patients and colleagues was good.

Technical skills are adequate for most of the common procedures in cardiothoracic surgery.

His conclusion is:

Dr Munir is adequate to function as a Specialist in Cardiothoracic Surgery.

He should not attempt to be an expert in all the different sub-categories in the speciality, but rather strengthen his expertise in dealing with the more general and common pathologies encountered.”

[36] Presumably, Dr Mbulawa-Hans in summarising the opinions, categorized Professor Du Plessis' assessment on the same level as that of Professor Chauke.

²⁴ The one positive with the other partially negative

[37] It is extremely difficult to appreciate the essential import of the views expressed by Professor Du Plessis as his report has not been made available. At best, and relying on the accuracy of the short summary of his assessment, his views on Applicant's competency is at best ambivalent.

[38] Thereafter the PTEM considered the assessors reports and resolved that the matter be referred to the Education and Registration Committee to recommend that the Applicant be placed under supervision practice for two years.²⁵

[39] The Education and Registration Committee considered the assessors' reports and the recommendation of the PTEM²⁶ and resolved that the Applicant be placed in supervised practice for a period of two years during which period he should submit quarterly reports and that he should cease to work in private practice until he has completed his supervision period.

[40] Pursuant to the foregoing, the Board, resolved at its meeting on 9 June 2017, to approve the resolution of the Education and Registration Committee.²⁷

[41] On 8 August 2017 the Applicant received the written communication dated 8 August 2017 which he seeks to have set aside in these proceedings.

[42] He is informed that a decision had been taken by the Education and Registration Committee which was endorsed by the Board, that he:

- (i) Be placed under supervised practice for two years.
- (ii) Be required to provide quarterly progress reports.
- (iii) Cease working in private practice until he has completed the two-year period of supervision.

²⁵ It is apparent from the papers that Applicant was not afforded an opportunity to make any representations regarding the resolution by PTEM

²⁶ Once again *sans* any representations by Applicant

²⁷ Which recommended the two year period and cessation of private practice referred to above

[43] Thereafter on 5 September 2017²⁸ the Applicant was issued with a qualified Certificate of Registration for the category Supervised Practice Specialist in Cardiothoracic Surgery and, on 6 September he was placed on special leave by his employer.²⁹

[44] The Applicant seeks to impugn the decision of 8 August essentially on the basis that it is procedurally flawed and in contravention of the relevant legislative framework. It is contended that he has not been subjected to fair and just administrative action.

[45] The essence of the Applicant's contentions are that on a broad analysis of the provisions of the Act together with the Regulations relating to inquiries the manner in which he was dealt with, resulted in non-compliance by the Respondents with the procedural requirements laid down in the Regulation resulting in the process being flawed by a list of irregularities.³⁰

[46] On the other hand, the Applicant contends that having regard to the powers of the Board³¹ and having regard to the objects of the Board as set out in Section 15A of the Act, the Board is possessed of the power to do all such things as is deemed necessary to achieve the objects of the Act.

[47] Essentially what the Respondents contend is that inquiries which do not relate to discipline and unprofessional conduct are not covered by the Regulations and accordingly the HPCSA has inherent powers to deal therewith outside the provisions of the Regulation.

²⁸ With effect from 9 June 2017

²⁹ The Department

³⁰ For instance the contention that the election by the Applicant to remain silent obligated the preliminary inquiry to issue a directive calling for a formal inquiry and that Applicant should have been furnished with a notice formulated in accordance with annexure "A" of the Regulation. Furthermore, it is contended that as no formal inquiry was initiated, no lawful finding was made or could have been made and that it was not open to the Preliminary Committee of Inquiry to refer the matter to the PTEM for assessment of Applicant's clinic competency which in terms of the Regulation is dealt with in Regulation 9(23) which only occurs after a formal inquiry. The Applicant was deprived of the benefit of the process in terms of the Regulation which includes a right to an appeal.

³¹ As contained in Section 15B of the Act

[48] In this regard the Respondents argue that the Board has a discretion as to the manner in which it should deal with complaints or allegations relating to the health profession.

[49] It seems to me that the Respondents' argument is based on the proposition that compliance with the Regulation insofar as set down procedures for inquiries are concerned, are not apposite under circumstances where poor performance and/or lack of competence are to be evaluated and dealt with.

[50] It is not in dispute that the procedures set out in the Regulations were not followed in the present instance.

[51] Although it is conceded by the Respondent that the commencement of the proceedings³² commenced with a complaint and a communication to the Applicant in which his rights in terms of the Regulation were pointed out to him, this, during the course of time, changed into a process of assessing the Applicant's competency outside the provisions of the Regulations, such powers being exercised in terms of the broader principles enunciated in the Act.

[52] In this regard the Respondent contends for instance that annexure "HM14", the letter of 10 December 2014, wherein Applicant's attorneys are advised of the resolution by the PTEM, unequivocally indicates that a different process is being embarked upon. This process, as I understand the Respondents' argument, is separate and distinct from any process contemplated in terms of the Regulations and separate and distinct from the process of performance assessment contemplated for instance in Regulation 9(21) which follows upon a finding by a Professional Conduct Committee.

[53] Furthermore, and so the argument is advanced, the assessment of poor performance is not an assessment in terms of Regulation 9(23) which sanctions the committee imposing practice restrictions in respect of findings of poor performance.

[54] In short, the Respondents contend that the process that was followed is not a process whereby a medical practitioner, upon a finding by the committee of poor

³² As far back as 18 December 2012

performance, is entitled to “*address the committee on the appropriateness of the full or partial referral of the matter to a performance assessment committee to inquire into the performance of*” a medical practitioner and “*make a determination on the appropriate management thereof*”.³³

[55] As indicated, the Respondent relies on the provisions of Sections 15A and 15B read with the provisions of Section 49 for advancing the proposition that the Regulations are not applicable in the present instance as the Board had decided in its discretion that the conduct was not unprofessional conduct and therefore not requiring the strict procedures laid down in the Regulations.

[56] There can be no doubt that the Respondent is correct in asserting that professional bodies such as the Respondents are better equipped than a court to decide whether ethical and professional standards have been breached.³⁴

[57] In my view, however, the present instance is not a situation where I am called upon to substitute my own opinion for the opinion and conclusion of HPCSA, the Board or any of its committees.

[58] The question is rather whether or not the Applicant’s right to a fair hearing and treatment has been infringed and whether or not he has been prejudiced as a result.³⁵

[59] The Respondents’ argument is based on the contention that in respect of the alternative process undertaken, the Respondents have “*the implied power to do so by virtue of the express powers conferred upon them by the provisions of Section 15B of the Act*”.

[60] The interpretation of documents, including statutory provisions are well-established.³⁶

³³ Regulation 9(21)

³⁴ *Thuketana v Health Professions Council of South Africa* 628 TPD more particularly at para 26.6 and *Roux v Health Professions Council of SA and Another* [2012] 1 All SA 49 (SCA)

³⁵ It hardly behoves any further debate that the Applicant is indeed prejudiced if one has regard to the restrictions on his ability to practice medicine

³⁶ See *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (4) SA 593 (SCA) at para 18. See also *Sakhiwo Health Solutions v MEC of Health, Limpopo* 908/2013 [2014] ZASCA 206 (28 November 2014); *Swart v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A); *North East Finance (Pty) Ltd v Standard Bank of South Africa* 2013 (5) SA 1 (SCA); *Bothma-Batho Transport v S Bothma en Seun*

[61] One cannot, in the context of the present matter, ignore the fact that the entire process commenced by virtue of a complaint. Section 3(n) of the Act provide that the objects and functions of a council are to ensure the investigation of complaints concerning persons registered in terms of the Act. This power is designed to serve as a protection of the public interest at large.

[62] Regulation 4 relates to preliminary inquiries which commences with a fact finding sifting process.³⁷

[63] Section 15(5) provides for Regulations relating to the constitution, functions and functioning of a professional board.

[64] Section 15(f)(A) relates to Regulations in respect of professional conduct committees.

[65] The objects of professional boards as set out in Section 15A are generalised and broad whilst the powers of the Board as recorded in Section 15B are similarly broad and all encompassing. Section 15B(1)(a) however, provides that in “... *circumstances as may be prescribed, or where otherwise authorised by this Act, remove any name from a register or, upon payment of the prescribed fee, restore thereto, or suspend a registered person from practising his or her profession pending the institution of a formal inquiry in terms of Section 41*”.

Transport 2014 (2) SA 494 (SCA); *X-Procure Software (Pty) Ltd v Sutherland* (882/13) [2014] ZASA 196 (28 November 2014); *Mass Stores (Pty) Ltd v Murray and Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) and *Ekurhuleni Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA); *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZASCA 62 (17 April 2015); *Novartis v Maphil* (20229/2014) [2015] ZASCA 111 (3 September 2015); *Educated Risk Investments 165 (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2016] 3 All SA 18 (SCA); *Annual Survey of South African Law 2014 Interpretation of Written Agreements - Basic Approach to Interpretation*, at 502 to 505; *City of Tshwane Metropolitan Municipality v Mitchell* [2016] 2 All SA 1 (SCA); *Padayachee v Adhu Investments* (2016) 2 All SA 555 (GJ) and *G4S Cash Solutions v Zandspruit* 2017 (2) SA 24 (SCA); *South African Law Journal* 2017 Volume 134 Part 3 at 514 and *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at paras 52, 53, 54 and 55; *Centriq Insurance Company Limited v Oosthuizen and Another* (237/2018) [2019] ZASCA 11 (14 March 2019) at paras 17 and 18

³⁷ See for instance *Roux v Health Professions of South Africa* *supra* at para 21

[66] The foregoing read with Chapter IV of the Act, in particular Sections 41 and Section 41A indicate the nature of inquiries by a professional board into the unprofessional conduct of a medical practitioner.

[67] The argument that as we are in the present instance not dealing with unprofessional conduct, these provisions, as well as the Regulations, are not applicable, cannot be sustained.

[68] Just as much as the Respondents contend that the Respondent acted in terms of the general implied powers and objects of the Act in dealing with this matter, just as much can one in contradistinction thereto, argue that the exercise of power to investigate professional competency and to effectively impose a sanction as a result of a finding, should be in accordance with procedures, which afford the ultimate recipient of the sanction, a fair hearing³⁸. This must surely be implied from the general powers which must be understood and read in conjunction with Constitutional imperatives.

[69] In my view, and in any event, the Applicant has, set out a sufficient factual basis in the founding affidavit to lay the foundation for a contention that procedurally fair administrative action did not occur in the present instance, more particularly as the Applicant was not afforded an opportunity to make any representation regarding the assessments which only came to his knowledge later and to make any representations regarding the ultimate sanction that was imposed on him on 8 August 2017.

[70] The Respondents' powers would not be rendered nugatory as contended for by the Respondents and not disentitle them to effectively discharge their duties towards the public should the Applicant have been afforded a fair hearing.

[71] In this regard it is contended by the Respondent that issues of a fair hearing outside the strict parameters of the Regulation was only raised in the replying affidavit and accordingly should be ignored.³⁹

³⁸ Similar to the procedures as set out in the Regulation

³⁹ In this regard reliance is placed on *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) and *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* 2007 (5) SA 146 (SCA)

[72] The rule relating to new matter in the replying affidavit is based on a trite principle but the rule is not absolute and the present tendency is to permit greater flexibility with regard to admissions of new matter, particularly in the absence of prejudice, and for the application of the rule with a fair measure of common sense.⁴⁰

[73] Similarly, in *Lagoon Beach Hotel (Pty) Ltd v Lechane NO and Others*⁴¹ it was stated that in applying the rule “*practical common sense must be used*”.

[74] In any event, I am satisfied that a factual basis has been made out in the founding affidavit read with the averments in reply.⁴² In this regard, the Applicant contends that the performance assessment was improper, irregular, unlawful and invalid and in contravention with the legislative framework. The Applicant expressly and specifically relies on the common law principle of *audi alteram partem*⁴³ and submits that in terms of Paragraph 6 of PAJA he is entitled to an order for judicial review.

[75] In the circumstances, I am of the view that the decision as communicated to the Applicant on 8 August 2017 is unlawful as it failed to have regard to the Applicant’s constitutional and common law rights to a fair hearing.

[76] As to the remedy available to the Applicant, I will revert to that issue hereunder.

[77] The Respondents contend that the application is in any event doomed to failure as the decision was not challenged within a period which does not constitute an unreasonable delay and in event not later than 180 days after the date that the Applicant was informed of the decision.

[78] The Respondents contend firstly that the decision of August 2017 is rooted in the Board’s decision of 10 December 2014 wherein it was decided that the Applicant should be placed under supervision for a period of six months where after a final decision would be made based on a final assessment.

⁴⁰ *Nkengana and Another v Schnetler and Another* [2011] 1 All SA 272 (SCA) at para 10

⁴¹ 2016 (3) SA 143 (SCA) at para 16

⁴² It remains unexplained why the Applicant elected not to file a supplementary affidavit in terms of Rule 53(4) after the record was filed.

⁴³ Also a constitutional imperative

[79] Accordingly, and so it is argued, one should look, insofar as delay is concerned, at the decision of December 2014 as the commencement date. I do not believe that there is any merit in this suggestion.

[80] The decision of 10 December 2014 was not a final decision and it is recorded as such and, in any event, the time period that lapsed in between could only have given the Applicant the impression that nothing further was being done and that he was no longer subject to competency evaluation.

[81] Insofar as the decision of 8 August 2017 is concerned, it is correct that the jurisdictional threshold of 180 days has expired as the application was launched on 24 May 2018. The 180 period as provided in PAJA would have expired in March 2018 with the result that the application is some two months late.

[82] The factors to be taken into account in considering an application for an extension of time in terms of Section 9 of PAJA are well-known.⁴⁴

[83] I have considered all these factors including the nature of the relief, the extent and cause of the delay, the effect of the delay on the administration of justice and the other litigant, the reasonableness of the delay, the importance of the issue and the prospects of success.

[84] I do not believe that the Applicant's explanation for the delay is unreasonable and in particular, a portion of the delay justifiably can be placed at the doors of the Respondents who failed to furnish on request relevant documentation to enable the Applicant to assess his claim. As previously indicated, even at the stage of the hearing of this application, a vital document such as the assessment report by Professional Du Plessis has not been made available.

[85] For the reasons advanced, I am also of the view that the Applicant has prospects of success⁴⁵ and I have also weighed up the question of any potential prejudice to the Respondents as against the prejudice suffered by the Applicant.

⁴⁴ *City of Cape Town v Aurocon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) particularly at para 46

⁴⁵ See *Squid Packers (Pty) Ltd v Ollemans* [2003] 1 All SA 98 (SCA) at para 48 where condonation was more readily granted where the prospects of success are favourable

[86] I am of the view that it cannot be said that the Respondents were unduly prejudiced by the relatively short delay of approximately two months.

[87] The Respondents also contend that the Applicant acquiesced in the process by acquiescing in the decision taken in December 2014 and agreed to the process that ensued thereafter. This argument loses sight of the fact that the Applicant was not privy to all the communications and exchanges between the various committees and the HPCSA and at no stage was the Applicant specifically informed as to the nature and content of the investigation and under which prescripts it was being conducted.

[88] To say, as the Respondents do, that the Applicant waived any entitlement as it was apparent from the communications to him, more particularly with the commencement letter of December 2014, what the process going forward entailed, is without merit.

[89] The onus rests on the Respondents who rely on waiver / acquiescence to prove on a balance of probabilities that the Applicant has waived his rights to claim a reliance on fair administrative action.

[90] A court, in assessing the probabilities, must have regard to the factual presumption that a party is not likely deemed to have waived any rights and that clear evidence of such a waiver is required.⁴⁶

[91] If one has regard for instance to the request from Applicant's attorneys as to the nature and content of proceedings, it cannot be said that the Applicant with a full understanding of all his rights, waived the entitlement to rely thereon. This is particularly so where one is dealing with a contended for waiver of a Constitutional right.

[92] I am therefore of the view that the 180-day time period should be extended in terms of Section 9 of PAJA.

[93] This then brings me to the question of the suitable remedy.

⁴⁶ *Feinstein v Niggli* 1981 (2) SA 684 (A)

[94] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others*⁴⁷ Froneman J stated as follows:⁴⁸

“Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution’s “just and equitable” remedy.”

[95] As was stated by Plasket J in *Joubert Galpin & Searle Inc. and Others v Road Accident Fund and Others*⁴⁹

“Appropriate relief is relief that effectively remedies the breach of the right. It is relief that fits the injury: it must be ‘fair to those affected by it yet vindicate effectively the right violated’ and be ‘just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law’.”

[96] Although a court retains a discretion to refuse to award a remedy when unlawfulness is found, the default position remains that the principle of legality should be upheld and vindicated.⁵⁰

[97] Firstly, in the circumstances of this particular case, I am unable to issue an order that the Second Respondent issue the Applicant with an unqualified certificate of registration.

[98] Besides the fact that a setting aside of the decision of 8 August 2017 does not ineluctably lead to the issue of an unqualified certificate of registration, it would clearly not be in the public interest for me to do so where the competency of the

⁴⁷ 2014 (1) SA 604 (CC)

⁴⁸ At para 25

⁴⁹ 2014 (4) SA 148 (ECP) at para 96

⁵⁰ *Joubert Galpin & Searle supra* at para 97 with reference to *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC)

Applicant to perform all forms of cardiothoracic surgery is still an issue which would have to be determined.

[99] Formulated differently, the fact that the decision of 8 August 2017 is set aside does not lead to a finding that it is a foregone conclusion that the Applicant is entitled to an unqualified certificate of registration.

[100] This is also not a case where I am enjoined to exercise my discretion to determine whether exceptional circumstances exist to make a substitution order.⁵¹

[101] I believe the Applicant will be sufficiently vindicated should I simply make an order that the decision of 8 August 2017 be set aside.

[102] If this is done, the Respondents may initiate whatever lawful proceedings are available to them to finalise and/or regularize the Applicant's registration. It must also be borne in mind that if the decision of August 2018 is set aside, and as argued on behalf of the Respondents, there still remains the decision of 10 December 2014.⁵²

[103] Under the circumstances I am of the view that the Applicant is entitled to substantial relief and is therefore entitled to the costs of this application.

[104] The following orders are made:

- (i) The 180-day period referred to in Section 7 of PAJA is extended to the date upon which this application was served on the Respondents.
- (ii) The decision of the First Respondent acting under the auspices of the Second Respondent contained in the written communication dated 8 August 2017 (annexure "HM1" to the founding affidavit) is reviewed and set aside.

⁵¹ *Trenco Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at 255 and further

⁵² "HM14". That decision also constituted administrative action and remains valid until set aside (which has not been done). *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); *MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA); *MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC)

- (iii) It is declared that such decision is null and void and of no force and effect.
- (iv) The First and Second Respondents are ordered to pay the Applicant's costs of this application jointly and severally, the one paying the other to be absolved.

A BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv T Rossi instructed by BLC Attorneys

For First and
Second Respondents: Adv L Kutumela instructed by Attorneys Gildenhuys
Malatji Inc. c/o Joubert Galpin & Searle

For Third Respondent: No Appearance