

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3342/2013

In the matter between:

AADEL RAMADAN SSUFYA

APPLICANT

and

**HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

FIRST RESPONDENT

**MEDICAL AND DENTAL PROFESSIONS
BOARD**

SECOND RESPONDENT

UNIVERSITY OF KWAZULU-NATAL

THIRD RESPONDENT

JUDGMENT

Delivered on : 19 February 2015

OLSEN J

[1] This judgment determines a question of costs, which is all that remained after the claim made in the present application became moot. In my view the claim ceased to have practical significance in April 2013 when, by consent and within twelve days of the launch of the application, interim relief was granted in terms which had final effect. At that stage only the founding papers had been lodged. If I misinterpret the interim order of April 2013 (which had been granted in the precise terms sought finally in the application), then

the issues underlying the claim became entirely hypothetical on 31 December 2013 when the operation of the interim relief ceased by effluxion of time. At that stage answering papers had been delivered, that having been done in July 2013. A replying affidavit then followed in April 2014.

[2] The matter was argued before me in February 2015. Unsurprisingly almost all of the argument was directed at the question as to who was right in the first place. Whilst I was requested to decide the case “on broad general lines” (see *Jenkins v SA Boiler Makers, Iron and Steel Workers and Ship Builders Society* 1946 WLD 15 at 17-18), the argument, which took some hours, nevertheless traversed the case and the papers (the latter much amplified after April 2013) in some detail, as the question of success cannot be regarded as insignificant when considering where the burden of the costs of litigation should lie.

[3] In the result the costs now in issue exceed those at stake in April 2013 (or for that matter in December 2013) by a considerable margin; the increase since then must be measured in multiples. This is a wholly unsatisfactory state of affairs. It is one which should have been avoided by compromise. However the costs of the proceedings constituted a justiciable issue from the moment the application was launched. An order that each party should pay his/its own costs, made merely as a mark of displeasure at the court time and resources taken up to resolve an issue which the parties should have resolved themselves, might in this case be regarded as an arbitrary deprivation of rights to have justiciable disputes resolved, as promised by s34 of the Constitution. I accordingly propose to deal with the case as it was presented to me, without thereby suggesting that, given our law and practice regarding costs, and the court’s discretion with respect to them, there are not circumstances in which litigation concerning only its own costs should be discouraged by denying both parties the victory each seeks.

[4] The applicant, Dr A R Ssufya, is a Libyan National. The Health Professions Council of South Africa and the Medical and Dental Professions Board, respectively the first and second respondents, stand together, and I

will refer to them as the “respondents”. The University of KwaZulu-Natal is the third respondent. It delivered a notice to abide the decision of the court. I will refer to it as the “university”.

[5] The applicant qualified as a medical practitioner in Libya. He graduated from the University of Tripoli in February 1999 and completed his internship in April 2000. In 2009 he decided to apply to the university for admission for the purpose of postgraduate studies in the field of neurology. The university accepted his application upon the basis that he would be engaged as a postgraduate supernumerary registrar in a four year study programme at the Inkosi Albert Luthuli Central Hospital in Durban. The Department of Health endorsed the applicant’s request for admission to the university, his unpaid engagement in that regard for postgraduate study purposes to be for the period 1st January 2010 to 31st December 2013.

[6] To be employed in a hospital in South Africa a doctor must be registered appropriately under the Health Professions Act, 1974, and there are regulations which govern especially the registration of persons who hold qualifications not prescribed for registration. The regulations appear in Government Notice R101 published on 6 February 2009. Regulation 2(6) is the applicable one. It provides as follows.

“The registrar may register a foreign qualified person in the category of postgraduate study in any of the professions registered under the Act, if such a person holds a foreign qualification and is to be enrolled for postgraduate study and/or research as the holder of an appointment which is of a temporary and supernumerary nature for a period not exceeding 5 years.”

[7] The applicant applied for such registration, submitting the requisite documents, and it was granted. In about February 2010, he was provided with a Certificate of Registration which recorded his registration as a medical practitioner in the category “Postgraduate Study University of KwaZulu-Natal” from 1st January 2010 to 31st December 2010. The applicant’s registration

would obviously have to be renewed, as the course of study to which he had been admitted was to endure for 4 years.

[8] It is not clear why the certificate did not initially cover the period 1st January 2010 (when the study period began) to 31st March 2011, given that the respondents' registration year runs from 1st April in one year through to 31st March in the next year. Be that as it may, in about April 2010 the respondents issued an invoice to the applicant reflecting his registration fees for the year 1st April 2010 to 31st March 2011, and that they had been paid. Accompanying that invoice was a card reflecting the applicant's registration as a medical practitioner in the category "Postgraduate Study University of KwaZulu-Natal" valid for the period 1st April 2010 to 31st March 2011. Thereafter, and on notification that renewal fees for subsequent years were required, the applicant paid fees for what are called the 2011 and 2012 years (running in each case from 1st April in the named year to 31st March in the next); and submitted to the university's postgraduate administration on each occasion a letter from the head of the Department of Neurology for onward transmission to the respondents. On each occasion he received an invoice from the respondents reflecting the registration fee and the fact that it had been paid, and a similar registration card reflecting his registration as a medical practitioner in the category referred to above. The respondents deny that the letters from the head of the Department of Neurology were forwarded to them, but nothing was made of it at the time.

[9] On 17 January 2013 the applicant received a text message from the respondents advising him that his annual fee reminder had been posted and that his fees for the 2013 year would have to be paid by 1st April 2013. But on 23rd January 2013 the postgraduate administrator at the university advised the applicant that a member of the second respondent's staff had informed her over the telephone that the applicant was not registered as a medical practitioner and that he would have to cease his clinical work forthwith and would have to re-apply for registration from "scratch". It was reported to the applicant that the reason given was that the respondents had not received letters of request for extension of the applicant's training from the university.

The dean of the School of Clinical Medicine at the university, Professor R.H. Hift, took up the matter. He wrote to the respondents saying that the applicant was paid up and registered and had the certificate and cards to prove it. He undertook to check the university records to see whether there were letters of request for extension outstanding and to rectify it if this was the case. The letter continued as follows.

“He [the applicant] is now in his 4th year of training, and are about to write exams. To suspend training for 6 months while following due process for registering from the start makes no sense. May I please appeal to you to ensure that his current registration is confirmed. If you have further requirements, such as retrospective requests for extension, I will comply immediately. The matter is urgent since they have clinical responsibilities: apart from their academic needs, they provide vital service to our patients in the hospitals and their suspension will result in a threat to patient care.”

[10] A few days later Professor Hift addressed the respondents again, referring to the issue to the applicant of annual certificates of registration (the reference ought more accurately to have been to registration cards) clearly stating that the applicant had been registered for the relevant year. He also referred to an email which the applicant had by then received stating that these registration cards were the products of a so-called system error. Professor Hift complained that a practitioner in the position of the applicant would believe that his registration was up to date and that it is unfair to hold a practitioner responsible for errors made by the first respondent. Professor Hift asked that the applicant's registration be re-activated without delay, and that a negative response to the request should come from the President of the first respondent or the Chair of the second respondent as it may well have to be “contested in court or via the Public Protector”.

[11] The content and tone of these communications from Professor Hift reveal a high state of anxiety. Not much imagination need be employed in order to assess the state of mind generated in the applicant once he came to

understand the implications of the stance which had been adopted by the respondents.

[12] Ms Meintjes replied to Professor Hift's emails on behalf of the respondents. On 30 January 2013 she recorded that it is the practitioner's responsibility to ensure that his registration is extended on an annual basis and that this requires not only the payment of a fee but a letter of request from the practitioner as well as a letter of support from the Dean. She recorded that the first respondent would only be "in a position to confirm the one year of registration as indicated on his registration certificate (1 January 2010 to 31 December 2010)". She said that the applicant would have to reapply for registration "indicating the reasons for non-registration". The matter would then be tabled at the next meeting of the sub-committee.

[13] Professor Hift was not satisfied and responded reiterating what he had already said. In the face of that Ms Meintjes referred in reply to a letter allegedly provided to the applicant upon his initial registration which clearly indicated, she said, that registration for supernumerary posts would only be made for periods of 12 months at a time, that an application for extension would have to be accompanied by a full motivation from the Dean of the Faculty, and that payment of annual fees without a formal application would not "imply" that registration had been extended. Professor Hift asked for a copy of the letter said to have been supplied to the applicant upon his initial registration and was apparently sent one under cover of an email dated 4th February 2013. The applicant stated in his founding papers that he had never received such a letter with his initial registration certificate and that indeed, at the time his application was launched, he still had not seen the document. I will deal with this dispute a little later.

[14] At the end of February 2013, the applicant decided that he should instruct attorneys. They ascertained that Professor Hift had referred the matter to the university's legal advisor. Before anything could come of that the applicant received notification that a meeting of the first respondent would consider his case on 4th March 2013. The university was supposed to make

representations, but it was not clear to the applicant that the university had done so.

[15] On 8 March 2013 the applicant's attorneys addressed the respondents asking after the outcome of the meeting of 4 March 2013. The urgency of the matter and the prejudice to the applicant was stressed. The attorneys asked for notification of the decision and reasons for it and expressed their desire to see the matter resolved speedily without the necessity of instituting urgent High Court proceedings. The attorneys received no response to that letter.

[16] On 28 March 2013, the founding papers in the present application were issued. They gave notice of an intention to seek a rule nisi on 9 April 2013 with interim relief in the form of an order directing the first respondent to take all necessary steps to cause the applicant to be duly registered for the period 1 January 2011 to 31 December 2013.

[17] On 9 April 2013 an order was taken by consent in terms of which the rule nisi was issued without a specific return date, and the interim relief granted. There was no qualification to the interim relief, that the respondents would be permitted to retract or cancel the registration of the applicant to which they consented, if the proceedings terminated in favour of the respondents prior to 31 December 2013. The respondents' consent to the order was accompanied by a recordal made in the order:

“...that, in consenting to this order, the first and second respondents have not admitted the allegations in the applicant's founding affidavit or the confirmatory affidavits delivered in support hereof and that their rights are reserved to address these allegations in due course if necessary.”

[18] I have given a relatively detailed account of the events which preceded the grant of an order by this Court on 9 April 2013 because it seems to me that in considering the question as to the costs of these proceedings I should examine more than the issue as to whether the applicant would have obtained

his relief ultimately if the matter had not become moot. At least two other questions strike me as important.

- (a) Was the applicant justified in launching the application?
- (b) Did the applicant in fact achieve success?

[19] As to the second of these questions, the answer is obviously in the affirmative. The respondents agreed to an order which obliged them to register the applicant for a period terminating on 31 December 2013, which is the final relief which he sought in the proceedings. I was told in argument that the respondents had delivered replying papers in July 2013 because it was necessary to proceed with opposition to the application in order to protect the respondents' processes and policies. I disagree. The basis upon which the respondents had consented to an order directing them to register the applicant to the end of December 2013 was recorded in the order, and if matters had been left at that there could subsequently have been no suggestion that any concession had been made or any precedent set. It is also not without significance that the respondents took no steps to set the matter down for hearing once the period for delivery of a replying affidavit as of right had lapsed. If the respondents were under the impression that ultimate success in the litigation would entitle them to bring the applicant's registration to a premature end (i.e. before 31 December 2013) then they took no steps to pursue that outcome. In the end, and whatever the outcome of the debate over whether the applicant's case would have prevailed if the matter had been disposed of finally before it became moot, as a matter of fact the relief the applicant sought was granted and the benefit of it enjoyed by the applicant in full. The applicant was factually successful.

[20] Turning to the first of the two questions posed above, I take the view that the applicant was justified in launching these proceedings. (As to the legitimacy of the question, see *Rainbow Chicken Farm v Mediterranean Woollen Mills* 1963 (1) SA 201 (N) at 206 A-C.) He had been told by the respondents that he had practised medicine in a public hospital unlawfully from 1 January 2011 onwards. He had been told that he should desist from

practice forthwith. The registration cards he had received from the respondents contradicted the assertions they now made. (It is clear on the papers that there was nothing untoward or unreasonable about the applicant's belief, shared by Professor Hift and presumably by the university authorities generally, that the registration cards provided by the respondents to the applicant reflected the fact that he had been duly registered as a medical practitioner throughout the period to which those registration cards spoke.) The correspondence from the respondents did not contradict Professor Hift's belief that the registration process that the applicant was invited to participate in, which would interrupt not only his work but his studies, would likely take some six months. The respondents' failure to disclose to the applicant's attorneys what had transpired at the meeting of 4 March 2013 was and remains inexplicable. There was never any suggestion that the declaration made in advance of the application that the first respondent would only be in a position to confirm the one year of registration indicated on the original registration certificate (1 January 2010 to 31 December 2010) had anything to do with any shortcoming in the applicant's studies or his performance as a medical doctor. In my view the applicant cannot be faulted for taking the view that there was no reason to have any confidence in a just outcome if he submitted himself to the jurisdiction of the respondents by applying for what they would have regarded as the necessary retroactive registration of the applicant as a medical practitioner; and indeed for his further registration from 1 April 2013 to 31 December 2013, all of which was necessary in order for him to complete his studies. Furthermore, his approach to the Court was justified by the fact that what the applicant had taken to be his lawful registration was due to terminate on 31 March 2013; urgent relief was required and the respondents' failure to disclose what had happened at the meeting of 4 March 2013 hardly engendered any confidence in the proposition that urgent relief would be available otherwise than through legal process.

[21] In my view the papers before me establish that the respondents' conduct in advance of the launch of the application fell short of what was required administratively. The respondents denied the applicant's due registration as a practitioner with effect from 1 January 2011 despite the fact

that they had issued documentary proof (in the form of the registration cards) that the applicant had indeed at all material times been duly registered. They adopted that stance upon the basis that they had not received a formal request for an extension of registration from the applicant (this notwithstanding the respondents' own invitation to the applicant to pay for re-registration on each occasion), and relied on the absence of formal letters of support from the university despite the fact that the respondents had to have known that the university supported the continued registration of the applicant as it continued to educate him and use his services at the hospital. Why, if these formalities were of such crucial importance, was it only noted that they had not been complied with two years after the first event of non-compliance? The answering affidavit delivered by the respondents does not explain the basis upon which it agreed, when consenting to interim relief, to register the applicant forthwith despite the continued absence of compliance with the very formal requirements which, according to the respondents, justified the course they had taken with regard to the applicant in advance of the application.

[22] Confronted with these issues in argument, counsel for the respondents conceded that perhaps the correct order was that each party should pay their own costs. Counsel for the applicant did not regard that as a just outcome and persisted in the applicant's prayer for costs. For reasons already given, and because I have concluded that the applicant would in any event have succeeded in this litigation if it had not become moot, the stance adopted by counsel for the applicant is in my view correct.

[23] The first point made by the respondents in the answering affidavit put up by the registrar of the first respondent is one which, at best for the respondents, puts form above substance. It is suggested that a mandamus is impermissible in this case as what the applicant ought to have done is to review and set aside what the deponent calls the "administrative decision of the [first respondent] to de-register him". Of course, when the application was launched the applicant had not been told that he had been "de-registered" (whatever that may mean). He had in effect been told that he had not been registered for the previous two years. Furthermore, if the deponent

is right in saying that a decision had been made to de-register the applicant (presumably at the meeting of 4 March 2013) then he must have been on the register before that, a proposition which had been repudiated by the respondents in the correspondence which preceded the application. Section 19 (1) of the Health Professions Act, 1974 does empower the second respondent to direct the removal of a name from the register. However, sections 19 (2) and (3) are to the effect that notice of such removal must be given by the registrar to the person concerned by way of certified mail, and that with effect from the date on which such notice is given the registration certificate relating to such a practitioner shall be deemed to be cancelled, and the practitioner shall cease to practise. No such notice was given to the applicant.

[24] The kernel of the respondents' argument lies in the proposition that there is a policy of registering supernumeraries like the applicant for one year at a time so as to keep proper control over them in the public interest. Apparently recognising that the implementation of such a policy, when it requires input or action on the part of the persons whose rights or interests are affected by it, cannot be rational, reasonable or indeed lawful without the affected persons being informed of what action or input is required of them, the respondents sought to make the case that:

- (a) the applicant knew that he had to submit annual letters of support from the university because he had been told of that in a letter under cover of which his original certificate had been sent to him; and
- (b) applying the rule in *Plascon-Evans*, the applicant's denial of receipt of that letter must be rejected.

And in the circumstances, says the registrar in the respondents' answering affidavit:

"The policy implemented by the [first respondent] is a reasonable one and one which [the applicant] was aware of. It is due to his own neglect that the present situation has arisen."

[25] The registrar states in the respondents' answering affidavit that the applicant received the letter in question with his registration certificate. But there is no admissible evidence put up by the respondents to the effect that the letter was actually sent; this despite the fact that the founding affidavit denied its receipt. The registrar annexed a copy of the letter to her affidavit. One of the remarkable things about the letter is that it is not addressed to anyone at all. (Another remarkable thing is that it speaks to regulations which had by then been repealed in terms of the new applicable ones which had been published a year earlier, on 6 February 2009.) The letter does state that the period of registration could be extended upon application with full motivation from the dean of the faculty or head of the institution for further periods of not more than twelve months per application. It informs its intended recipient that such an application for extension must be submitted at least three months prior to the expiry date. The letter goes on to remind the intended recipient of the need to pay the annual fee and then contains the following warning.

“Kindly note that payment of the annual fee, without a formal application to extend your registration, does not imply that your registration has been extended”.

What the letter does not address is the question as to what is to be “implied” if a practitioner who pays his or her fees receives in exchange a registration card reflecting that the practitioner’s registration has in fact been extended.

[26] Be that as it may, the clue to what might have happened to the letter if it was sent may lie in the manner in which the first respondent transmitted the invoices and registration cards to the applicant. Although the invoices in each case reflect the applicant as the named intended recipient, they were actually addressed to one Michelle Ramlal of the University of KwaZulu-Natal. It may very well be that, if it was sent, the crucial letter relied upon by the respondents got to the university but not to the applicant.

[27] In my view this case would have been decided upon the basis that the applicant did not receive the letter advising him of what was required of him in

order to secure the requisite extensions of his registration. Whilst the probabilities on this issue would not have been considered by the court (*National Director of Public Prosecutions v Zuma* 2009 (2) 277 (SCA) at para 26), the prior question as to whether a dispute over receipt of the letter had been properly raised would have been answered against the respondents.

[28] In the circumstances I conclude that if this application had proceeded to finality otherwise than in the moot form in which the papers were ultimately finalised, the applicant would at least have succeeded in having his name restored to the register for the period up to 31 March 2013. That on its own would have constituted substantial success, justifying an order of costs in favour of the applicant. Moreover, in the absence of any suggestion that the applicant did not qualify for further registration, an order compelling the respondents to register the applicant as a practitioner up to 31 December 2013 would in my view also have been granted.

I accordingly make the following order:

[1] The first and second respondents are ordered to pay the applicant's costs, their liability being joint and several.

OLSEN J

Date of Hearing: Tuesday, 03 FEBRUARY 2015

Date of Judgment: : Thursday, 19 FEBRUARY 2015

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