

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO. ☒ YES	REPUBLIC OF SOUTH AFRICA
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES	
(3) REVISED. ☒ YES	
11/11/13	<i>[Signature]</i>
DATE	SIGNATURE

CASE NO: 54834/2013

N'YUNYI WAMBUYI KATUMBA

Applicant

And

THE HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA

Respondent

JUDGMENT

1. The applicant, N'yunyi Wambuyi Katumba, is a medical practitioner residing at 162 Club Avenue, Ashley Gardens, Pretoria, Gauteng.
2. The respondent is the Health Professions Council of South Africa, a juristic person established in accordance with section 2 of the Health Professions Act 56 of 1974 ("the Act") of 553 Madiba Street, Pretoria, Gauteng.
3. The applicant claims that he is a duly qualified neurosurgeon entitled to practice as such. In order to be able to practice his calling lawfully, he must be

registered as a specialist by the respondent. The respondent refuses to register the applicant as a specialist as it disputes the applicant's qualifications.

4. The applicant relies on a foreign qualification that entitles him, so he argues, to be registered as a neurosurgeon. The relevant qualification was obtained at the University of Leuven, which applicant alleges has been recognised by the respondent as an equivalent to the South African neurosurgical Fellowship Examination.
5. The dispute between the parties has a long history which needs to be recorded for a better understanding of the matter.
6. The applicant was born in what is now the Democratic Republic of Congo. From 1972 to 1979 he went to medical school at Kinshasa where he passed his final examination and was registered as a medical doctor in 1979.
7. From 1984 to 1991 he studied at Leuven in Belgium, which according to the applicant ended with the award of a specialist Master's degree equivalent to a specialist degree in Neurosurgery. The applicant furthermore, according to his founding affidavit, followed a parallel course presented by the European Association of Neurological Societies, which he passed successfully.
8. The respondent claims that the Belgian qualification obtained at the Leuven University is one in community medicine and not neurosurgery, as is evident, according to the respondent's answering affidavit, from the certificate obtained by the applicant itself. In reply, the applicant has filed an affidavit of the Dean of the Medical Faculty of Leuven University, which confirms that the applicant

received training which had the same content as the training undergone by the Belgian medical practitioners specialising in neurosurgery. The relevance of this affidavit will be dealt with below.

9. The applicant's case is that his foreign qualification was recognised by the respondent when the Professional Education and Training Committee recommended his registration as neurosurgeon in public service in 2008. The respondent disputes this averment and alleges that the chronology of the parties' interaction with one another is quite different from that presented by the deponent to the founding affidavit.
10. According to the respondent's deponent, Dr Mbhele, the applicant first wrote to the respondent 2001 seeking enrolment, at that stage apparently as a neurosurgeon. As the application was not in the proper form it was not acted upon. The applicant then applied to the respondent's Medical and Dental Professional Board on the 17th January 2003, which application did at that stage appear to be aimed at registration as a general practitioner.
11. On the 28th July 2003 a letter sent by the registrar of the Colleges of Medicine of South Africa was received by the respondent, from which it became apparent that the applicant would in fact be seeking registration as a neurosurgeon, which he could obtain if he sat and passed the Fellowship Examination held by the South African Colleges of Medicine. It is common cause that this examination had to be passed at that time to qualify for registration as a neurosurgeon in South Africa.
12. The respondent's Postgraduate Education and Training Committee ("the PET Committee") resolved that the applicant would be registered as a

neurosurgeon if he passed the examination, which resolution was communicated to the applicant. The applicant then sat for the Fellowship Examination in 2004. It is common cause that he failed and was therefore not entitled to be registered as a neurosurgeon in the Republic of South Africa, or to apply for such registration.

13. In 2005 the respondent adopted a new internal policy relating to the registration of specialist medical practitioners to enable the recognition of foreign qualified doctors' qualifications as equivalent to South African standards in respect of degrees awarded by specific foreign universities. Degrees awarded by the Catholic University of Leuven were included in the list of foreign qualifications that would grant access to South African registration for foreign doctors. It must be underlined, however, that it is clear from the wording of the Act and the internal policy ("may") that the respondent is not obliged to register a foreign holder of a qualification conferred by one of the recognised universities, but that it is granted a discretion to accept the foreign qualification for purposes of registration as a specialist in South Africa. The respondent prepared a standard document that was addressed to practitioners seeking registration with it to convey the new policy. Its relevant part reads as follows:

"Foreign qualified health practitioners with qualifications that enable them to practice medicine or dentistry abroad/in their country of origin may apply for registration with the Health Professions Council of South Africa in the category Public Service, provided the applicant complies with the minimum requirements. In special circumstances, based solely on the discretion of the Board, applicants with identified qualifications, which were evaluated by the Board, may be exempted from the Examination of the Board.

Applicants are further required to secure written support in terms of employability from the Foreign Workforce Management Program (FWMP) of the National Department of Health, Pretoria.

South African qualified practitioners are required to submit Form 21 and 57, duly completed.

A person who secures relevant registration shall be restricted in terms of the conditions of his or her practice to the Public Service, whilst the duration of registration and scope of his or her practice shall be as specified by the Board. Registration is conditional in that the applicant should submit the required information, meet the minimum requirements for registration as specified by the Board and successfully complete the Board Examination for foreign qualified practitioners (where applicable).

The National Department of Health does not encourage the recruitment of individual foreign health professionals who are citizens of developing countries.

Since the procedures are clearly outlined in the application form for foreign qualified medical practitioners and dentists (Form 176 MP/DP) only a concise summary of information to be submitted is provided.

The following should be submitted to the Board for consideration prior to registration:

- The attached application form, duly completed.
- Copies of degree certificates of qualifications in medicine/dentistry and sworn translations in English (Copies will **only be accepted if certified by an attorney in his/her capacity as a notary public and bearing the official stamp**. Copies certified only by a Commissioner of Oaths **will not be accepted**

In view of possible damage or loss of such documents it is not advisable to send such documents by mail.

Only original translations of the required documents done by a sworn translator and duly sealed and notarised will be accepted. In addition to such English translations, as indicated above, legible copies of the original documents, certified and duly sealed by a Notary Public should be submitted.

- A copy of the official and detailed curriculum of the applicant's course of study, specifying courses, content of education (theory) and training (practical/clinical), duration and mode of examination/evaluation.
- Verification of credentials by the Education Commission for Foreign Medical Graduates: International Credentials Services (to be obtained by the applicant at own cost) (see separate application form – applicable to medicine only). The Board recently agreed that the document could be submitted within a period of 6 months from the date of registration. Applicants who fail to meet this requirement will be de-registered.
- A recent original Certificate of Status (Certificate of Good Standing), indicating that the applicant is in good standing, issued by the foreign registration authority where the applicant is currently registered issued within the preceding three months.
- A copy of a valid Passport or Identity Document as proof of current citizenship, duly certified by a notary public as indicated above.
- A letter of endorsement in support of the application for registration issued by the Foreign Workforce Management Program (FWMP) of the National Department of Health. Applications should be directed to The Program Manager, FWMP, Room 1123, Fedlife Building, National Department of Health, Private Bag X828, Pretoria, 0001, RSA (e-mail: smiths@health.gov.za or pinal@health.gov.za). Applicants who fail to secure the support of the FWMP towards an application for registration or employment will not be eligible for registration.

In view of possible damage or loss of such documents it is not advisable to send such documents by mail.

Only original translations of the required documents done by a sworn translator and duly sealed and notarised will be accepted. In addition to such English translations, as indicated above, legible copies of the original documents, certified and duly sealed by a Notary Public should be submitted.

- *A copy of the official and detailed curriculum of the applicant's course of study, specifying courses, content of education (theory) and training (practical/clinical), duration and mode of examination/evaluation.*
- *Verification of credentials by the Education Commission for Foreign Medical Graduates: International Credentials Services (to be obtained by the applicant at own cost) (see separate application form – applicable to medicine only). The Board recently agreed that the document could be submitted within a period of 6 months from the date of registration. Applicants who fail to meet this requirement will be de-registered.*
- *A recent original Certificate of Status (Certificate of Good Standing), indicating that the applicant is in good standing, issued by the foreign registration authority where the applicant is currently registered issued within the preceding three months.*
- *A copy of a valid Passport or Identity Document as proof of current citizenship, duly certified by a notary public as indicated above.*
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14. Following upon the amendment of the policy, the applicant submitted a formal application for registration as a neurosurgeon in South Africa to the respondent on the 10th November 2006. The application lists all academic achievements obtained by the applicant, as well as the conferences and other opportunities for further training and education attended by him. The application was clearly based upon his proficiency as evidenced by his foreign qualifications. While the annexures to this application appear to be comprehensive and complete inasmuch as they record the applicant's experience and qualifications, it makes no reference to his failure to pass the Fellowship Examination at all.

15. His application was considered by the PET committee and accepted in the category Public Service for which the applicant was accordingly registered. The respondent's deponent to the answering affidavit is adamant that this decision was taken in error as the committee was under the impression that the applicant had in fact passed the Fellowship Examination. The minute of the PET's meeting does not bear out this statement in as many words, as it refers to the applicant having passed the Board Examination and not the Fellowship Examination – but so does the document sent to the applicant when he sought registration. What is clear from the minute of the meeting on the 30th January 2007, however, is the fact that the PET approved the application for registration on the basis of the applicant's proficiency as neurosurgeon had been established by the passing of a relevant examination. The committee accordingly never considered the question whether the foreign qualifications the applicant relied upon were in fact equivalent to the South African qualification for the speciality the applicant wished to be registered for.
16. In 2009 the applicant applied for registration as a specialist neurosurgeon in private practice, which application was granted on the basis that he would be allowed to enter private practice once he had followed his profession in terms of his existing registration for Public Service for a period of three years, i.e. from July 2010.
17. In August 2011 the respondent received a complaint relating to the applicant's expertise and proficiency. The respondent examined the applicant's record and realised that he had never passed the Fellowship Examination and had therefore been registered as a result of a misapprehension under which the PET laboured when it approved his request for registration as a specialist

neurosurgeon in Public Service. He was informed of the respondent's intention to delete his name from the register and thereby revoke his permission to practice. The respondent was clearly under a duty to rectify the incorrect registration – in terms of the Act it had no choice in the matter. The applicant did not avail himself of the opportunity to make representations to the respondent why he should not be struck from the register. The respondent therefore deleted his name from the list of neurosurgeons entitled to practice in South Africa on the 9th December 2011.

18. Since that date the applicant has tried repeatedly to have his registration restored. The respondent has adopted the view that he will be allowed to register once he has passed both the Board Examination and the Fellowship Examination. The applicant applied to be restored to the register on the 14th August 2012, which application was considered by the respondent's PET and its Executive Committee, which referred the matter back to the PET. The latter eventually refused the application and confirmed that the applicant will have to pass the abovementioned examinations before he will be eligible for re-registration.
19. This decision is attacked by the applicant on a basis of urgency. He seeks the review and setting aside thereof and an order restoring his name to the register of neurosurgeons.
20. The applicant has adopted the stance throughout, and persists in this approach in the present urgent application, that he is entitled to registration on the basis of his foreign qualifications as a neurosurgeon. The respondent disputes the alleged equivalent nature of the Belgian qualification to the South

African Fellowship Examination, as it is of the view that the Belgian version is a qualification as specialist community health practitioner. The respondent has refused to accept the affidavit of the Dean of the Medical Faculty of Leuven University as dispositive of the nature of the applicant's qualifications.

21. The first hurdle the applicant has to overcome, however, is the respondent's denial that he was admitted to practice in 2007 on the basis of his Belgian qualification having been accepted as sufficient proof of his proficiency as neurosurgeon. While it is correct that he placed all his qualifications before the PET when he applied for registration in that year, it is clear from the facts related above that the PET did not investigate the question whether the Belgian qualification was sufficient, but admitted the applicant on the basis of the mistaken belief that he had passed the Fellowship Examination. The applicant's assertion that his foreign qualifications were in the past accepted as a basis for a South African registration in his specialist category is therefore incorrect and must be rejected.
22. But the applicant argues further that the respondent is obliged to consider his application for re-registration on the ground that his Belgian application entitles him to be admitted regardless of his past failure to pass the Fellowship Examination. In fact, he submits that the failure to pass the Fellowship Examination is irrelevant for purposes of his application which is launched solely in reliance on his foreign qualification. Quite apart from the fact that the nature and extent of this qualification is in dispute between him and the respondent – a dispute that could only be resolved by oral evidence – the applicant's approach is completely unrealistic and in stark conflict with the correct interpretation of the Act. As has been recorded above, section 15B of

the Act vests the professional board and its delegated committees with a discretionary power to recognise foreign qualifications. The PET is allowed to consider registration as a specialist practitioner on the basis of a foreign qualification, but is not obliged to do so. Its duty is to ensure that only duly qualified candidates are admitted to specialist practice. Evidence that the holder of a qualification obtained in a foreign country, which is *prima facie* equivalent to the South African Fellowship Examination, failed the South African examination that all South African candidates must pass to be allowed to practice as neurosurgeons, must self-evidently be taken into consideration when a foreign qualified doctor seeks registration in the Republic. The respondent is tasked with ensuring that the professional standards of the medical profession are maintained in the interest of public at large, and in the particular interest of patients who might consult a doctor in the future (see section 3 of the Act). Whatever a candidate's qualifications, the failure to pass an examination that is obligatory for all intending specialists who qualify in the Republic must surely cast a shadow of doubt over the proficiency and professional ability of the individual who failed the same test. The PET and the respondent would be failing in its duty if it did not take appropriate steps to ensure that such individual provide proof of her or his professional ability before registration of the individual concerned could be permitted.

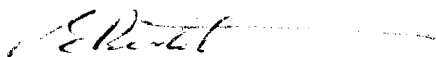
23. The PET's and the respondent's demand that the applicant pass the South African examinations before being allowed to re-register is therefore lawful, rational, reasonable, in the public interest and professionally appropriate. The applicant's claims must therefore fail.

24. It is unnecessary to deal with other issues raised on the papers. Strictly speaking, the application was not urgent, but in the exercise of the court's discretion it is in the interest of the parties that the merits be decided. The respondent correctly points out furthermore that the applicant has not sought to attack the decision to remove his name from the register, but in the light of the finding on the merits this point becomes academic. The applicant has sought to sit on all chairs available in law to an aggrieved litigant seeking to take an administrative decision on review with an eye to have it set aside. None of the arguments advanced on his behalf can affect the finding that the PET acted properly, correctly, rationally, reasonably and in the public interest in its dealings with the applicant.
25. The matter is of importance to both parties. The respondent is severely embarrassed by the registration of a candidate who was not duly qualified in a speciality as sensitive as neurosurgery. When the papers were filed, the cause of the incorrect registration had still not been fully established. The dispute is of considerable public importance. The respondent was therefore fully entitled to brief two counsel.

The following order is made:

The application is dismissed with costs, such costs to include the costs of senior and junior counsel.

Signed at Pretoria on this 4th day of November 2013.

A handwritten signature in black ink, appearing to read 'E. Berelmann', with a long horizontal flourish extending to the right.

E BERTELSMANN

Judge of the High Court