REPORTABLE

Case Number: 624 / 98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between :

THE MINISTER OF HEALTH	**First Appellant**
THE NATIONAL INTERIM MEDICAL AND DENTAL COUNCIL OF SOUTH AFRICA	**Second Appellant**

and

A M MALISZEWSKI	**First Respondent**
SAROLTA KERESZTES	**Second Respondent**
JAN HENDRIK JOSEF SZCZYGIELSKI	**Third Respondent**
MARTIN TUPY	**Fourth Respondent**
DANIELA TUPY	**Fifth Respondent**
JOVAN MILOVIC	**Sixth Respondent**
ILIA TODOROV EVREV	**Seventh Respondent**
RYSZARD GORBASZEWICZ	**Eighth Respondent**
MALGORZATA RADZIKOWSKA-WASIAK	**Ninth Respondent**
LEONID GOLDBERG	**Tenth Respondent**
T MARIUSZ TOMASZ PASZKIEWICZ	**Eleventh Respondent**

Composition of the Court : **Smalberger, Olivier, Scott, Plewman JJA and Melunsky AJA**

Date of hearing : **11 May 2000**

Date of delivery : **30 May 2000**

SUMMARY

Registration of medical doctors with foreign qualifications - extension of special dispensation given in 1991 by SA Medical and Dental Council. Punitive costs order as regards unnecessary exhibits.

J U D G M E N T

P J J OLIVIER JA

OLIVIER JA

[1] This appeal is against the successful claim by the respondents in the Transvaal Provincial Division of the High Court that they be granted "full registration" by the second appellant in terms of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 ("the Act"). The second appellant had refused such registration. The trial judge, MacArthur J, ordered the appellants jointly and severally to register the respondents as medical practitioners without restrictions within seven days from the date of his order. He awarded the respondents their costs of action. The judgment is reported as ***Maliszewski and Others v Minister of Health and Another*** 1999 (2) SA 399 (T). The appeal is before us with leave of the court *a quo*.

[2] The appellants are entrusted with the function of administering the health services in the Republic of South Africa. The second appellant, which

is the successor to the South African Medical and Dental Council ("the Council") is, in terms of the Act, called upon to regulate and control the health professions, including the registration of medical practitioners. The first appellant ("the Minister") is the member of the executive branch of government responsible for the administration of the Act.

[3] All the respondents are medical doctors who have passed the primary medical examinations at certain overseas universities (in Poland, Hungary, Slovakia, Serbia, Bulgaria and Russia) qualifying them to practise as general practitioners in these countries. They then immigrated to South Africa. They were given so-called "limited registration" by the Council, which permitted them to work only in the public service, that is, in government or provincial hospitals. They have all worked in that capacity for a number of years. They are now all permanent residents and citizens of South Africa.

[4] The bone of contention in the present matter is that the appellants

refused the respondents full registration because they had not passed an examination known as the examination for full registration ("the EFR"). It is a practical, clinical, oral examination similar to the one set for South African medical students at the end of their final year. The appellants aver that in terms of the Act the respondents must sit for and pass the EFR before they can be granted full registration. Only then would they be entitled to enter private practice as general practitioners. In support of their contention the appellants rely on the provisions of the Act and the regulations as at 29 October 1997 ("the relevant date"), being the date of the institution of the action.

[5] The respondents contend that on the basis of their qualifications and experience, they are entitled to equal treatment with South African born citizens or with foreigners who acquired South African citizenship and who were able to benefit from the so-called special dispensation granted in 1991

inter alia to doctors in a situation similar to that in which the respondents find themselves. In this regard it is common cause that the respondents all acquired South African citizenship after 31 December 1991. It was averred on behalf of the respondents that had they acquired citizenship before that date, they would have received full registration by special dispensation because the Council, having adopted the special dispensation, had given full registration to doctors who before 31 December 1991 had both become South African citizens and had applied for registration. The respondents' case is that the said cut-off date was arbitrary; that citizenship has no rational, reasonable, relevant or justifiable nexus with the criteria for admitting the respondents to qualify as general practitioners in private practice; that the Council has the discretion to grant them full registration on the same basis as was provided for in the special dispensation, and that the Council's refusal to do so was unreasonable, biased and *mala fide*.

[6] The recognition of foreign medical qualifications in South Africa for the purpose of the registration of the holder thereof as a medical practitioner is governed by the Act, which makes provision for the promulgation of regulations by the Minister. The relevant provisions are to be found in ss 17, 24, 26, and 28 of the Act as it then read, and two sets of regulations, R2274 of 3 December 1976 and R1243 of 8 June 1990.

[7] Sec 28 of the Act stipulates that doctors like the respondents who have only limited registration may qualify for full registration provided they meet the following requirements :

(1) In terms of s 28 (1) (b) they must have held limited registration for at least two years.

(2) In terms of s 28 (1) (c) (i) they must, while so registered, have practised in South Africa for at least two years of which at least one year must have

been at a public health facility approved by the Council.

(3) In terms of s 28 (1) (c) (ii) they must submit a certificate by the head of the health facility at which they practised certifying that they are "competent and of good character".

(4) In terms of s 28 (1) they may then apply to the Council to sit for the EFR. In terms of s 28 (2) the EFR must be an examination designed to ascertain whether the practitioner,

"(a) possesses professional knowledge and skill which is of a standard not lower than that prescribed in respect of medical practitioners ... in the

Republic;

(b) has sufficient knowledge of the laws of the Republic applying to medical ... practice ... ; and

(c) is proficient in at least one of the official languages of the Republic."

The EFR can be taken at any South African medical school.

[8] Only after the practitioner has passed the EFR and complied with all the other requirements, is he or she entitled to full registration (s 28 (4)).

[9] Sec 28 (5) provides that the Council may partially exempt a practitioner under limited registration from the EFR requirement. The Council, however, was not competent to exempt the respondents under this provision for the following reasons :

(a) Sec 28 (5) permits the Council to exempt only those practitioners

who have passed an examination which entitled them to limited registration ("ELR"). With one exception, none of the respondents had done the ELR. They acquired limited registration during the temporary suspension of the ELR requirement from 1990 to 1992. They accordingly did not qualify for exemption in terms of s 28 (5).

(b) Sec 28 (5) in any event only permits exemption from part (a) of the EFR. It does not permit exemption from parts (b) and (c). It accordingly does not avail the respondents because,

- they refuse to sit for the EFR at all, and
- they claim full registration without having done so.

(c) The respondents in any event never applied for exemption under s 28 (5) and did not allege that they had done so.

[10] The respondents approached the Council for full registration during

the period 1995 to 1997. When the Council refused such registration, they instituted action for

(1) An order striking down the aforesaid regulations as unconstitutional; and / or

(2) An order in terms of which the Minister and the Council are jointly and severally compelled to register them as medical practitioners without restriction within a period of seven days from the date of the court order;

(3) Costs of suit; and / or

(4) Further and / or alternative relief.

[11] The court *a quo* did not base its judgment on the invalidity of the aforesaid regulations, and granted prayers (2) and (3) set out above. Before us, the attack on the validity or constitutionality of any provision of the Act or of the said regulations was abandoned.

[12] Furthermore, it was correctly conceded by Mr Raath, counsel for the

respondents, that if one leaves the so-called special dispensation out of account, the respondents would not be entitled to full registration because they have not presented themselves for the prescribed examination. In order to establish a cause of action the respondents were constrained to rely on the special dispensation, the principle of equality and s 4 (g) of the Act.

[13] The special dispensation is a striking illustration of the way in which bridges were built between the Old and the New South Africa. The evidence, *inter alia* of Mr Prinsloo, the secretary of the Council, was to the effect that the special dispensation was introduced in April 1991 in response to the unique circumstances of that time. From 2 February 1990 the government had abandoned its policy of apartheid: the ban on the liberation movements was lifted, the armed struggle came to an end, and South African exiles returned home. These exiles included South Africans who had studied and qualified as medical practitioners abroad, and the special dispensation was

devised to facilitate their return to South Africa by easing the normal requirements for the recognition of their foreign qualifications. This dispensation was however intended and designed to be a once-off concession in response to the unique circumstances of the time. It was not intended or designed to introduce lasting changes to the normal requirements for the recognition of foreign qualifications.

[14] The special dispensation was introduced in response to representations made to the Council by a variety of medical and political organisations in January 1991. Representatives of those organisations met with representatives of the Council on 10 January 1991. The meeting adopted a set of recommendations which were approved by the executive committee of the Council in March 1991 and ultimately by the Council itself in April 1991. These approved recommendations constituted the special dispensation.

[15] The special dispensation applied to all South African citizens who

had qualified from or were enrolled at universities outside South Africa before the end of 1991. The appellants' witnesses, Prinsloo and Dr Becker, explained that, although the special dispensation was designed to accommodate South African exiles and their spouses, it was not possible and in any event not practical to define this class of beneficiary in such a way that only they qualified for it. The class was not one that lent itself to a simple definition capable of ready application, because those who had gone into exile had done so for such diverse reasons. That was why a wide definition was adopted even though it would also include people other than the exiles for whose benefit the special dispensation was designed. For this reason, it applied also to foreigners who were not spouses of South African citizens, but who had acquired South African citizenship by naturalisation before the cut-off date.

[16] Those who sought registration under the special dispensation had

to qualify and apply for it before the end of 1991. The special dispensation was made subject to a cut-off date because it was intended to be a once-off concession to returning exiles. There was no intention to introduce a lasting change to the normal rules that govern the recognition of foreign qualifications, nor to introduce a policy to be followed in all future cases, nor to introduce a general practice.

[17] The main features of the system of registration of practitioners with foreign qualifications under the special dispensation were the following:

(a) They had to complete a year's intern training, if they had not yet done so.

(b) They were initially given limited registration which allowed them to practise at an approved hospital or training facility. An effort was made to ensure that they were placed in departments most suited to their training needs. Their heads of department also had to ensure that they were familiarised with local legal and ethical norms.

(c) Their performance was monitored during the year. Their heads of department had to render interim reports on their performance to ensure that corrective action was taken if they were not performing satisfactorily.

(d) At the end of the year, their heads of department had to report on their professional competence. Only those candidates who were certified to be sufficiently competent for full registration were granted full registration. Those who were not certified to be sufficiently competent for full registration, had their limited registration extended for another year. If after the second year the head of the department again did not certify the candidate sufficiently competent for full registration, the latter was required to pass a final year medical examination at a South African university.

[18] The special rules in other words departed from the normal rules that govern the recognition of foreign qualifications in the following respects:

(a) Candidates were not required to do the ELR before they were granted limited registration.

(b) They were carefully assisted and monitored during their period of practice under limited registration.

(c) They could qualify for full registration after one year of practice under limited registration .

(d) They were not required to do the EFR but only if their heads of department certified them to be sufficiently competent for full registration.

[19] The complaint of the respondents, and their cause of action, is based on certain features of the special dispensation. They do not contend that it was unreasonable for the Council to exempt returning South African exiles from the normal rules.

[20] They complain that those who qualified for full registration without an EFR under the special dispensation, were not limited to returning exiles; they included immigrants who differed from the respondents themselves only in that

they had acquired citizenship before the cut-off date at the end of 1991: an immigrant who had obtained his or her medical academic qualifications at any one of the universities at which the respondents also qualified, was given full registration by virtue of the special dispensation if he or she had obtained South African citizenship before 31 December 1999. But a person in a similar situation who acquired South African citizenship on 2 January 1992 would not qualify for the dispensation and would have to write the EFR. This includes the respondents, all of whom acquired South African citizenship after 31 December 1991.

[21] The complaint of the respondents then is that they have been and are being unfairly discriminated against by the Council : the date 31 December 1991 was arbitrarily decided upon; had it been fixed for a later date - say the end of 1996 or 1997 - they would have qualified for the special dispensation and would have been absolved from taking and passing the EFR. They

therefore seek equal treatment with those of their fellow countrymen who benefitted from the special dispensation. Hence the prayer aimed at compelling the Council to grant them full registration.

[22] The court *a quo* upheld the respondents' claims at common law. It found as follows:

(a) The Council's refusal to exempt the respondents from the EFR requirement for full registration was held to be administrative in nature and accordingly subject to review at common law under the rules applicable to the exercise of an administrative discretion.

(b) The only basis on which the Council distinguished between some of the practitioners who were granted full registration under the special dispensation without having to do the EFR and the respondents who were refused full registration because they had not done the EFR was that the former had acquired South African citizenship by

the cut-off date at the end of 1991 while the latter had not. This distinction was held to be entirely arbitrary and the Council was held to have unreasonably discriminated against the respondents.

(c) The Council was held to have failed to take into account the particular circumstances of the respondents.

[23] One cannot but have sympathy for the respondents. They hold degrees from internationally recognized universities, which required a course of study of at least six years and a year of clinical practice thereafter. Their practical experience and competence in public health institutions in South Africa have never been challenged. Most of them are also required to teach South African students, interns and registrars, *i.e.* medical doctors qualifying for their specialisation, and lead them to successful completion of their examinations. It was not contested that the working conditions of practitioners in the public health sector are exceptionally demanding and

perhaps even more onerous than the conditions in private practice. They all have held limited registration for longer than the two year period required as one of the requirements for full registration. As limited registration relates to registration as a general practitioner, it follows that the Council regarded the respondents as suitably qualified as general practitioners to be employed in the public health sector. Their personal commitment to South Africa has been proved by their acceptance of citizenship.

[24] However, the relief sought in this action, *i.e.* a *mandamus* against the Council compelling the latter to give the respondents full registration without having to do the EFR, can be granted only if this Court can lawfully compel the Council to do so. Considerations *ad misericordiam* cannot dictate the outcome of the action.

[25] As stated above, the respondents abandoned their attack on the invalidity or unconstitutionality of any provision of the Act or the regulations.

On their behalf it was also, correctly, conceded that they are not entitled to full registration (and to the relief sought) merely by relying on the provisions of the Act and the regulations. In fact, having regard only to these provisions, the respondents are not entitled to full registration. The successful participation by each candidate in the EFR is a valid condition for full registration (s 28 (4)). The respondents have not complied with that requirement.

[26] The respondents were driven to rely on the special dispensation, the principle of equality and the discretion of the Council under s 4 (g) of the Act.

Sec 4 (g) reads as follows :

> "The council may -
>
> (a) to (f) .....
>
> (g) upon application of any person, recognize any qualifications held by him (whether such qualifications have been obtained in the Republic or elsewhere) as being equal, either

> wholly or in part, to any prescribed qualifications, whereupon such person shall, to the extent to which the qualifications have so been recognized, be deemed to hold such prescribed qualifications."

[27] I will assume, without deciding, the following aspects in favour of the respondents :

(a) That they have complied with all the other requirements for full registration provided for in the Act and all the relevant regulations, *i.e.* that all that stands between them and full registration is the requirement that they pass the EFR.

(b) That their applications for registration should have been regarded as including applications for the recognition of their qualifications in terms of s 4 (g).

(c) That the Council has not exercised its discretion in terms of s 4 (g) of the Act, *i.e.* to recognise their qualifications as equal to the prescribed South African academic qualifications, entitling them to

registration. (Had the Council exercised this discretion against them, they still would not have been entitled to the form of relief claimed in this action.)

(d) That the granting of the special dispensation was valid. (If not, the respondents' reliance on it and the basis of their claims, fall away.)

[28] Against the aforegoing it needs to be stated, as far as the equality argument is concerned, that the respondents have been treated on the same basis as all the other foreign doctors immigrating to South Africa who have acquired citizenship after December 1991. Thus viewed, there is no discrimination against the respondents. Nor is there discrimination against them *vis-a-vis* South African citizens by birth who qualified elsewhere but sought registration after December 1991 in South Africa : they have to pass the prescribed examination (unless they qualified in certain countries whose standards of training were by regulation accredited as being on a par with

those of South Africa - which is not the case with the respondents). The only basis for the reliance on the equality principle lies in a comparison of the respondents, who acquired citizenship after December 1991, and other foreign doctors in their position who acquired citizenship before that date.

[29] The crucial question, therefore, is this : Are the respondents entitled to full registration by virtue of the provisions of, or by way of extension of, the special dispensation?

[30] As explained above, the special dispensation was a relaxation of the normal requirements for full registration for a limited group of individuals and for a limited time with a clear cut-off date. It amounted to a clearly defined exemption from the EFR. For the very reason that the Council did not wish to establish the special exemption as a general rule of practice or to create expectations, the cut-off date was established and made known. As with all similar exemptions or exceptions or special dispensations, the cut-off date was

somewhat arbitrarily chosen, but it was not contended by Mr Raath that it was done so unreasonably or unfairly.

[31] When the special dispensation came to an end, the statutory provisions relating to full registration once again became applicable. When the respondents applied for registration, the statutory rules applied and they had to comply with them.

[32] There is no basis for extending the provisions of the special dispensation to the respondents. The special dispensation, by its very terms, is not applicable to them. They cannot rely on an extension of it, because it created no entitlement on which to rely; it did not establish a policy or general practice binding the Council in respect of future cases, nor could it be said to have created a reasonable or legitimate expectation on the part of the respondents that they would be able to rely on it or benefit from it. The respondents always knew what the requirements for full registration, applicable

to them, were. They had either to pass the EFR or to approach the Council under s 4 (g) to recognise their qualifications as being equal, either wholly or in part, to any prescribed qualifications. For individuals in the position of the respondents these requirements are neither onerous nor unfair. It follows that the respondents have failed to prove a basis for the application of the equality principle and thus of compelling the Council to grant them full registration.

[33] In ***Absa Bank Ltd v Davidson*** 2000 (1) SA 1117 (SCA) at 1126 paras [28] and [29] the attention of practitioners was once again drawn to the displeasure of this Court at the habit of putting bundles of unproved and irrelevant documents before a trial Court and eventually a Court of Appeal (see also previous statements to that effect in ***Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk*** 1984 (1) SA 680 (A) at 692 E *et seq* and cases there cited; ***Louw v WP Koöperatief Bpk en Andere*** 1994 (3) SA 434 (A) at 447 D - 448 C). Practitioners have had timely

warning that special costs orders may be considered in appropriate cases.

[34] This warning was not heeded in the present instance. The record of appeal contains 2445 pages of documents, representing a bundle placed before the trial court and simply duplicated and thrust upon this Court, most of which was not relevant.

[35] When the record for the appeal was prepared, the attorneys and counsel well knew that the issue had been narrowed down to a legal one: could the respondents rely on the special dispensation for the relief claimed by them? The record should have been pruned accordingly. On a realistic assessment, no more than one third of the record was necessary for the appeal.

[36] Counsel for the appellants were requested during the trial to provide the Court with an explanation for belabouring this Court with an extraordinary number of irrelevant documents, and why a special costs order should not be made against the appellants, who were responsible for the preparation of the

appeal record.

[37] In a letter emanating from the appellants' attorneys dated 18 May 2000, this Court was advised as follows:

> "1 Dr Ashley Memela, a then recently qualified attorney, having served his clerkship with Rooth & Wessels Inc., was mandated to prepare the record. Dr Memela was also the attorney who instructed counsel for the trial under the supervision of Mr Griessel, a then director of Rooth and Wessels Inc.
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> 2 Prior to the record being lodged, Dr Memela was offered the position as Registrar of the second appellant. On his appointment Dr Memela resigned from this firm.
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> 3 On the resignation of Dr Memela, the extended time limit for lodging of the record became imminent as result of which a second practitioner, one Mr Young, was mandated to attend to the preparation and lodging of the record. Because he was not involved in the trial, and because of demanding time constraints, Mr Young was unable to distinguish between what should have been included in the record and what documents were superfluous. This judgment call [sic] to err on the side

of completeness and bore no desire to be avaricious or to be improper.

4 The transcribers apparently indicated that they were unable to prepare the record without having access to all the exhibits. Mr Young was unable to locate the exhibits in the dossier of the court *a quo*. Because of his limited knowledge of the specific documentation strictly required for purposes of the record, Mr Young sought the co-operation of the respondents' attorneys to assist him with the preparation of the record. They rendered their assistance in reconstructing and compiling the record.

5 Both attorneys *inter alia* attended at the offices of the second appellant to extract relevant minutes from the meetings which were referred to in the evidence.

May we be afforded the opportunity to apologise profusely and unconditionally for the preparation of the record and more so to the extent that superfluous documentation was included therein. It is clear from enquiries conducted by the writer, that the mentioned practitioners in our employment were erroneously of the *bona fide* opinion that the entire and complete record with all exhibits as it served before the court *a quo*, had to be prepared for purposes of the appeal."

[38] While one can have sympathy with Mr Young, the explanation furnished by the appellants' attorneys does not put forward an acceptable excuse. If Mr Young was not *au fait* with the matter, he should have consulted a member of the firm who had dealt with the matter at the trial stage or he should have consulted counsel. Furthermore, the attorney who was in charge of this matter during the trial stage, Mr Griessel (and whose name appears on the appeal record as the responsible attorney), should have supervised the preparation of the record. He should have given proper instructions to Mr Young.

[39] I bear in mind the warning that in considering a punitive costs order, a court should warn itself against using hindsight in assessing the conduct of a party (see ***A A Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*** 2000 (1) SA 639 (SCA) at 648 par [20]). In the present appeal, however, it is clear that no consideration at all was given to the question of curtailing the record,

nor was proper supervision provided by the attorney dealing with the matter.

[40] In the result, I am of the view that a punitive costs order should be made against the appellants' attorneys. In my view, the appellants should not be entitled to recover any costs relating to the preparation, perusal and presentation of two thirds of the record from the respondents, nor should the appellants' attorneys be entitled to recover from its own client any such costs.

[41] In the result the appeal must succeed. The following orders are made:

(a) The appeal succeeds with costs, such costs to include the costs of two counsel, but excluding the costs relating to the procural, preparation, perusal and presentation of two thirds of the appeal record.

(b) It is ordered that the appellants' attorneys shall not recover from their own clients any costs relating to the procural, preparation, perusal and presentation of two thirds of the appeal record.

(c) The judgment of the court *a quo* is set aside and replaced by the following order : "The action is dismissed with costs, such costs to include the costs of two counsel."

P J J OLIVIER JA

CONCURRING :

SMALBERGER JA

SCOTT JA

PLEWMAN JA

MELUNSKY AJA