

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1930/2008

In the matter between:

DR. OSMAN BHEKIIT
and

RESPONDENT

**THE SWAZILAND MEDICAL AND DENTAL
COUNCIL
REGISTRAR OF THE SWAZILAND DENTAL
AND MEDICAL COUNCIL**

1st RESPONDENT

2nd RESPONDENT

CORAM : Q.M. MABUZA -J
FOR THE APPLICANT : MR. RODRIQUES OF RODRIQUES
AND ASSOCIATES FOR THE
RESPONDENTS : MR. KHUMALO OF ATTORNEY
GENERAL'S CHAMBERS

RULING 31/10/08

[1] In this application the Applicant seeks the following order:

(a) That the Respondents be and are hereby directed to issue in favour of the Applicant an open licence to practice medicine in the Kingdom of Swaziland with immediate effect.

(b) Costs and

(c) Further and alternative relief.

[2] The Applicant who is a medical practitioner is a registered paid up member of the Medical and Dental Council of Swaziland. He is an Egyptian National who has acquired Swazi citizenship through kukhonta. He was licenced to practice medicine at the Swaziland Government Hospital and later at Imphilo Clinic in Manzini. He is no longer employed by Imphilo Clinic. He applied to the Respondents to issue him with an open registration certificate which would allow him to practice medicine for his own account. This application has been pending with the Respondents since April 2000 to date with no definite response from them.

[3] During July 2006 the Respondents informed him that they would meet and deliberate on his application but to date he has not been advised of the outcome of the meeting. The only response from them is that they could not process his application because there was a case pending against him.

[4] The Respondents took a point *in limine* that the matter had been brought prematurely before this court because the Applicant has not requested the reasons for the refusal to issue him with an open registration certificate. In my view the point of law is ill-conceived. The Respondents have not refused to issue the Applicant with an open registration certificate. In fact they have not made any decision at all, let alone one that refuses the

application. **The point *in limine* is dismissed.**

[5] The Respondents in their answering affidavit have set out what they call a full and factual background of this matter in order to give the court a broader picture of the circumstances surrounding this matter namely:

- They set out a case by one Primrose Fakudze who was operated upon by the Applicant during 2006. As a result of this operation the said Primrose was left permanently deformed.
- They state that in the same year the Applicant was implicated in improper conduct involving a falsification of his registration certificate.
- They further name a Jane Hlophe who was operated upon by the Applicant during 1999 which case points to improper professional conduct on the part of the Applicant.

[6] The Applicant has denied all the above allegations. He perceives the allegations as a witch hunt against him motivated by ill conceived and sinister motives and not by professional motives.

[7] As a result of the above cases the Respondents have since formally launched intensive investigations into the alleged complaints against the Applicant with a view of getting to the bottom of the cases. It was while these investigations were taking place that the Applicant applied for the open registration certificate. The Respondents further state that the Applicant was verbally advised of these complaints against him and the pending investigations hence he could not be issued with the

said certificate. The Respondents further state that they are not obliged to give reasons in writing for the refusal of the application for an open certificate unless a request has been made in terms of section 21 (1) of the Medical and Dental Practitioners Act, 1970.

[8] They further state that it would not be in the interest of the health sector and the Swazi Nation at large to issue the Applicant with an open registration certificate to practice on his own accord when he would be a threat to lives of his would be patients. This would also mean that he works unsupervised. They further state that it is the Respondent's duty to ensure the safety of his would be patients' lives.

[9] The Applicant in his reply raised a point *in limine* to the effect that the Respondent was not properly before court on the basis that the Attorney-General's office has no *locus standi in judicio* to represent the Respondent because 1st Respondent is a statutory body separate and distinct from any organ of Government. He further states that the 2nd Respondent is cited in his official capacity arising from his office as Registrar with the 1st Respondent and is not entitled to representation by the Attorney General.

[10] I disagree. Section 3 (2) of the Medical and Dental Practitioners Act 1970 sets out the members of the Council as follows:

(a) Director of Medical Services of Swaziland who shall act as Chairman;

(b) The Attorney General or a law officer appointed by him from time to time;

(c) A government Medical Officer appointed by the Minister from time to time;

(d) Two registered medical practitioners carrying on the practice of a private medical practitioner in Swaziland who shall be elected by the association of Medical Practitioners recognised by the Minister as the Medical Association;

(e) A registered medical or dental practitioner carrying on the practice of a private medical and dental practitioner in Swaziland.

[11] I agree with Mr. Kunene further that the presence of so many Government officials and the visible involvement of the relevant Minister makes the Council unique and different from the other statutory bodies cited by Mr. Rodrigues. The Respondents are responsible for the protection of life and the regulation of the operations of the medical profession. ***The point of law is dismissed.***

[12] I agree with Mr. Kunene further that this court cannot usurp the functions of the Respondents and direct them to issue an open licence to the Applicant. This court can only direct the Respondents to process the application. **It is up to them to grant or refuse same.** In the event that they refuse same they should give cogent reasons for doing so. In this regard they are referred to section 33 of the Constitution which is the supreme law and which overrides the provisions of the Act that they rely on for their refusal to give reasons.

[13] In the event I order that the Respondents process the application as speedily as possible, whether they conduct a formal enquiry or disciplinary proceedings is up to them. I hasten

to add that this order was agreed to by Mr. Khumalo for the Respondents. They cannot leave the situation in limbo indefinitely. This application could have been prevented had the Respondents acted decisively in one way or another. For this reason they are ordered to pay the costs of the application on the ordinary scale.

Q.M. MABUZA-J