REPUBLIC OF NAMIBIA

CASE NO. A159/08

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PANDULENI FILEMON BANGO ITULA **Applicant**

and

THE MEDICAL AND DENTAL COUNCIL OF NAMIBIA **Respondent**

CORAM: **VAN NIEKERK, J**

Heard: 10 February 2010

Delivered: 10 June 2011

JUDGMENT

VAN NIEKERK, J: [1] The applicant, who works in the dental profession and resides in the United Kingdom, is also a dentist registered in Namibia. This application concerns his efforts to secure registration in Namibia as a specialist in the field of maxillofacial and oral surgery and to

have certain additional qualifications registered in Namibia. He seeks, by way of an amended notice of motion, an order with costs in the following terms:

> "1.1 Reviewing and setting aside the decision taken by the Respondent on 6th May 2008 refusing to consider and recognize the qualifications of Applicant as an Oral and Maxillofacial Surgeon and to register him as well as to recognize, and to register additional qualifications of the applicant as applied for.
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> 1.2 Reviewing and setting aside the decision taken by the Respondent on 27 June 2008 refusing to recognize the qualifications of the Applicant as an Oral and Maxillofacial Surgeon and to register him in accordance with the applicable laws of Namibia at the time when he applied.
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> 1.3 Declaring the decisions by the Respondent as unfair, unreasonable, unprocedural, discriminatory and contrary to Articles 10, 18 and 21(1)(j) of the Constitution; alternatively null and void and in any event of no force and effect.
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> 1.4 Ordering the Respondent to consider the Applicant's application as provided for by the applicable laws and to recognize and to register him as above."

[2] The applicant studied in the United Kingdom at the University of Bristol Dental School where he obtained a qualification in 1994, which led to his registration as a dentist in that country. After that he obtained further qualifications from the Royal College of Surgeons of England in Dental Surgery (1994) and a Master's of Medical Science in Oral Surgery from the University of Sheffield (1998).

[3] During April 2001 Dr Itula applied to the then Dental Board of Namibia to be registered both as a dental practitioner and as a maxillofacial

and oral surgeon. A year later Dr de Chavonnes Vrugt, the secretary and registrar of the Dental Board of Namibia, directed a letter to the applicant informing him that his primary qualification as dentist was acceptable in Namibia and that he could be registered as such. Dr de Chavonnes Vrugt pointed out that, under the Namibian regulations, a person cannot be registered as a dentist and a specialist at the same time. He further stated that the application for registration as maxillofacial and oral surgeon could not be accepted, as registration as such requires a minimum period of study and curriculum to be followed as stipulated in the applicable regulations, of which he attached a copy. Although the applicant disputes that any regulations were attached to this letter, it was common cause during oral argument before me that the regulations referred to were certain regulations promulgated in 1976.

[4] Eventually on 20 June 2003 the applicant was informed that his full registration as a dentist with the Dental Board of Namibia had been successful. He was also informed that his application for registration as a specialist was not recognised.

[5] In the meantime since he lodged his initial application in April 2001, the applicant had continued to gain further qualifications and successfully completed certain fellowships in the United Kingdom. These were achieved at the Royal College of Physicians and Surgeons of Glasgow, where he was elected as Fellow in April 2002, and at the Royal College of Surgeons of Edinburgh, where he became a Fellow in June 2002. In April 2005 he

obtained a Post Graduate Diploma in Dentistry (Sedation & Pain Control) at the University of the Western Cape.

[6] On 10 April 2007 Dr Itula submitted two applications to the respondent. According to his founding affidavit he applied for his qualifications to be "recognised and registered." The application forms he completed were those of the Interim Health Professions Council of Namibia. The forms provide for an application "for Registration of an Additional Qualification, Speciality, Professional Category, Additional Professional Category" and further provides that an applicant should cross out or highlight which of the alternatives he/she is applying for. The applicant did not indicate this clearly on the two forms. From the respondent's papers is appears that the respondent interpreted the one application to be for the registration of a speciality in maxillofacial and oral surgery and the other as an application for the registration of an additional qualification, namely that of the Post Graduate Diploma in Dentistry (Sedation & Pain Control) at the University of the Western Cape.

[7] Throughout his papers the applicant averred that his application for registration as specialist was continuous or on-going since 2001, which was disputed by the respondent. However, in oral argument applicant's counsel conceded that a fresh application for such registration was made in April 2007. This concession is well founded.

[8] Correspondence and emails were exchanged between the applicant and staff of the respondent regarding the contents of the courses he had completed. It appears that the relationship between the applicant and the

respondent, and/or some of its members, became strained for various reasons which it is not necessary to set out here in any detail. It is also not necessary to set out the correspondence in any detail. What is clear is that the respondent as some stage became of the view that there were no regulations in existence in Namibia to accommodate applications for additional qualifications by dentists and for the registration of specialists. The reason for this view, as I shall examine in more detail below, is that certain regulations dating from 1976 had allegedly been repealed in the interim. The applicant was informed of this view at least since September 2007. He was also informed that draft regulations were being prepared for consideration by the Minister of Health and Social Services and that his application for registration as specialist could and would not be considered by the respondent until such regulations had been promulgated. In November 2007 the applicant was also forewarned that the draft regulations contemplated increasing the number of study years to a four year degree for specialists and that the respondent would not engage in any further correspondence or communication regarding the application until the new regulations are in force.

[9] It appears that the applicant remained of the view that his qualifications and experience were more than adequate for him to qualify for specialist registration. During a meeting in January 2008 with Ms Barlow the idea of him personally making representations to the respondent at a meeting to explain his position, qualifications and expertise was discussed.

The representations never materialised as the respondent on 25 February 2008 declined to hear the applicant in person.

[10] On 21 April 2008 the executive committee of the respondent met and discussed the applicant's application for registration as specialist. It noted that his first application for registration as a specialist in maxillofacial and oral surgery had been declined in 2003; that the respondent had already before responded that the application could not be considered in the absence of regulations prescribing for dental specialization and that he would be informed once the new regulation have been made. It further noted that Dr Itula had indicated that he will seek arbitration and instruct his lawyers accordingly. It noted that the respondent had also obtained a legal opinion. The committee resolved to reiterate the earlier resolution by the respondent that the applicant should wait for the new regulations before his application for registration as a specialist could be considered. It resolved that the earlier response given to Dr Itula is "still relevant". It further resolved that the respondent should expedite the publication of the new regulations and that it should then convene a meeting to consider Dr Itula's application.

[11] On 6 May 2008 the respondent met and noted the discussion of the executive committee on 21 April 2008. It resolved that Dr Itula should be informed to apply for registration of his additional qualifications. The respondent clearly decided to stand by its earlier decision regarding the application for registration as specialist. After the meeting the registrar on

12 May 2008 addressed a letter to the applicant, the relevant part of which reads as follows:

> "Kindly be advised that the Medical and Dental Council of Namibia has finalised the draft Regulations relating to qualifications that may be registered as specialities and additional qualifications for dental practitioners. In this regard, the Council at its meeting held on 06 May 2008 resolved that the draft Regulations should be forwarded to the Hon. Minister of Health and Social Services as a recommendation to enable the Hon. Minister to issue the Regulations under Section 59 of the Medical and Dental Act, 2004 (Act No. 10 of 2004).
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> The Council also reaffirmed its earlier decision, which was communicated to you accordingly, that you will be notified once the promulgation of the Regulations is completed and that it is only then that your application for registration as Specialist: Maxillofacial and Oral Surgery will be considered while, in the meantime, Council will not entertain enquiries on the above.
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> Furthermore, please be informed that the Ministry of Health and Social Services was recently advised by the Ministry of Justice that the Regulations relating to the registration of additional qualifications (R 2275 of December 1976) are still operational in Namibia. In this regard, Council at the same meeting resolved to consider your qualifications for recognition as additional qualifications, should you apply for such recognition. With the exception of your postgraduate diploma in Sedation and Pain Control, the Council noted that the records in your file shows that you had only applied for registration as a Specialist: Maxillofacial and Oral Surgery on the basis of the qualifications submitted and did not apply for the recognition of these qualifications as additional qualifications.
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> In view of the above, the Council resolved to approach you to indicate the qualifications you may wish to be considered for recognition as additional qualifications and submit an application accordingly."

[12] From these developments it is clear that the respondent, since the receipt of the Ministry of Justice's opinion, realised that at least as far as the registration of additional qualifications are concerned, there were regulations in place dating from 1976.

[13] The applicant does not say in so many words in his papers that he did or did not apply as invited by the respondent and there is no copy of such an application in the review record. He only states in passing in a different context that there is no advantage to him to have the additional qualifications registered if they do not lead to registration as a specialist. Nevertheless there are several references in the correspondence by the respondent's staff to applicant's subsequent application dated 14 May 2008 for the registration of his additional qualifications. There is also a letter by Mr Weyulu of the respondent's staff mentioning the fact that the applicant lodged a notice of appeal against the respondent's alleged refusal to register same while it had not yet considered the application. The respondent's papers point out that the application was not complete as it was not accompanied by the requisite application fee and that this was pointed out in correspondence to the applicant.

[14] it is common cause that on 30 May 2008 the applicant lodged three notices of appeal at the registrar's office: two were notices of appeal against the respondent's decisions about certain complaints he had made against other professional in the field; the third was against the respondent's decision on 6 May 2008 about the applicant's application for registration of additional qualifications and registration as specialist in maxillofacial and

oral surgery. However, the appeals never went ahead. There was no appeal body in place as required by the Act.

[15] Shortly after these events the long awaited new regulations were promulgated on 18 June 2008. The respondent then went ahead on 27 June 2008 to consider the applicant's application for registration as specialist. As his qualifications did not meet the new 4 year minimum requirement, his application was refused. His application to register his additional qualifications was not considered as it was incomplete despite the fact that he was earlier informed of this fact.

[16] On 20 June 2008 the registrar informed Dr Itula of the outcome of the meeting and again requested him to pay the prescribed application fee as his application was still incomplete.

[17] The next step was the launching of this application, in which the applicant seeks to have the decisions of 6 May and 27 June reviewed and set aside. The applicant launches his attack on several grounds. The first main ground is that the respondent erred in law by declining to exercise the jurisdiction it had to consider the applicant's application for registration as a specialist under the 1976 regulations. The other grounds cover a wide range including allegations of irrationality, arbitrariness, capriciousness, unreasonableness, procedural unfairness, unfair discrimination and bias. On the view I take of the matter, it is not necessary to deal with all these grounds. The gist of the matter lies in deciding whether the first ground holds any water. I therefore turn now to an overview of the various pieces of legislation which have a bearing on the matter.

[18] At the time during April 2001 when Dr Itula first applied to be registered as a specialist the applicable statute governing the dental profession was the Medical and Dental Professions Act, 1993 (Act 21 of 1993). The predecessor of this Act was the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974,) of South Africa. Under Act 56 of 1974 there was a joint governing body for the medical and dental professions called the South African Medical and Dental Council.

[19] By virtue of section 56(2) of Act 21 of 1993, certain regulations made under Act 56 of 1974 and regulating both the medical and the dental profession were deemed to have been made under Act 21 of 1993. One set of such regulations was made by the (South African) Minister of Health, on the recommendation of the South African Medical and Dental Council under (South African) Government Notice R. 2276 of 3 December 1976, namely "*Regulations relating to the registration of the specialities of medical practitioners and dentists, the requirements to be satisfied before their specialities can be registered, the circumstances in which any applicant for registration shall be exempted from such requirements and the conditions in respect of the practice of medical practitioners and dentists whose specialities have been registered.*"

[20] It is common cause that these were the regulations which governed the applicant's first application in 2001 for registration as a specialist and that these regulations continued to apply at least until 29 October 1999. It is the respondent's case that these regulations were repealed on that date,

while it is the applicant's case that they continued in existence until their repeal on 18 June 2008.

[21] Another set of regulations which were deemed to have been made under Act 21 of 1993 were *Regulations relating to the registration of additional qualifications* made under (South African) Government Notice R2275 of 3 December 1976. It is common cause that these regulations were repealed on 18 June 2008.

[22] Under section 2 of Act 21 of 1993 there was no longer a joint council for the medical and dental profession as was previously the case. Instead, there was a separate professional board for each, namely the Medical Board and the Dental Board. Each of these Boards was endowed with certain powers under Act 21 of 1993, but only with respect to the profession for which it was established. One such power was granted by section 18(1) of Act 21 of 1993, namely to make recommendations to the Minister to prescribe the qualifications which, when held singly or conjointly with any other qualification, shall entitle the holder thereof to registration as a medical practitioner or a dentist under the Act. Clearly each Board was authorised to act only within the sphere of the profession for which it was established. Another power was contained in section 50(1) of Act 21 of 1993, namely to make recommendations to the Minister to make regulations on a wide range of matters. Of relevance here is the powers under section 50(1)(j)(i)-(iv) to make regulations concerning the registration of specialities under section 24 of the Act.

[23] On 29 October 1999 the Namibian Minister of Health and Social Services made, on the recommendation of the Medical Board, certain regulations in two government notices. In Government Notice 237 certain regulations were made relating to qualifications entitling medical practitioners to registration. Regulation 3 of this Notice reads as follows: "The regulations published under Government Notice No. 2273 of 3 December 1976 are repealed." (Although the reference is to Government Notice "No. 2273", it is clear that the reference should have been to "No. R 2273"). On the face of it regulation 3 repealed regulations that dealt with medical practitioners as well as dentists. However, while other qualifications were prescribed for medical practitioners in place of the repealed qualifications, none were prescribed for dentists.

[24] Similarly, in Government Notice 238 new regulations were made relating to the registration of medical practitioners, specialities and medical interns. It is common cause that none of the regulations in this Notice deal with the dental profession. Moreover, regulation 24 of GN 238 repealed Government Notices R. 2271, 2272, 2274, and 2276 of 3 December 1976. For purposes of this judgment I shall deal only with the repeal of GN R. 2276. The effect of regulation 24, on the face of it, was that there were new regulations governing the registration of specialities in the medical profession, but no regulations governing the registration of specialities in the dental profession.

[25] It is respondent's case that initially its part-predecessor, the Dental Board of Namibia, unaware of the implications of the purported repeal of the

said regulations, continued to apply them after 29 October 1999, as is evidenced by the records of the Dental Board and its registers. Only after Act 21 of 1993 was repealed on 1 October 2004 by the Medical and Dental Act, 2004 (Act 10 of 2004), and the respondent was established as a new joint governing body for both professions, was it "realized" that there allegedly were no regulations prescribing qualifications for dentists or regulations for the registration of specialities in the dental profession. In this regard the respondent relies on the alleged repeal by regulation 24 in GN 237. After the opinion of the Ministry of Justice mentioned above in paras. [11] and [12] was received, the respondent changed its view on the existence of regulations relating to the registration of additional qualifications.

[26] The respondent proceeded to draft new regulations and these were promulgated in Government Notice No. 155 by the Minister of Health and Social Services on the recommendation of the respondent on 18 June 2008 as "*Regulations relating to registration of dentists; Qualifications that may be registered as specialities and additional qualifications; Maintaining of registers of dentists and restoration of name to register".* Of interest is that in paragraph (b) of the Notice the Minister repeals "the regulations made under Government Notices Nos. R2269, 2273, 2274, 2275, 2276, 2277 and 2278 of 3 December 1976, and No. R 1829 of 16 September 1977, insofar as they apply to dentists".

[27] Mr *Borgström* on behalf of the applicant submitted that the 1976 regulations under GN R. 2276 in so far as they related to dentists were not

in fact repealed in 1999, but continued to apply until 18 June 2008 by virtue of section 65(2) of Act 10 of 2004, which reads as follows:

> "(2) Unless otherwise provided in this Act, any notice, regulation, rule, authorisation or order issued, made or granted, or any removal from the register or appointment made, or any other act done, or regarded to have been so issued, made, granted or done in terms of a provision of any of the laws repealed by subsection (1), must be regarded as having been issued, made, granted or done in terms of the corresponding provision of this Act, and continues to have force and effect-
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> (a) unless it is inconsistent with this Act; or
>
> (b) until such time as it is set aside or repealed."

[28] Mr *Barnard* on behalf of the respondent, on the other hand, submitted that section 65(2)(b) finds application here, as the regulations were expressly and clearly already repealed in 1999. He submitted that the words used in the 1999 regulations were clear and unambiguous, their effect being that all the regulations, including those in GN R. 2267 that deal with dentists, were repealed. He submitted that the applicant's argument that the repeal of these regulations insofar as they relate to the dental profession amounted to an error cannot be entertained without the Minister being joined as a party. Furthermore, he submitted, even if the Minister had made a mistake, which the respondent does not admit is the case, the mistake cannot be corrected by means of interpretation.

[29] Counsel referred to the general rule that the words of a statute must be given their ordinary, grammatical meaning unless doing so would lead to an absurdity so glaring that it could never have been intended by the lawmaker, or where it would lead to a result contrary to the intention of the

lawmaker, as shown by the context or by such other considerations as the court is justified in taking into account. (In this regard he referred to *Summit Industrial Corporation v Jade Transporter* 1987 (2) SA 583 AD at 596G and *Engels v Allied Chemical Manufacturers (Pty) Ltd* 1992 NR 372 HC at 382F and further). He submitted that the mere fact that the 1999 regulations caused a repeal of regulations relating to dentists without providing alternative regulations does not lead to a glaring absurdity or a result contrary to the intention of the Minister.

[30] I do not agree with counsel's submissions in this regard. To my mind the context of the words used in regulation 24 cannot be divorced from the introductory words of the notice which clearly state that the Minister has *"under section 50(1) of the Medical and Dental Professions Act, 1993 ..... and on recommendation of the Medical Board, made the regulations set out in the Schedule."* The Minister is clearly of the intention to act lawfully in terms of section 50(1), which permits him only to make regulations on the recommendation of the relevant Board, which in turn can only make recommendations pertaining to the medical profession. To hold otherwise would mean that the Minister intended to unlawfully repeal the 1976 regulations insofar as they relate to dentists. Read properly in context the words in regulation 24 intended to convey and should be interpreted to mean that the 1976 regulations are repealed only insofar as they relate to the medical profession.

[31] In the alternative, it seems to me that Mr *Barnard's* submissions lose sight of the fact that any repeal of the 1976 regulations by the Minister

without the recommendation of the Dental Board at the time would have been *ultra vires* and of no effect. Clearly the Minister could only act on the recommendation of the Dental Board, which was not involved in the making of the 1999 regulations or the purported repeal. Furthermore, the purported recommendation by the Medical Board to the Minister to repeal the 1976 regulations in their totality and not just those relating to the medical profession would have been unlawful and invalid and therefore ineffective. There is a presumption that the lawmaker does not intend to make any ineffective provision (Steyn, *Die Uitleg van Wette* (4th ed) p124 a.f.). Furthermore, in the case of sub-ordinate legislation, such as regulations, the presumption finds application in that the Court, when interpreting a regulation has a duty to avoid, if possible, an interpretation which renders the provision lawful and valid, rather than giving it a meaning which renders it invalid (*R v Vayi* 1946 NPD 792; *R v Pretoria Timber Co. (Pty) Ltd* 1950 (3) SA 163 (A) 170). To the extent that it may be said that the words in regulation 24, by not expressly limiting the ambit of the repeal, creates ambiguity as to their extent and meaning and thereby cause uncertainty as to their applicability to dentists, they must be interpreted in a manner which would uphold their efficacy and validity.

[32] I therefore agree with the submissions made on behalf of the applicant that his application for registration of a speciality should have been considered under the 1976 regulations as these were still in force at the time, until they were repealed on 18 June 2008.

[33] It is common cause that the applicant's qualifications did not comply with the requirements set at the time in regulation 5 which reads as follows:

> "5. A dentist who desires to have his speciality entered into the register, and who was not practicing such speciality prior to the promulgation of these regulations, shall be required to hold a degree or diploma indicating to the satisfaction of the council a standard of professional education related to the speciality concerned higher than that prescribed for registration as a dentist, and to submit documentary proof to the council as follows:
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> (1) That he has held a registrable qualification for a period of at least five years; and
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> (2) that he has spent at least two of these years in general practice or in lieu thereof has obtained such other experience as the council may from time to time determine; and
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> (3) that he has spent either three years' full-time, or a longer part-time period covering the same prescribed course, in a recognised university, dental school, hospital or similar institution or department which provides satisfactory opportunity for the study of the particular speciality."

[34] As I understand it, the problem was that the applicant did not comply with the requirements of regulation 5(3) in that the study period for any of his qualifications relating to the speciality did not exceed two years full time. However, the applicant relies on the provisions contained in regulation 6 of GN R.2276 which state:

> "6. Notwithstanding anything to the contrary in these regulations contained, it shall be lawful for the council to register the speciality of the .... dentist who has substantially complied with the requirements of these regulations and who in the opinion of the council is competent to practice as a specialist."

[35] The applicant submits that the combination of his qualifications, competence and experience is sufficient for the respondent to conclude that he substantially complies with the requirements of the 1976 regulations. Ms Barlow has expressed the contrary view in her affidavits. In my view this is a decision which the respondent itself should make, properly and fairly taking all relevant aspects into consideration. The respondent, because it mistakenly held the view that it was not empowered to consider the application in the light of the 1976 regulations, has not yet applied its mind to this question.

[36] In his notice of motion the applicant prays that the respondent should be ordered to consider the application and "to recognize and register" him as a specialist in maxillofacial and oral surgery. During the hearing before me counsel for the applicant submitted that the Court had enough information before it to direct the respondent to register the applicant as such a specialist and requested the Court to do so. I do not think that the Court should accede to this request. It does not have the necessary expertise or information before it to take such a step. The process under regulation 6 entails an evaluation and review of the content of the various qualifications and the competence of the particular dentist which is best left to the respondent to undertake.

[37] As I understand it, Mr *Barnard* submitted that it would serve no purpose to refer the application back to the respondent, because the application is in any event incomplete. I do not find an indication in the papers that the application for registration as specialist is incomplete. This

application should therefore be considered by the respondent in the light of the 1976 regulations. It is only the application for registration of the additional qualifications that was incomplete as the applicant had not paid the prescribed fee. As far as this application is concerned, I do not think I need to make any order.

[38] The result is then that the application succeeds in the main, subject to some adjustments to the order prayed for. The following order is made:

1. The decision of the respondent taken on 6 May 2008 refusing to consider the applicant's application for registration as a specialist in maxillofacial and oral surgery is reviewed and set aside.

2. The decision of the respondent taken on 27 June 2008 refusing the applicant's application for registration as a specialist in maxillofacial and oral surgery is reviewed and set aside.

3. The respondent is ordered to consider the applicant's application for registration as a specialist in maxillofacial and oral surgery on the basis of the requirements of the regulations made under Government Notice R. 2276 of 3 December 1976.

4. The respondent shall pay the costs of the application.

VAN NIEKERK, J

Appearance for the parties

For the applicant: Adv D Borgström

Instr. by Conradie & Damaseb

For the respondent: Adv P Barnard

Instr. by Metcalfe Legal Practitioners