IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 21 / 27362

Thursday 24 June 2021

(1) REPORTABLE: YES [redacted]
(2) OF INTEREST TO OTHER JUDGES: YES [redacted]
(3) REVISED.

In the matter between:

DR HOOSAIN MAHOMED VAWDA Applicant

and

MEDICAL AND DENTAL PROFESSIONS BOARD First Respondent

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

Second Respondent

MINISTER OF HEALTH Third Respondent

J U D G M E N T (Urgent Court)

VICTOR J :

Introduction

[1] The applicant, Dr Hoosain Mahomed Vawda, seeks an urgent order from this Court to write his practical medical examination known as the OSCE examination (acronym for Objective Structural Clinical Examination) which is due to take place in four days' time on Monday 28 June 2021. He also seeks to set aside the Pathway policy which makes it compulsory for foreign trained medical health practitioners (doctors) after 24 June 2020 to do a further year of clinical training over and above their two year internship.

[2] The applicant, a South African citizen completed his medical degree at the Anna Medical College in Mauritius. When he tried to register for the OCSE examination, the respondents declined his registration for the examination.

[3] He complied substantially with the procedure for registration when he submitted his necessary documentation for registration as a health care practitioner (a doctor) in March 2020. There was the deadline for submission of his application documents for internship before 24 June 2020 deadline (the critical date). The deadline meant that the receipt of any applications for registration as a health care practitioner *after* that date would mean the extra year of clinical training known as the Pathway. The applicant only learned on 25 April 2021 when the respondents told him that he could not sit the OSCE examination in preparation for internship. At that date he was in the process of preparing and writing his theory examination which he passed.

[4] On 21 May 2021 his legal representatives requested reasons as to why the applicant could not write the OSCE examination whilst another student of his ilk from the same university was allowed to write the OSCE and not him. The issue of unequal treatment is an important issue in the review. On 22 June 2021 the respondents make it clear that those who filed all their documents before the 24 June 2020 did not have to follow the Pathway programme. Now there is also the suggestion that he did not submit a certificate of good standing from a regulatory body authority or authority, no internship duty certificate and no proof of work experience. This was an additional requirement which had never been enforced before. They also point out that the other

doctor who the applicant named as being in the same position as he, avoided the Pathway because he had apparently submitted his documents timeously, meaning before 24 June 2020.

[5] It was also common cause that the next meeting to consider the applicant's application by the Medical Education Training and Registration Committee METRC would be held on 3 July 2020 and thereafter the matter would be referred to the first respondent's meeting which would only be held on 20 September 2020. This was almost three months after the OSCE examination of 28 June 2021. Even if his application were to be approved in September 2021 it was unclear as to when he could sit for the OSCE examination in future, but he would have missed the 28 June 2020 slot to write the examination.

[6] He explains that he duly completed all the requirements for his degree and was awarded that degree. He submitted all the necessary documentation for registration in March 2020 save for his formal degree certificate which was not issued due to circumstances beyond his control. Because of the Covid pandemic, the convocation ceremony in Mauritius only took place in June 2020 instead of April 2020. He received the degree certificate on 27 June 2020 which he submitted to the respondents on 8 July 2020. This delay also affected him registering his degree with the Education Commission for Foreign Medical Graduates, known as the ECFMG. This is an internationally recognised verification body which authenticates and evaluates the qualifications of international medical graduates. The respondents accepted the ECFMG verification but for the reasons given was filed after 24 June 2020.

Urgency

[7] The applicant has explained in detail why this urgent application was only launched on 10 June 2021. The respondent's case is that the applicant's urgency is self-created. He should have known a long time ago that the decision was about the Pathway. That would have been as early as 19 and 24 June 2020 and not wait until 10

June 2021 to launch the urgent application. That date relates to the first decision.

8[] The applicant's response was that he did not know the pathway would apply to him until he received the correspondence on 25 April 2021 from the respondents. He submits it would be severely prejudicial if this Court did not hear the matter as one of urgency. There is no real dispute that the applicant heard about the new Pathway in the year 2020 but I accept that he had no idea it would apply to him prior to the receipt of the correspondence from the respondents.

[9] The respondents contend that he would have known about the application brought in the High Court in Pretoria by foreign qualified medical students. The applicant asserts that he did not know the details of the application in Pretoria by 96 foreign trained medical students until he received the first and second respondents answering affidavits. It was not something that was brought to his attention and did not know he would have to be part of that group. He had heard of other foreign students who had successfully approached the Court to obtain an order to write the OSCE examination. The effect of the new Pathway is significant in that it would mean that he would have to spend another year obtaining clinical experience. Now the respondents also raise a further barrier to writing the OSCE examination. He had to comply with Regulation 4(g) of Regulation 101 of the Act where a certificate of good standing is required from a foreign registering authority. It had never been necessary up to that point to lodge the latter certificate and a bar to writing the OSCE examination. The respondents put up every obstacle to prevent the applicant from writing the examination.

[10] After receipt of the letter of 25 April 2021 from the second respondent he took the necessary steps to launch the application by way of urgency. He took the following steps. He engaged his attorneys to assist him in the matter. He was studying for the theory portion of his examination which he wrote on 20 May 2021. On the next day his attorney wrote to the first respondent making a specific request that the applicant be allowed to write the OSCE examination. Alternatively, that comprehensive reasons be

provided why the applicant was bound by the new Pathway. On 26 May 2021, the first and second respondents responded, and their attitude was to the effect that the implementation of a new Pathway would be enforced, and that the applicant would not be allowed to write the examination. The applicant and his attorneys did not remain supine, they engaged in correspondence to avoid the urgent application. Correspondence was exchanged between the attorneys on 31 May, 3 June, and it then became evident by 6 June 2021, that the applicant would then have to approach the Court.

[11] Dr Motau on behalf of the respondents contends that the matter is not urgent and that in any event the urgency is self-created. Dr Motau states that other students who studied with the applicant launched the application in Pretoria and the applicant should have known he would not be excluded from the Pathway policy. Dr Motau states that even if the applicant knew for the first time that he would be excluded on 25 April 2021 he does not explain the 7 week delay in launching the application which he did on 10 June 2021.

[12] The respondents contend that the explanation given for the delay from 25 April until 20 May 2021 when his attorney wrote the first letter is a period of three weeks was also unacceptable. The applicant was in the midst of preparing for the theoretical examination and once he completed it, he sought legal advice. I accept the applicant's explanation that he was focused on writing his theoretical examination and this consumed him.

[13] The Pathway policy was adopted on 19 and 24 June 2020. These rules were of application to all foreign trained medical students, who wished to do internship and practise in medicine in South Africa. The applicant despite having filed his application in March 2020 was not invited to comment on the new policy. The applicant proceeded on a bona fide basis thinking that he would be entitled to register for internship, and it was only clear to him after 25 April 2021, that he would not be entitled to write the OSCE examination and would have to follow the Pathway policy.

[14] Urgency must be assessed within the context of the facts. The applicant has explained the delay from 25 April 2021 to his writing the theoretical examination. From the moment he approached his attorney immediately after his examination, the legal representatives did all they could to avoid an urgent application. Importantly the applicant had submitted his a substantial part of his documentation prior to the deadline of 24 June 2020. He had submitted his papers in March 2020 except for his original degree certificate and the international verification certificate from ECFMG which delay he explained above. In response to his assertion that he submitted his papers in March 2020, Dr Motau on behalf of the respondents in the answering affidavit merely noted it. Dr Motau does not dispute that date. Clearly if the date of submission was a source of genuine dispute, Dr Motau would not have dealt with it in the cursory way he did. He would have set out a detailed dispute with the details.

[15] There is also the question of the applicant submitting his authentication from the Education Commission for Foreign Medical Graduates, known as the ECFMG. During argument it was submitted on behalf of the respondents that he could not have submitted his ECFMG certificate in March 2020 if one has regard to the various correspondence. His degree certificate is dated 18 February 2020, but he only received the actual degree certificate on 27 June 2020. Upon receiving it, he sent it to the respondents and also immediately sent it to the ECFMG for certification and when it was approved he sent it to the second respondent on 8 July 2020. He attached the letter confirming the receipt, and of course, the acceptance of his certificates by the respondents. He never claimed to have filed the ECFMG certificate prior to 24 June 2020. This also adds credibility to his assertion that his documentation had already been submitted in March 2020 as it would be improbable that he would simply send an additional certificate without the application documentation if those had not already been filed with the respondents.

[16] It is clear therefore that the applicant submitted the necessary documentation timeously and to be time barred based on excessive formalism would result in a grave injustice. Had he received his degree certificate timeously in February 2020 he would

have sent it to the ECFMG and all his documentation would have been complete when he lodged in March 2020 or at the latest 24 June 2020. The domino effect of not receiving his degree certificate timeously due to the pandemic must give way to the formalism that all documents had to be filed by 24 June 2020 to avoid the Pathway procedure. The unavoidable delay in filing the degree certificate, the ECFMG certificate as well as the applicant's explanation has been adequately explained and is sufficient to justify the hearing of this application as one of urgency.

What is the Pathway Policy

[17] Prior to 24 June 2020 the admission to internship was in accordance with sections 25(1), (2) and (3) of the Act read with Regulation 2(1)(b) and 2(2)(b) of Regulation 101 of Act. A foreign trained medical student had to meet the requirement of an examination or evaluation which consisted of two components: the theory component which the applicant passed and a practical component which is the exam in question. Any application received for admission to internship **post** 24 June 2020 meant compulsory compliance with the new third requirement of 12 months of compulsory clinical training at a South African university. This clinical exposure was to be commenced once the theoretical examination had been successfully completed. Upon completion of the 12 months of clinical training the OSCE examination could then be taken. This is described as the first reviewable decision.

[18] The Pathway policy was for those candidates who could not meet the registration requirements as set out in Regulation 4 and the decision was then taken by the respondents on 19 and 24 June in terms of Regulation 101 to make the Pathway compulsory. The new proposed Pathway provides that:

> " 1. The Medical and Dental Board (MDB) considered the registration of South African citizens who hold qualification not prescribed for registration during the board meeting held on the 19th and 14th June 2020.

2. The MDB decided on a Pathway for registering such citizens who hold foreign qualifications and who are not registered as medical practitioners under a foreign registering authority and therefore not meeting all the requirements for registration in terms of regulation 4 of the regulations relating to the registration of persons who hold qualifications not prescribed for registration (Regulation (101). "[1]

Analysis of the statutory framework

First reviewable decision

[19] The essential difference between pre and post Pathway means that *pre* Pathway there was provision for an evaluation. Whilst post Pathway the further 12 months clinical training was required. The wording of section 25(1), (2) and (3) of the Health Professions Act (Act) read with Regulation 2(1)(b) and 2(2)(b) of Regulation 101 of the Act makes it clear that an evaluation is required. In terms of Section 25 and the Regulation it is clear that the first respondent may require a person who holds a foreign qualification as set out section 25(2):

> "... to pass to the satisfaction of the professional board, ... an *evaluation* contemplated in subsection (3) before persons appointed by the professional board, for the purpose of determining whether such person possesses adequate professional knowledge, skill and competence and whether he or she is proficient in any of the official languages of the Republic."

Here it is only an evaluation and not a further twelve months of clinical training.

[20] Section 25 (3) of the Act provides

> "The council may from time to time determine- (a) the *nature of the evaluation* which shall be conducted the purpose of subsection (2), the requirements for admission and any other matter relating to such *evaluation*, including the number of attempts... "

[1] Regulations relating to the registration of persons who hold qualifications not prescribed for registration. (foreign trained). This was promulgated in 2009.

[21] It is an evaluation process and not the imposition of a further compulsory period of clinical training. The second respondent may determine the nature of the evaluation. In terms of Regulation 2(1)(b) and 2(2)(b) of Regulation 101 of the Act the respondents may require a foreign qualified person to pass to the satisfaction of the first respondent an *examination or evaluation* in terms of section 25(2) of the Health Professions Act.

[22] Regulation 2 requires that the applicant:

> "2(a) shall, before registration, furnish the board with authoritative information on the education, training and duration of study required for that qualification and, if the board considers the standard of such education and training and the duration thereof to be satisfactory, the council may accept such qualification; and (b) may be required *to pass, to the satisfaction of the board, an examination or evaluation* in terms of section 25(2) of the Act in the profession for which he or she applies for registration."

[23] The new Pathway is not an evaluation before persons appointed by the first respondent or an examination or evaluation by the first respondent. The theory examination and the OSCE examination is such an evaluation or examination.

[24] The respondents submit that because s 15 and 15A of the Act provides that the Minister shall establish a Board and the objects of the Board shall in relevant part be to exercise authority in respect of all matters affecting *education and training* of person who wishes to practice in the health profession. Section 15A also enables the Board to recognise qualifications obtained whether in South Africa or elsewhere. Section 25 further empowers the Board to recognise qualifications prescribed for registration. It is clear that s25(1) then enables the Board to exercise its discretion to so recognise the qualification, but it is subject to any *regulations* and international protocols which the Minister may make. In this case the provisions of Regulation 4 could not be clearer.

[25] The respondents contend that this policy guideline has been in the making since April 2018 and at that stage was called the Pathway for registration of South African citizens who hold qualifications not prescribed for registration, to be registered as medical practitioner. The import of what the respondents are submitting is that there

was a lot of public knowledge about this Pathway requirement and the applicant should have known about it.

[26] According to the respondents the main purpose for adopting this policy guideline was to provide uniform standards for foreign trained medical students and to ensure that they have been sufficiently trained before they can provide medical services to the public.

Second reviewable decision

[27] The respondents also made a second decision which pertained to the applicant personally. From a series of correspondence from the respondents commencing 25 April 2021, 26 May 2021 and 3 June 2021 in response to the correspondence from the applicant's attorneys of 20 May 2021 and 31 May 2021, the respondents decided that the applicant would not be exempt from the new Pathway. This is a decision that pertains specifically to the applicant and not to the decision taken to implement the Pathway. The applicant submits that this constituted a second decision since it pertained to him as an individual and not just the general pathway policy decision. The respondents submit it is the same decision. In my view these are clearly two separate decisions.

[28] Conditions for admission to internship have been defined in regulation 57 of 23 January 2004. These have not been amended. The schedule provides for the registration as an intern in medicine in relevant part as follows:

> "(1) Any person who holds a qualification prescribed in the regulations made in terms of the Act shall, after or in connection with obtaining such a qualification and before he or she is entitled to registration as a medical practitioner in any category of such registration, undertake training to the satisfaction of the board as an intern in medicine for a period and in the manner described in regulation 3.
>
> (3) A person referred to in subregulation (1) shall - (a) submit his or her application to the board in terms of section 17 of the Act for registration as an intern in medicine on an application form supplied by the board and duly completed; (b) submit proof that he or she holds a qualification - (i) prescribed in the *Regulations* relating to the Registration of Persons as Geneml Practitioners and Family Physicians in Medicine made in terms of section 24 of the

Ad; or (ii) accepted by the board in terms of section 25 of the Act and *has passed an examination or other evaluation determined by the board*;

(4) Internship training commencing after 30 June 2006 shall be of not less than twenty four months' duration

(11) (a) Upon completion of internship training, an intern shall submit a duty certificate to the satisfaction of the board to certify that he or she has satisfactorily undertaken internship training as required by the board and such submission shall be a precondition for his or her registration as a medical practitioner to perform community service as prescribed in terms of section 24A of the Act. (b) The duty certificate referred to in paragraph (a) shall be issued by the head of an approved facility where an intern successfully undertook internship training, as the board may require."

[29] Subsection (3) of Regulation 57 also requires that an applicant *may be required to pass, to the satisfaction of the board, an examination or evaluation in terms of section 25(2) of the Act in the profession for which he or she applies for registration.* The regulations do not compel him to do a further twelve months clinical training. The Regulation pertaining to internship in subregulation has not been amended and only requires an evaluation or examination determined by the board.

[30] Section 25(1), (2) and (3) of the Act is really the empowering section for the registration of persons who hold qualifications not prescribed for registration. The Minister can, in consultation with council, require that any person who holds a qualification which the council may accept, be registered in terms of the process.

[31] In terms of Regulation 4(d) the original certificate of good standing which shall not be more than six months old, issued by the Foreign Registration Authority where the applicant is, or was registered. Obviously this cannot be achieved because the applicant was not registered as a doctor in Mauritius. He was a medical student and therefore he cannot produce a certificate of good standing as a practitioner in that country. It was argued on behalf of the applicant that in any event, he was applying to do the internship, so it would be impossible for him to produce such a certificate. The applicant did do clinical training in Mauritius, but did clinical practice during his studies. In addition, he is not seeking to avoid internship in South Africa.

[32] The applicant submits that there is no reason why he should undergo this further 12 months of clinical exposure as described by the Pathway. The applicant also contends that the decision to exclude him and to force him to undergo the Pathway route is unfair and procedurally irrational.

[33] In my view the omission of the degree certificate with his application papers submitted in March 2020, because of the COVID epidemic is a valid explanation and an explanation of substance. The respondents are being overly formalistic to disregard his application because his degree certificate was omitted for reasons beyond his control. The rationality of this decision will be considered later

[34] The respondent submits that if the applicant were to avoid the Pathway, going forward, he would be let loose on the public and that would constitute a risk. This is factually incorrect as once the applicant is enrolled for internship; he is under the direct supervision of the hospital and the university involved. So he is not "let loose" on the public. The further aspects relating to the Pathway are according to the respondents aimed at making sure that there is uniformity in relation to foreign trained students.

[35] Regulation 4(g) requires an original certificate of good standing, which shall not be more than six months old, issued by the foreign registration authority where the applicant is or was registered. The applicant did not have a such a certificate as he only studied in Mauritius, he did not register as a doctor there. This was a barrier to graduates like the applicant who studied abroad and could not be registered with any foreign authority at that stage of his career. The intention was also to ensure that these graduates will be properly qualified and well suited to practise medicine in South Africa.

[36] The Regulation makes no reference to a Pathway procedure. The applicant met the statutory requirements.[2] In addition, if he were to write the practical component, the OSCE examination, he would be entitled to move directly into the internship.

2

[37] The respondents should have known that he had an interest. That he would be affected by the decision to enforce the 12 months of clinical completion. After lodging his application in March 2020, the respondents must have known that he had an interest. In the result they should have given him an opportunity to be heard. Therefore, he has been treated differently from those whom the respondents accepted on the basis that they had submitted their documentation timeously.

Review of the new Pathway policy terms of PAJA.

[38] A copy of the record was attached to the answering affidavit. This is relevant to the first decision being the Pathway decision. It is the applicant's case that important relevant facts were not taken into account in the decision, and this was procedurally unfair resulting in an irrational decision.

[39] The applicant has set out the reason for the review comprehensively and they are repeated verbatim. The applicant asserts that no consideration was given to whether South African universities could actually provide clinical exposure to foreign trained medical students and the extent thereof. He speculates that there may have been two universities that could have offered possible clinical exposure, but they would have had insufficient capacity to allow for clinical exposure for all applicants for registration

[40] He also pointed out that the respondents ignored the extent to which any foreign trained medical students who had already submitted applications for registration and which applications were pending, already had clinical exposure. No consideration was given to the extent to which the applicant had clinical exposure; the position of foreign trained medical students whose applications for registration would be submitted and finalised prior to the new pathway compared to the position of foreign trained medical students whose application for registration would be submitted prior to the new pathway but completed thereafter with the formal degree certificate – especially foreign trained medical students from the same medical school, in the same classes and who had conducted the same course; any representations by foreign trained medical students who had already submitted applications for registration and whose applications were

pending, including the applicant; affording an opportunity to foreign trained medical students who had already submitted applications for registration and whose applications were pending, including the applicant, to make representations.

[41] The applicant also contends that the respondents failed to seek such representations from foreign trained medical students who had already completed their degrees in Mauritius; the foreign trained medical students were not notified in any manner of any impending decision to impose the new pathway; no grace period was considered for foreign trained medical students who had already submitted applications for registration and whose applications were pending, including the applicant to comply with any outstanding requirements for registration; the sudden introduction of a certificate of good standing in terms of 4(g) of Regulation 101 before doing the OSCE and a certificate of completed training 4(e) of Regulation 101 of the Act.

[42] Importantly at the time the decision was taken, by 28 September 2020 no South African university had any programmes in place to provide clinical exposure to foreign trained medical students. This much is clear from the minutes of a meeting of the first respondent held on 30 October 2020.

[43] In the correspondence from the respondents of 26 May 2021 and 3 June 2021, the respondents do not differentiate between foreign trained medical students whose applications for registration were submitted and finalised prior to the new pathway and foreign trained medical students whose application for registration were submitted prior to the new pathway but completed thereafter – especially foreign trained medical students from the same medical school, in the same classes and who had conducted the same course.

[44] The applicant also asserts that the respondents were aware that he was an individual that would be effected by the first decision and that for reasons beyond his control, he might not be in possession of his original degree certificate by the time that the first decision was made on 24 June 2020. The applicant contends that despite him and two other doctors whose applications for registration were submitted and finalised

prior to 24 June 2020, they did not have to follow the Pathway whilst he had to and was therefore treated differently to his prejudice.

[45] On the question of clinical exposure, the degree which the applicant completed, being a Bachelor of Medicine and Bachelor of Surgery at Anna Medical College, exposed him to extensive clinical practice during October 2015 to September 2016, October 2016 to October 2017 and October 2017 to September 2018. This appears from the "*Certificates of Clinical Postings*"[3] from the Anna Medical College.

[46] The respondents do not even attempt or apply their minds to the certificate of clinical exposure produced by the applicant. They do not even make a comparison between the clinical exposure of foreign trained medical students in general and of the applicant in particular, nor do they state it is inferior to that of South African university trained medical students.

[47] This demonstrates in my view the extent to which the first decision was procedurally unfair when relevant considerations were not taken into account. The fact that the applicant, being a foreign trained medical student who had already submitted an application for registration and whose application was pending, was not afforded an opportunity to make representations prior to the decision imposed by the new Pathway, The applicant is not comforted by the fact that when the decision is considered in September 2021, the situation may be rectified. He would have lost a year of his career.

[48] All the listed reasons referred to above also apply to the second decision where the applicant was affected personally. He points out that there is no dispute that certain foreign trained medical students who brought an application to review the decision by the respondents to impose the new Pathway were allowed to take the OSCE examination, but he was not. He also refers to those of his ilk who were allowed to write the OSCE examination without court action. He submits that this decision was arbitrary and capricious.

---

[3] FA, annexure "**FA12**", 001-71 to 001-74.

Analysis in terms of PAJA

[49] There seems to be no dispute by the respondents that the decisions were indeed administrative action. Section 1 of PAJA defines administrative action "as any decision taken, or any failure to take a decision which adversely affects the rights of any person, and which has a direct, external legal effect."

[50] In *Grey's Marine* Nugent JA described administrative action as conduct which affect legal rights.

> " Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so." "Administrative action is rather, in general terms, the conduct of the bureaucracy in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."[4]

[51] What cannot be disputed is that the necessary documentation for registration had been submitted, except of course, for the degree certificate and the ECGMG certificate. Based on substance over form, the respondents are being overly formalistic as the applicant could not have submitted these documents prior to the date when he did.

[52] The applicant relied on several grounds in terms of PAJA. I deal only with those that are relevant.

[53] The applicant relied on s 6(2)(f)(ii) of PAJA which provides that administrative action will be reviewable if it is not rationally connected to —

'(aa) the purpose for which it was taken;

(bb) *the purpose of the empowering provision;*

---

[4] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA)

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator'.

[54] The applicant also relied on s 6(2)(e) of PAJA which provides:

'(2) A court or tribunal has the power to judicially review an administrative action if —

...

(e) the action was taken —

(i) *for a reason not authorised by the empowering provision*;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) *arbitrarily or capriciously*.'

[55] An analysis of the record demonstrates that a considerable number of material and relevant considerations were not taken into account. It is also clear that some students who were in the same position as the applicant were treated differently thus resulting in an arbitrary approach. An analysis of s 25 and Regulation 2 shows that the decision to impose the Pathway was taken *for a reason not authorised by the empowering provision* (6(2)(2)(i) nor was it rationally connected to —(bb) the purpose of the empowering provision

[56] The long list of important considerations referred to that should have been considered were not and this then is fatal to the process in respect of which the Pathway decision was taken. The decision based on that flawed process is therefore irrational.

[57] As stated by Khampepe J in *Nersa*

"The relevant question for rationality is whether the means (including the process of making a decision) are linked to the purpose or ends. To my mind, rationality necessarily, whether found in PAJA or anywhere else, must include some evaluation of process. If not, then we are simply asking whether a decision is right or wrong based on post hoc reasoning.

[49] It is a natural and inescapable denouement that the process leading to a decision 'must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred'. As stated in Democratic Alliance:

'The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

Additionally, in Zuma, Navsa ADP stated that a rationality review also covers the process by which the decision is made. 25 There is no reason why rationality under PAJA should be given a different (more restrictive) meaning. It follows that rationality under PAJA includes an assessment of whether the means (including everything done in the process of taking the decision) links to the end. Problems found in the process used to reach a decision can be very useful evidence or illustrative of a faulty rational link. How far that evaluation of process goes depends on the facts of a particular case."[5]

[58] In my view there is sufficient evidence of the "missing links" being the failure to hear the applicant and consider the aspects set out in the long list of complaints about the process. In assessing this aspect, I find the absence of consideration shows that there is a faulty or missing link between the means and the ends. The facts in this case demonstrate "the faulty rational link" which led to the flawed and irrational decision.

[59] Khampepe J in referring to the matter of *Democratic Alliance* where the Court held:

"this [C] court held that it is an established principle of administrative law that a failure to consider a relevant material factor in the process of coming to an administrative decision can render the decision irrational. The entire process is tainted as irrational if the relevant factor

[5] *National Energy Regulator of South Africa and another v PG Group (Pty) Ltd and others 2020 (1)SA 450 (CC)*

that was not considered ought to be central to finding a rational or even reasonable final outcome." [6]

[60] Khampepe J in *Nersa* also stated that:

"Rationality is concerned with one question: do the means justify the ends? Democratic Alliance developed the test for rationality by explaining that an absence of a sufficient link can arise for procedural reasons. This is not a new or different type of irrationality, but rather a way of evincing a broken or missing link between the means and the ends. The means chosen by an administrator include everything done (or not done) in the process of making that decision."[7]

[61] In this case the respondents failed to consider the long list filled with critical aspects which should have been taken into account before imposing the Pathway. In addition, the imposition of the Pathway is in contravention of s25 and Regulation 2 as outlined above and was a central failure in that it constituted a policy not empowered by the provision. The unequal treatment of other applicants of his ilk also constitutes an arbitrary and capricious decision.

[62] The applicant based all his grounds of review on PAJA. He has certainly succeed on two of them. Both grounds although not the same, show that the first respondent did not act rationally in deciding to implement the Pathway prior to taking all the relevant procedural steps into account in relation to the first decision. The same applies to the second decision.

Delay in launching PAJA proceedings

[63] In this regard the main complaint is that the applicant has delayed excessively and is therefore not, is not permissible to place himself within the provisions of PAJA. The respondents submit that there is a delay of 295 days in launching this review application. That calculation is incorrect. If the decision was made on 24 June

---

[6] *Democratic Alliance v President of the Republic of South Africa and Other*s 2013 (1) SA 248 (CC) DA para 63

[7] Id at para 64

2020. To comply with the time periods in PAJA he should have launched the review of the first decision by 24 December 2020 and did not do so. He launched this application on 10 June 2021 which is a delay of just over five months.

[64] Section 7(1)(b) of PAJA requires that the proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date when that person concerned became aware of the action and the reasons for it have to be properly explained. The respondents submit that these reasons have not been properly explained. Importantly throughout this period the applicant did not think the Pathway applied to him.

[65] In *Gwetha* Mpathi P referred to a number of cases where the determination of the reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case and secondly can the delay be condoned. The latter aspect involves a value judgment. [8] The reason for the rule is "firstly the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions." [9]

[66] In *Wolgroeiers* the following considerations applied

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?[10]

---

[8] *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) see also *Associated Institutions Pension Fund* and Others v Van Zyl and Others 2005 (2) SA 302 (SCA); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41). *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2)
2006 (2) SA p607

[10] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 29-C-D

[67] In *Setsokosane* [11] it was held that an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion.

[68] The respondents contend that the delay exceeding 180 days is per se unreasonable and the reasons as given by the applicant are insufficient. I find the delay was not unreasonable and I accordingly grant condonation.

Remedy

[69] The imposition of the Pathway has important consequences for South Africans who have attended foreign medical schools. There is also a consequence for the public at large who obviously require medical doctors to have the proper skill before being allowed to practice. There is also a shortage of doctors in South Africa. There is also the interests of the respondents who want to exercise control over the education of future doctors who wish to practice in South Africa and in whose interests the respondents official purported to act. There is also the personal financial cost to South African students who went to study medicine abroad believing that after their training they would be required to do an internship now to be faced with the Pathway. It was spoken from 2018 without proper engagement with young South African doctors with foreign degrees and on the cusp of entering internship. There was no transition period and this has led to hardship for young South African who attended foreign universities.

[70] All those interests must be carefully weighed. The default remedy for declarations of invalidity of administrative action is usually to set aside the invalid action and remit it to the decision-maker for reconsideration. Obviously once a decision has been set aside, it ceases to have an effect and is treated as if it never existed.[12]

---

[11] Id at 86E - F

[12] Pikoli v President of Republic of South Africa and Others 2010 (1) SA 400 (GNP) at 408 – 409

[71] As stated in a number of cases it remains a discretionary remedy. In certain instances, setting-aside and non-remittal may be appropriate. This is a young doctor on the cusp of completing his training and to send him back to the respondents when he should write his examination in four days times is impractical and disruptive.

[72] In the case of *JFE Sapela,* Scott J reasoned that a "remittal would be impractical and disruptive and accordingly held that it would be in the interests of finality, pragmatism and practicality for the invalid action in that case not to be remitted." The facts in this case are in point not to remit the matter back.

[73] This approach was also adopted in *Millennium Waste Management.* [13] s8 8(1)(c)(ii)(aa) of PAJA empowers a court in proceedings for judicial review of administrative action, to substitute its own decision for that of the decision-maker in 'exceptional cases'.[14] A court in considering 'exceptional' circumstances must consider the effect on the applicant in these circumstance and the urgent circumstances in this case being the applicant's examination in four days' time. The effect of delay and consequential prejudice on him is considerable. On the other hand, there is no prejudice to them if I substitute their decision. At the time of imposing the Pathway they did not even have a proper system in place with the universities for clinical . No proper structured curriculum was in place for the clinical training. Universities can't be expected to improvise a programme of clinical training without proper planning. These are all exceptional circumstances. Once exceptional circumstances are established, the Court must still be satisfied that the substituting its decision would be just and equitable. In this regard the Constitutional Court held:

> 'Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable

[13] Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA)

[14] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC)

order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.'[15]

[74] I therefore find that these are exceptional circumstances and that it would be just and equitable to set aside the first decision to impose the Pathway and to set aside the second decision to refuse to allow the applicant to write the OSCE examination. The respondents need to change the relevant regulations including the reference in the Internship regulation and put proper processes in place if they wish to make such a dramatic change to the training of young doctors

Conclusion

[75] I have already found that the applicant submitted his application papers in March 2020, and I have found that he only knew by 25 April 2021 that the Pathway policy would apply to him. His explanation I find to be perfectly consistent with his explanation and also on the probabilities of the surrounding factual matrix. It would be incomprehensible for the applicant having studied all those years in Mauritius to simply sit back and not do anything if he thought that the Pathway policy applied to him. In my view there has been no delay beyond 180 days on the second decision but in relation to the first the delay is not excessive, and it is condoned. .

[76] It is clear to me that the first and second respondents should have been aware that the applicant would be adversely affected by the decisions. Therefore, they should have consulted with him when they realised that the degree certificate was not attached to his application and that there would be adverse consequence for the applicant.

[77] They should have, then, engaged with him at that point on the Pathway Policy. Then he would have taken the necessary steps at that point to deal with his legal situation.

---

[15] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC)

[78] In the result I granted the draft in which I set aside the Pathway and allowed the applicant to write his examination

M VICTOR
Judge of the High Court