

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 69302/2019

(1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO  
(3) REVISED. YES

DATE:

18/07/2022

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In the matter between:

**YANNICK MOUSSA LEYKA**

**Applicant**

**And**

**MINISTER OF HEALTH**

**First Respondent**

**DIRECTOR-GENERAL: NATIONAL**

**Second Respondent**

**DEPARTMENT OF HEALTH**

**HEALTH PROFESSIONS COUNCIL OF SOUTH**

**Third Respondent**

**AFRICA**

**MEDICAL AND DENTAL PROFESSIONAL BOARD**

**Fourth Respondent**

**THE REGISTRAR OF THE HEALTH PROFESSIONS**

**COUNCIL OF SOUTH AFRICA**

**Fifth Respondent**

**MEMBER OF THE EXECUTIVE COUNCIL,**

**GAUTENG DEPARTMENT OF HEALTH**

**Sixth Respondent**

HEAD OF DEPARTMENT,

GAUTENG DEPARTMENT OF HEALTH

Seventh Respondent

CHRIS HANI BARAGWANATH ACADEMIC HOSPITAL

Eighth Respondent

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## JUDGMENT

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**BAQWA J:**

### **Introduction**

- [1] It is a requirement set by the First Respondent (The Minister) that any person with a medical qualification as prescribed by the Health Professions Act is required to do a medical internship prior to being entitled to be registered as a medical practitioner.
- [2] An intern has to undergo a two-year medical internship at a training hospital or an accredited training facility and whilst the interns are funded, there are limited instances where unfunded internship/ is granted.
- [3] This application is about whether the Applicant is entitled to funded internship.

### **Factual Matrix**

- [4] The application was initially brought as an urgent application on 16 September 2019 when the Applicant sought an order reviewing and setting aside the “decision to refuse the Applicant’s 2018/2019 cycle of applications for placement as a medical intern lodged on 15 August 2018 and 23 May 2019 respectively.” An order was also sought for the Applicant to be placed in the

next available medical intern position, alternatively to ensure that the Applicant was placed during the first 2020 cycle of applications.

- [5] The application was struck from the urgent roll for lack of urgency.
- [6] Subsequently the Applicant had a change of mind and entered into a contractual arrangement with the Respondents to be placed in an unfunded medical intern post.
- [7] The Applicant subsequently amended the relief initially sought by him on 21 October 2020. He presently seeks to review and set aside the decision to offer him the unfunded internship. He further seeks an order that the Court substitute it with its own decision and grant him a funded medical internship post.
- [8] The Applicant also seeks an order that in the event that the Respondents oppose the application on the basis that there are no approved and funded health facilities available to accommodate the Applicant, that the Medical and Dental Professional Board (The Fourth Respondent) take the necessary urgent steps to either accredit further health facilities as may be required to accommodate the Applicant and other unplaced interns if necessary, alternatively to prescribe alternative equivalent training for the Applicant and other unplaced intern Applicants. Further, that the Respondents be directed to ensure that the required funding is provided to fund any further required accredited posts/equivalent training and directing the Minister, the Second Respondent (The Director General) and the Medical and Dental Professional Board to report to the Court on the plans that they have adopted to give effect to the order.



- [9] At the commencement of these proceedings, Counsel for the Applicant indicated that the Applicant will now confine the relief sought to the issue of the funded internship regarding Dr Leyka, the Applicant.
- [10] The Respondents oppose the application mainly on two grounds. The first is that the Respondents are not possessed with the financial resources to fund the Applicant's internship, nor to pay him a stipend. Further, the issue of placement of the Applicant as a medical intern was settled between the parties when the Applicant signed a contract accepting a contract for an unfunded internship.

### **The law**

#### **The Health Profession Act 56 of 1974**

- [11] The Health Professions Act (HPA) established the Health Professions Council of South Africa (HPCSA) and professional boards- for the purpose of controlling education, training, registration, and practising of health professionals registered under the HPA and to regulate related matters.
- [12] Medical practitioners and medical interns must be registered in terms of section 17(1) of the HPA.

#### **Regulations for the Registration and Training of Interns in Medicine (GN R57 OF 2004)**

- [13] The Regulations for the Registration and Training of Interns were published by the Minister in terms of section 61(1)(e)(i) and (ii) of the HPA and they provide that:
- 13.1 Any person who holds a prescribed qualification 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 prescribed period, unless the board exempted him or her partially or in full from such requirement on submission of documentary evidence to the satisfaction of the board of internship or equivalent training undergone or experience obtained outside South Africa.

- 13.2 Regulation 3(4) provides that internship training which commenced after June 30 2006 shall be for a period of not less than twenty-four months duration subject to leave and sick leave provided for.
- 13.3 The period of twenty-four months must be completed within a period of three years from the date of having been registered in terms section 17 of the HPA.
- 13.4 If an intern does not complete his or her internship within a period of three years, his or her registration in terms of section 18 of the HPA shall be cancelled unless he or she provides satisfactory reasons to the board for the registration not to be cancelled.
- 13.5 The training must be undertaken in a facility approved by the board. Where such facility is not available the board may accept alternative training which in its opinion is equivalent to training at a facility approved by the board.

#### **Refugees Act 130 OF 1998**

- [14] The Refugees Act defines an asylum seeker as a person who is seeking recognition as a refugee in South Africa. A refugee is defined as any person who has been granted asylum in terms of the Refugees Act.

[15] Section 27(b) of the Refugees Act provides:

*“A refugee –*

*(a) .....*

*(b) Enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa 1996, except those rights that only apply to citizens”.*

[16] Notably, refugees are entitled to seek employment whilst there are no stipulated corresponding rights in respect of asylum seekers.

[17] An asylum seeker must apply to be recognised as a refugee and once such recognition is granted, he or she becomes entitled to the rights specified in section 27 of the Refugees Act which include the right to seek employment.

[18] *Section 27A of the Refugees Act provides, inter alia, that an asylum seeker is entitled to the rights in the Constitution “in so far as these rights apply to an asylum seeker.”*

### **Applicable Policies**

[19] The Policy Guideline on the Requirements for Practice of Medical Professionals in South Africa (25 June 2018) is applicable to South African Citizens and Non-Citizens wishing to register as medical practitioners and as medical interns in South Africa.

[20] The Policy Guideline does not address the issue of asylum seekers with pending permit applications who are not refugees. Regarding Non-South African citizens, it provides for three categories, namely: Permanent resident, Refugee and Critical Skills Visa.



- [21] The Policy Guideline provides that for both permanent residents and refugees, posts for internship are not guaranteed and would be offered to Non-South African citizens within available resources once all South African Citizens have been accommodated. The Policy also provides for self-funded internship as a supernumerary.
- [22] *Clause 5.3 of the Guideline deals with Non-South African citizens who completed their medical degrees at South African universities and in clause 5.3.2 provides as follows: "The internship programme is not an automatic progression for Non-South Africans who have completed a medical degree at a South African university recognised to provide medical training and limitations apply".*
- [23] Clause 5.3.3 of the Guideline provides
- "Internship programme*
- a) Posts for internship are not guaranteed and will be offered to Non-South African citizens within available resources once all South African Citizens and permanent residents who studied at South African universities have been accommodated.*
  - b) In the event that there are HPCSA accredited posts for internship that are not funded and all South African citizens and permanent residents who studied at South African universities have been accommodated, applicants will be permitted to provide self-funding for the prescribed period for the internship programme as a supernumerary. Funding for the salary for the internship must be for the cost of the sponsor and formal confirmation of self-funding will be required prior to registration with HPCSA.*
  - c) Endorsement letters for critical skills work permitted for community service are not an automatic progression from internship as in some instances the intention of providing endorsement letters for internship is on the basis of*

*completing training requirements for registration in the Applicant's country of origin and not for the purposes of immigration to South Africa".*

### **Progressive Integrated Plan**

[24] When the matter first came before this Court on the urgent court roll on 29 November 2019 it was postponed to 13 December 2019 for the Second Respondent to provide the Applicant with their progressive integrated plan as to how the remaining unplaced asylum seekers, permanent residents and refugees who have studied and qualified in South African universities would be allocated to medical internship positions in South Africa for the year starting January 2020 and going forward. This plan would have to indicate whether the Applicant in this matter would be allocated a position in January 2020 or not.

[25] On 10 December 2019 the National Department of Health (NDOH) provided Applicant with the Progressive Integrated Plan (The Foreign Intern Policy) which was the result of litigation instituted by 49 refugees who took the Respondent to Court in 2018 demanding to be placed in medical internship posts.

[26] The plan provides for two types of medical internship posts which are

26.1 South African Government funded medical internship posts which are reserved for South African citizens and;

26.2 Self-funded medical internship posts which are reserved for non-South African citizens who are refugees and asylum seekers.

[27] Regarding the placement of asylum seekers, the plan records that:

*"Asylum seekers have not yet been granted permission to stay longer than a period of six months in South Africa. It is therefore imperative for an asylum seeker to first provide proof that they have been granted permission to be in*



*South Africa for a period of at least two years prior to being placed in a medical intern post. The NDOH will be able to process their applications as medical interns and place them in HPCSA accredited posts in health facilities only as self-funded medical interns for the two year- internship programme subject to availability of posts. This self-funding method is not limited to self-funding and includes sponsorship”.*

### **Right to Internship**

[28] The duty of Government to facilitate opportunities for graduates to comply with the requirements for registration arises out of section 27(1) of the Constitution in terms of which everyone has the right to have access to healthcare services.

[29] In furtherance of the section 27(1) duty, section 27(2) provides:

*“The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

[30] The duty provided for in section 27(2) is however not absolute. Although giving judgment within the context of everyone’s right to have access to housing, the Constitutional Court defined the parameters within which this has to happen in the case of ***Government of The RSA and Others v Grootboom and Others***<sup>1</sup>. The Court found that the State’s obligation is defined by three elements, namely:

30.1 To take reasonable legislative and other measures;

30.2 To achieve progressive realisation of the right;

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<sup>1</sup> 2001(1) SA 46 (CC) at 67H-I (Para 38).

30.3 To do so within available resources. Further clarity was provided by the Constitutional Court regarding the issue of 'available resources' in the matter of **Soobramoney v Minister of Health, Kwazulu-Natal**<sup>2</sup>

*"What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled".*

[31] As Yacoob J stated in Grootboom (supra) whilst the goal had to be obtained expeditiously and effectively, the availability of resources remains a key factor in determining what is reasonable. A balance has to be struck between the goal and the means.

[32] It is common cause that the Applicant is an asylum seeker whose status as a refugee has not been approved. It has been held that it is implicit in section 27 that an Applicant for asylum has none of the rights in section 27 until she or he is recognised as a refugee. **Minister of Home Affairs and Others v Watchenuka**<sup>3</sup>.

[33] It was further held in the Watchenuka case (para 29-34) (supra) that a person such as the Applicant has a right to work as an asylum seeker but he does not statutorily enjoy the right to choose his work, that is, to practice as a doctor.

[34] Whilst the NDOH does not prohibit asylum seekers being allocated internship, it is obliged to act in terms of the foreign interns policy document. The status

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<sup>2</sup> 1998(1) SA 765 (CC) para [11] by Chakalson P.

<sup>3</sup> 2004(4) SA 326 (SCA) at para [3].

of a department's policy was commented upon in **Kemp N. O. v Van Wyk**<sup>4</sup> as follows:

- “(1) *A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally there can be no objection to an official exercising a discretion in accordance with existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this court in **Brittey v Pope 1916 AD 150** and remain applicable today”*,

#### **Is the Practice of the Ndoh Discriminatory**

- [35] In this application the Applicant contends that policy based on prioritisation is a violation of section 9(1) of the Constitution (The equality right). In **Union of Refugee Women And Others v Director Private Security Industry Regulatory Authority And Others**<sup>5</sup> the Constitutional Court held that in relation to the security industry, differentiation between citizens and permanent residents on the one hand and other foreigners on the other, has a rational foundation and serves a legitimate governmental purpose.

- [36] The Applicant has not challenged the legality or rationality of the Policy Guideline and the Plan and those policies remain valid and the implementation thereof by the NDOH with regard to the registration of interns is lawful.

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<sup>4</sup> 2005(6) 519 (SCA).

<sup>5</sup> 2007(4) SA 395 (CC).



[37] The issue of discrimination was considered in **Union of Refugee Women case** (supra) para 46 and the Constitutional Court found that whilst there was discrimination the issue of whether such discrimination was fair had to be considered and that in doing so the following factors had to be taken into account: (para 46)

- (a) *Under The Constitution a foreigner who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.*
- (b) *The Constitution distinguishes between citizens and others as it confines the protection of the right to choose a vocation to citizens.*
- (c) *In the final certification case this Court rejected the argument that the confinement of the right of occupational choice to citizens failed to comply with the requirements that the Constitution accord this 'universally accepted fundamental right' to everyone. It held that the right of occupational choice could not be considered a universally accepted fundamental right. It also held that the European convention for the Protection of Human Rights and Fundamental Freedoms embodied no such to occupational choice nor does The International Covenant of Civil and Political Rights. The distinction between citizens and foreigners is recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies such as India, Ireland, Italy and Germany where the right to occupational choice is extended to citizens or is not guaranteed to all.*
- (d) *In Watchenuka, Nugent JA held that it is acceptable in international Law that every sovereign nation has the power to admit foreigners only in such cases and under such conditions as it may see fit to prescribe and held, that it is for that reason that*

*the right to choose a trade or occupation or profession is restricted to citizens by s22 of The Bill of Rights”.*

- [39] Rights established through the Constitution are not unlimited. The NDOH contends that what might appear to be discriminatory in their implementation of the Plan is fair in the circumstances. They rely on section 36 in The Bill of Rights which provides:

*“36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including*

*–*

- (a) The nature of the right;*
  - (b) The importance of the purpose of the limitation;*
  - (c) The nature and extent of the limitation;*
  - (d) The relation between the limitation and its purpose; and*
  - (e) Less restrictive means to achieve the purpose.*
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights”.*

- [40] Regarding the placement of refugees, the plan further records:

*“Due to limited resources, the refugees who studied in South African institutions of Higher Learning who wish to complete their medical internship in South Africa will have their applications processed as medical interns and be placed in HPCSA accredited posts in health facilities only as self-funded medical interns for the two-year internship programme. This self-funding method is not limited to self-funding and includes sponsorship”.*



[41] Regarding asylum seekers, the Plan records:

*“Asylum seekers have not yet been granted permission to stay longer than a period of six months in South Africa. It is therefore important for an asylum seeker to first provide proof that they have been granted permission to be in South Africa for a period of at least two years prior to being placed in a medical intern post. The NDOH will be able to process their applications as medical interns and place them in HPCSA accredited posts in health facilities only as self-funded medical interns for the two-year internship programme subject to availability of posts. This self-funding method is not limited to self-funding and includes sponsorships.”*

[42] The Plan also makes reference to the Policy Guideline which provides:

*“It is emphasised that due to limited resources, internship posts cannot be guaranteed and are offered to all applicants in accordance with the approved internship and community service guideline that provides prioritisation of medical intern posts to South African citizens in line with the Immigration Act 2002. This means that Non-South African citizens will be placed subject to available resources once all South African citizens and permanent residents who studied at South African Universities have been placed”.*

[43] Evidently, the Applicant, as an asylum seeker falls to be considered in the final category. This is what the policy provides and absent a challenge to the validity of the policy, it would be difficult to find fault with and set aside the decisions of the Respondents.

### **The Binding Contract**

[43] In his amended Notice of Motion the Applicant seeks an order for a funded internship only whereas in the original application he also sought to be placed on internship.



- [44] Subsequently he accepted an appointment which offered him a non-funded position subject to the condition “that he will not receive any remuneration while performing medical internship at Chris Hani Baragwanath Hospital” on 25 March 2020.
- [45] The Respondents contend that he is bound by the contract and that he failed to exercise the option of rejecting the offer and continue with the review application, The Respondents rely on the parol evidence rule that aside from claims for rectification of a contract, no evidence may be given to alter or amend the clear and unambiguous meaning of the contract. Put differently, the applicant had freely and voluntarily chosen the contractual option as opposed to the review option, he cannot thereafter cry foul and claim to have been treated unfairly, when the contract is enforced.

### **Financial Constraints**

- [47] Objectively viewed, the evidence shows that the resource constraints have been caused by firstly an exponential increase in the demand for medical internship posts and secondly by the lack of accredited facilities and lastly the lack of funding.
- [48] The situation is not getting better in that whilst the need is growing for internship posts on the one hand there is a coincidence of significant decreases in the NDOH funding year-on-year from National Treasury.
- [49] From the evidence presented by the Respondents it would appear that the budget cuts have impacted across the department, its operational needs and functionality. It has resulted even in a shortage of not only ordinary doctors but also of specialists. The doctors and specialists are needed in order to train the

interns and for the accreditation of more training facilities which also come at additional cost.

- [50] The significant budgetary challenges facing the NDOH are such that whilst alive to their statutory and constitutional obligations, they cannot adequately meet the demands regarding medical internships not only in regard to citizens but also to permanent residents, refugees and asylum seekers. This seems to be the prism within which to weigh the considerations regarding the present application. Granting the application would not only negate the purpose of the Integrated Plan but render it a nullity.

### **Judicial deference**

- [51] In ***International Trade Administration v Scaw SA***<sup>6</sup> Moseneke DCJ said:

*"[94] For example, not infrequently courts are invited by litigants to intervene in the domain of other branches of government. That was the situation in Doctors for Life. This was the case in which pregnancy-and abortion-related legislation was challenged on the ground that parliament had failed in its duty to facilitate public involvement. The purpose of the constitutional requirement is to facilitate participatory democracy. The court had the following to say about separation of powers:*

*"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institution by which power can be exercised". Courts must be conscious of the vital limits on judicial authority and the*

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<sup>6</sup> 2012 (4) SA 618 paras [94-95].



*Constitution's design to leave certain matters to other branches of government. They too must observe the Constitutional limits of their authority. This means that the judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution."*

*[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric".*

[52] The *dictum* quoted above essentially sets out the context in which the present application has to be weighed and considered in that is the decision of the NDOH is both policy-laden and polycentric.

[53] A similar view is expressed in the SCA case of **Logbro Properties CC v Bedderson NO and Others**<sup>7</sup> as follows:

*"... a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden and polycentric issue; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of defence is perfectly consistent with a refusal to tolerate corruption and maladministration".*

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<sup>7</sup> 2003 (2) SA 460 (SCA) para 21.



- [54] This view is further endorsed in **Minister of Environmental Affairs v Phambili Fisheries (Pty)Ltd**<sup>8</sup> where Schutz JA said

*“The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decisions, and thus obliterate the distinction between review and appeal”.*

- [55] O'Regan J, referring to the judgment of Schutz JA in **Phambili Fisheries (supra) in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**<sup>9</sup> said

*“46 ... Schutz JA continues to say that ‘(j)udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function’. I agree. The use of the word ‘deference’ may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of separation of powers itself.*

*[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of The Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. **A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to those considerations will depend upon the character of the decision itself, as well as on the identity of the decision maker.**”.* (my emphasis)

- [56] It is not in dispute that the Progressive Integrated Plan followed intensive internal discussions which include the Minister. The Plan served before The National Health Council established in terms of section 22 of the NHA which

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<sup>8</sup> 2003(6) SA 407 SCA paras [52-53].

<sup>9</sup> 2004(4) SA 490 (CC) at paras [46] and [48].

consists of the Minister, or his nominee, the Deputy Minister of Health, the relevant members of the Executive Councils, the Director-General, the Deputy Director-General and others. Evidently the formulation and the production of the Plan received the highest priority at the highest level of government.

[57] The Applicant's contention regarding the Respondents' decision is that it is neither policy-laden nor polycentric but just a question of available funding as he was already an intern. Nothing could be further from the truth. The progressive Integrated Plan negates the applicant's contention.

[58] To contextualise the issue it must be recalled that the Applicant had originally rejected the offer of an unfunded internship on 13 December 2019. He then approached Respondents on 19 December 2019 and requested the Respondents to revisit the unfunded internship offer. The placement of the Applicant into the unfunded post was a special arrangement between the Applicant and the Respondents. He was offered a post out of turn and as an accommodation. It was not an allocation in the ordinary course.

[59] The Applicant now seeks that the post be funded. This would not only be against the policy-laden decision of the Respondents in terms of the Plan but would have wide ranging implications of a polycentric nature regarding the administration of foreign medical interns in the country. The Applicant's case, if successful would set a precedent which could possibly compel the Respondents to allocate interns in excess of the available resources.

[60] This is a situation which was commented upon by Mogoeng CJ in ***City of Tshwane and Metropolitan Municipality v Afriforum and Another***<sup>10</sup> as follows:

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<sup>10</sup>. *City of Tshwane and Metropolitan Municipality v Afriforum and Another*.



*“Sight should never be lost of the fact that Courts are not meant or empowered to shoulder all the governance responsibilities of the South African State. They are co-equal partners with two other arms of State in the discharge of that constitutional mandate. Orders that have the effect of altogether derailing policy-laden and polycentric decisions on the other arms of the State should not be easily made. Comity among branches of Government requires extra vigilance, but obviously not undue self-censorship, against constitutionally – forbidden encroachments into the operational enclosure of the other arms. This is such a case”.*

[61] The NDOH is, to use a colloquial phrase, between a rock and a hard place. It faces immense demands not only in the sphere of delivery of health services as demanded in the Constitution but also in the specialised field of providing internships. The demand for placement for internships is growing whilst the budget is shrinking incrementally. They have to prioritise South African citizens whilst not abandoning their responsibilities towards permanent residents, refugees and asylum seekers.

[62] In these circumstances I find that the Plan provides the best options for all concerned and that the appropriate people to deal with the implementation of those options are the Respondents.

[63] Further, I find that such discrimination as may be occasioned by differentiation between citizens and foreigners is both rational and fair in terms of section 9(5) read with section 36 and 22 of the Constitution

## **COSTS**

[64] Even though the internship contract of the Applicant has expired, I take cognisance of the Applicant's stated financial circumstances and the nature of



the issues raised in this application and the fact that the Respondents do not seek costs.

[65] In light of the above I make the following order:

64.1 The application is dismissed.

64.2 No order as to costs.



**SELBY BAQWA**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

Date of hearing: 3-4 May 2022

Date of judgment: July 2022 (18/07/2022)

**Appearance**

On behalf of the Applicants

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