

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

***REPORTABLE***

**CASE NO: J507/03**

Date heard: 30 May 2003

Date delivered: 10 June 2003

In the matter between:

**JORGE PEREZ DONATO**

**APPLICANT**

and

**MEC for Health and Welfare**

**Limpopo Province**

**FIRST RESPONDENT**

**SENIOR GENERAL MANAGER  
LIMPOPO PROVINCE (DEPARTMENT  
OF HEALTH AND WELFARE)**

**SECOND RESPONDENT**

**THE MEDICAL SUPERINTENDENT**

**WARMBATHS HOSPITAL**

**THIRD RESPONDENT**

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**J U D G M E N T**

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**PILLAY D, J**

1. The employment of six Cuban doctors by the first respondent was terminated on the basis that their registration with the Health Professions Council of South Africa (“HPCSA”) had allegedly lapsed because they had opted out of a government-to-government agreement between Cuba and South Africa (“the agreement”).
  
2. This judgment is framed on the facts pertaining to this applicant. However, my reasons for confirming the interdict, which became unopposed on 30 May 2003, apply equally to the disputes of six other Cuban doctors as the material facts are substantially similar.
  
3. The applicant, a Cuban, was employed in 1996 as an obstetrician and gynaecologist at Warmbaths Hospital by Limpopo Province. He was registered accordingly with the HPCSA to practice as such until 21 August 1997. In a letter dated 10 September 1996 from the South African Medical and Dental Council, the predecessor of the HPCSA, his attention was drawn to the fact that his registration was in accordance with the agreement and section 26 of the Health Professions Act 56 of 1974 (“HPA”) and its regulations. Initially, the doctors were to remain in South Africa for three

years. This was changed in 1998 when President Fidel Castro announced that they could remain indefinitely. The applicant's registration was extended periodically.

4. The applicant married a South African on 3 January 2001. When he told Dr Davis of the Cuban Embassy of his intended marriage, the latter was disappointed.
5. In July 2001, the applicant was instructed to return to Cuba, purportedly because he was required there. He explained the personal difficulties this created for him to Dr Davis. His wife could not accompany him for, amongst other things, she had two children from a previous marriage. He nevertheless returned to Cuba only to discover that he was not needed there after all. He was released to return to South Africa on 9 June 2002.
6. Dr Davis does not offer any explanation for dispatching the applicant to Cuba. More specifically, he does not refute the allegation that the Cuban officials in South Africa were deceitful in doing so. He denies, however, that the Cuban doctors were being harassed because they married South Africans. But, in a letter dated 2 March 2003 from Dr Davis sent on a letterhead of the Department of Health, purportedly in his capacity its consultant, to the second respondent, Dr Nkadimeng, the Senior General

Manager in the Department of Health and Welfare: Limpopo Province, the former writes:

“We are very concern (sic) with this situation. We think that those that are married with South Africans should fulfill what is establish (sic) by the Medical Council. They should droop (sic) out of our program and be examined by the Council to obtain their registration, because the one they have is in behalf of the government to government agreement. In the case of those that are not married to South African citizens by no means they should obtain a permanent residence.”

7. In this application however, Dr Nkadimeng concedes that the agreement did not prohibit doctors under the scheme from marrying a South African citizen.
8. On his return from Cuba in June 2002 the applicant verified with the HPCSA that he was properly registered. His attorney confirmed this in a letter of 1 July 2002 and indicated that unless the HPCSA advised of any problems with the registration it would be assumed that it was in order. There was no response to this letter.
9. On 6 February 2003, the applicant and another Dr Hernandez who had also

married a South African, were informed by Dr Ricardo, the acting Medical Superintendent, that they were not to work at the hospital from that day onwards.

10. This communication was pursuant to a letter dated 5 February 2003 from Dr M Nkadimeng, which read as follows:

***“DR JORGE PEREZ DONATO OPTING OUT OF CUBA-SOUTH AFRICA AGREEMENT***

*It has come to the notice of this office that Dr Jorge Perez Donato has opted out of the Cuba-South Africa Agreement on the utilization of Cuban Medical Professionals. Opting out of the Agreement has implication has implications (sic) on relations between the Republic of Cuba and the Republic of South Africa.*

*The registration of Dr Jorge Perez Donato with the Health Profession Council of South Africa (HPCSA), is dependent on this Agreement. Accomodation provided is also as a result of the Agreement.*

*With Dr Jorge Perez Donato having opted out of the Agreement it follows that he/she can no longer be treated under the conditions of the said Agreement. This equally implies that the condition of his/her registration*

*with Health Professions Council of South Africa has also lapsed.*

*You are therefore instructed to bring to the attentions of Dr Jorge Perez Donato the new situation. Dr Jorge Perez Donato should therefore produce proof of registration with the Health Professions Council, under South African regulations within 48 hours of your presenting a copy of this letter to him/her, or alternatively vacate and leave the premises of your institution (both residential where applicable and work-place) within the same period of 48 hours.*

*In the case of the latter he/she will not be expected to set foot on the properties of Limpopo Province Department of Health and Welfare, unless as a patient. (sic)*

*You are expected to expedite this instruction and inform this office in writing as soon as the instruction is implemented.*

*You have up to the end of business today 5<sup>th</sup> February 2003 to implement the instruction, which implies that a final settlement is expected by the end of business on Friday 7<sup>th</sup> February 2003."*

11. Firstly, the tone of the letter is far from dispassionate. It manifests an

underlying hostility towards the applicant which is as unexpected of a public authority as it is unexplained. Secondly, the gist of this communication is that participation in the scheme under the agreement was a precondition for registration with the HPCSA. Termination of such participation would lead to the lapsing of the registration, which in turn would trigger the termination of the applicant's employment. Dr Nkadimeng did not in this letter claim any right to terminate the applicant's employment as a result of his alleged opting out of the agreement.

12. The applicant telefaxed his certificate of registration on 6 February 2003. His attorney wrote to Dr Nkadimeng on the same day requesting *inter alia* a copy of the agreement, ruling, resolution or regulation recording the alleged lapsing of the applicant's registration. She further pointed out that as Dr Nkadimeng was already in possession of the certificate of registration, his demand for the certificate did not make sense.
13. To this Dr Nkadimeng responded on 9 February 2003 that the information requested could have best been provided by her clients. Purportedly on the basis of the agreement, he refused to retract the letter of 5 February 2003.
14. These communications precipitated the launching of this urgent application for an interdict on 12 February 2003. An interim order was granted that

day, *inter alia* interdicting the respondents from preventing the applicant from performing his obligations under his contract of employment for as long as he is employed by the Department of Health and Welfare and is in possession of a certificate of registration issued by the HPCSA.

15. It is common cause that the employment of the Cuban doctors in South Africa is pursuant to the agreement. However, the applicant was not aware of its contents. Nor was he furnished a copy thereof, despite his requests. Eventually, his attorney obtained a copy from a news reporter.
  
16. In amplification of the second respondent's case set out in the letter of 5 February 2003, Dr Nkadimeng testified that the applicant's registration with the HPCSA was limited in terms of the following "additional express oral terms" of the agreement, which allegedly, were known to all the participants in the scheme:
  - The employment of the Cuban doctors only in the public service;
  - The HPCSA would "relax" some specification requirements applicable to those holding foreign qualifications so that the Cuban doctors had less demanding requirements for registration;
  - The registration was conditional upon the doctors participating under the terms of the agreement;
  - On termination of the agreement or if a doctor exited the scheme,



the registration would lapse immediately.

17. These terms differ from those enumerated in Dr Davis's affidavit. None of the respondents produced any documentation evidencing the alleged conditional registration.
18. Given the differences in the evidence as to what the terms were, the Cuban doctors could not have known precisely what the oral terms were. In fact, because they were not party to or given copies of the agreement, I doubt that they were aware at all before this application that there were "express oral terms" governing their contracts of employment and registration.
19. According to Dr Nkadimeng the applicant had "opted out" of the scheme by applying for residency. This was contrary to the scheme as the secondment of the Cuban doctors was temporary and premised on their return to Cuba on expiry of their contracts. Consequently, the registration lapsed, he maintained.
20. Dr Nkadimeng ascertained this from the HPCSA who advised *inter alia* per letter dated 11 February 2003, a day before this application was launched, that practitioners engaged in a government-to-government agreement are required to meet the conditions of such agreement. Furthermore, the

certificate of registration would become null and void with effect from the date of termination of the agreement.

21. As the applicant denied that his extended registration had anything to do with the agreement, his registration was null and void. So it was contended on behalf of the HPCSA.
22. Mr Boyce Mkhize, the registrar and Chief Executive Officer of the HPCSA, testified that the HPCSA registered Cuban doctors expressly on the basis that such registration was valid for as long as the doctors work under the terms of the agreement; if they exited the scheme the registration lapsed.
23. He further stated that the HPCSA confirmed the “immediate lapsing” of the registration by letters, copies of which he undertook to make available at the hearing. His affidavit was attested to on 1 March 2003.
24. These responses resulted in the joinder of the HPCSA as the fourth respondent.
25. In reply, the applicant produced two letters the first of which is dated 24 December 2002 but received by him on 3 March 2003, i.e. two days after Mr Mkhize deposed to his affidavit.

26. The applicant contends that the letter is not genuine. It was signed by one Venter on behalf of the registrar. In his reply on behalf of the HPCSA, Dr Becker makes no attempt to establish the authenticity of the letter or prove that it had been copied to the applicant. I am satisfied that letter was not sent to the applicant. It could also be an attempt by the respondents to create a paper trail to establish that the registration had expired on 14 December 2001 when the HPCSA apparently received a letter from the third respondent, the Senior Medical Superintendent of Warmbaths Hospital, advising that his employment under the agreement had been terminated.
27. Curiously, it was also at the request of the third respondent that the applicant's registration, which would have expired on 20 August 2002, was extended for a further year by letter dated 8 July 2002. On 30 October 2002 the Department of Health (per Mr S.C. Mokuba) requested the HPCSA to cancel his registration. This could have prompted the "December" letter as reference is made therein to it. But, as its authenticity was put in issue, the fourth respondent ought to have proved its authorship, date of creation and delivery.
28. What emerges from the foregoing discussion of the correspondence is the

utter confusion and contradiction about the employment and registration of the applicant amongst the respondents themselves.

29. The second letter, which he received at the same time as the first, is dated 28 February 2003. In this letter Mr Mkhize informed the applicant *inter alia* that the HPCSA had no option but to terminate his registration. He was invited to advise within three days whether the assertion that he had opted out of the agreement was correct. In the replying affidavit, Dr Becker explains that the purpose of this letter was to comply with due process before the HPCSA took a decision affecting the applicant's rights.
30. From this it became obvious that the registration could not have lapsed as due process had not been followed. This was the position even after the interim interdict was granted. Dr Nkadimeng's reason for terminating the applicant's employment accordingly fell away.
31. The termination of the applicant's employment in terms of the letter dated 5 February 2003 was therefore unlawful.
32. However, Dr Becker contends that it is well within the powers of the HPCSA to terminate the registration of the applicant because he was registered under a special dispensation which no longer exists.

33. The issue that now remains for determination is whether registration lapses if the applicant ceases to participate in the scheme.
34. Mr Mkhize maintained that the HPCSA acted in terms of section 25 read with section 3(e) and 4(f) of the HPA when registering the Cuban doctors. Dr Becker, also attesting on behalf of the HPCSA, denied that the Cuban doctors were employed in terms of section 25, but in terms of its general powers in terms of section 3 and 4 of the HPA. Elsewhere in his affidavit he alleges that section 26 read with regulations published by the Minister of Health in Government Notice R2274 of 3 December 1976 “enabled” medical practitioners with foreign qualifications to be employed in the public service. The applicant’s letter of appointment also refers to section 26 of the HPA.
35. That there is such contradiction amongst officials of the HPCSA themselves and about an elementary matter as the legal basis for the registration of the Cuban doctors is quite extraordinary. It smacks of a cover up.
36. Section 4 which falls under the chapter headed “Establishment, Objects, Functions and Powers” of the HPCSA, provides for the general powers of the HPCSA. Sub-section f thereof enables the HPCSA to  
“perform such other functions as may be *prescribed, and generally, do*

*all such things as the council deems necessary or expedient to achieve the objects of this Act*" (my underlining)

37. The function of the HPCSA to register persons is prescribed in terms of section 25(1) in the chapter headed "Training and Registration". Any person may be registered subject to any restrictions imposed by any regulations published in terms of subsection 4 thereof. In essence, if a person holds a qualification which the HPCSA accepts indicates a satisfactory standard of professional education, the HPCSA has a discretion to register such person.
  
38. The Regulations Relating to the Registration of Persons Qualified Outside South Africa as Interns, Medical Practitioners or Dentists published in Government Notice R1203 dated 28 November 2000 in terms of section 25 ought, as the title suggests, to be the law applicable to the terms of the registration of the Cuban doctors. Yet, I have not found any reference or reliance on it by any of the respondents.
  
39. Section 26 of the HPA, prior to its amendment by Act no 89 of 1997, (the "old section 26") provided *inter alia* under subsection 1 for the registration as medical practitioners of non South Africans who held a qualification prescribed in terms of section 25(2) (as it the was) for South Africans. Sub-

section 2 of the old section 26 authorises the imposition of restrictions relating to the initial period of registration, the areas in which the doctor may practice and to in respect of his professional activities.

40. The current section 26 enables the HPCSA to impose conditions relating to continuing education and training as prerequisites for continued registration.
41. Nothing in section 25, in the regulations published in terms of subsection 4 thereof or the old and current section 26 permit the HPCSA to register a person subject to :
  - conditions contained in “express oral terms”;
  - such “express oral terms” that are variously described by the respondents.
42. That the registration of the Cuban doctors could be subject to “express oral terms” lacks credibility. The register, and accordingly any certificate of registration issued in terms of it, are *prima facie* proof of the facts appearing thereon. (section 22 of the HPA) The “express oral terms” upon which the registration was allegedly conditional, would not be evident from the register of the certifications.

43. Furthermore, it is hardly likely that a bureaucracy such as the HPCSA would permit registration subject to conditions that are oral. It is equally unlikely that parties to a government to government agreement would not reduce to writing such important terms as the “express oral terms”, especially if they were expressly agreed and binding on third parties, namely the doctors, who were not party to the agreement.
44. The general tenor of the powers and functions of the HPCSA is to regulate the health professions. It must exercise its discretion independently and within the four corners of the statute creating it. In so far as they might exist, the alleged “express oral terms” of the employment of the applicant would be a political and contractual matter between the Cuban authorities, the first respondent and the Cuban doctors.
45. Whether the applicant ceases to participate in the scheme is not a factor to be considered when registering the applicant. It does not affect his qualifications or professional competence. His competence as a practitioner is not disputed. By alleging that the registration of the Cuban doctors was relaxed, the HPCSA can hardly be suggesting that it permitted less than competent persons to be registered and to serve the community.
46. The HPCSA must exercise its powers to achieve the objects of the HPA,



which includes assisting in the promotion of the health of the population of the Republic. (section 3(e)) It can hardly achieve this objective by terminating the registration of the applicant, amongst other Cuban doctors, and thereby prevent them from serving the public of Limpopo Province.

47. The respondents have been less than forthright and fair in their dealings with the applicant. Furthermore, this application could have been averted altogether or at the latest when the first, second and third respondents were preparing their answering affidavits. Instead, the HPCSA chose to make common cause with the first, second and third respondents. This case has been a shocking waste of public funds. Those responsible for the wastage should be investigated and brought to account.

48. For these reasons I confirmed the interdict with costs.

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PILLAY D, J  
10 June 2003

For Applicant : Adv Maurice Pillemer, SC  
For Respondent : Adv David Unterhalter, SC