**REPUBLIC OF NAMIBIA** Not Reportable

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-REV-2019/00233

In the matter between:

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| **SASKIA MATURELL ELIAS** | **APPLICANT** |

and

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| **ALLIED HEALTH PROFESSIONS COUNCIL OF NAMIBA** | **FIRST RESPONDENT** |
| **MINISTER OF HEALTH AND SOCIAL SERVICE** | **SECOND RESPONDENT** |
| **ATTORNEY-GENERAL** | **THIRD RESPONDENT** |
| **SPEAKER OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF NAMIBIA** | **FOURTH RESPONDENT** |

**Neutral citation:** *Elias v Allied Health Professions Council of Namibia* (HC-MD-CIV-MOT-REV-2019/00233) [2020] NAHCMD 337 (5 August 2020)

**Coram:** ANGULA DJP

**Heard**: **28 May 2020**

**Delivered**: **5 August 2020**

**Flynote:** Administrative Law – Review of administrative action on grounds that action was unfair and unreasonable – Exhaustion of internal remedies.

**Summary:** In this application the applicant sought orders *inter alia* reviewing and setting aside the decision of the Council for Allied Health Professions whereby her application for registration as a physiotherapist in Namibia was declined – The application was opposed by the Council, the Minister of Health and Social Services as well as the Attorney-General as respondents who all raised a point *in limine* that the Allied Health Professions Act 7 of 2004 provides the applicant with sufficient internal remedies which the applicant out to have exhausted before resorting to court for an administrative review.

*Held;* that the applicant ought to first have exhausted internal remedies before approaching the court.

The application was accordingly struck from the roll with costs.

## ORDER

1. The review application is struck from the roll.

2. The applicant is to pay the respondents' costs who opposed the application such costs, where applicable to include the costs of one instructed counsel and one instructing counsel.

3. The matter is removed from the roll and regarded finalized.

## JUDGMENT

ANGULA DJP:

Introduction

[1] This opposed application is a consequence of the applicant being aggrieved by the first respondent's decision to refuse her application to be registered as a physiotherapist in Namibia. The applicant is a Cuban national. She arrived in Namibia under a cooperation bilateral agreement between the governments of Cuba and Namibia. It would appear that after the co-operation agreement came to an end she remained in Namibia and sought to be registered as physiotherapist.

The parties

[2] The applicant is an adult female Cuban national with permanent residence in Namibia hereinafter referred to as 'the applicant'.

[3] The first respondent is the Allied Health Professions Council of Namibia, a juristic body established in terms of ss 3(1) and (2) of the Allied Health Professions Act 7 of 2004 ('the Act'), hereinafter referred to as 'the Council'.

[4] The second respondent is the Minister of Health and Social Services, appointed in terms of Article 32(3)(i)*(dd)* of the Constitution of the Republic of Namibia, cited in these proceedings in his capacity as such, hereinafter referred to as 'the Minister'.

[5] The third respondent is the Attorney-General, appointed in terms of Article 86 of the Constitution of the Republic of Namibia, cited in these proceedings in his capacity as such.

[6] The fourth respondent is the Speaker of the National Assembly, appointed in terms of Article 51 of the Constitution of the Republic of Namibia, cited in these proceedings in his capacity as such.

[7] The first, second and third respondents oppose the application. They will jointly be referred to as 'the respondents' unless the context clear requires otherwise. The fourth respondent did not file any papers.

Relief sought

[8] The applicant seeks the following orders in these proceedings.

> '1. Reviewing and correcting or setting aside the decision of the First Respondent taken on 24 January 2019 whereby the First Respondent refused to register the applicant as a Physiotherapist in terms of section 20 of the Allied Health Profession Act No. 7 of 2004 (hereinafter the Allied Health Professions Act).
>
> 2. Declaring that Regulation 2(2) 0f the Regulations published in Government Notice No. 228 by Government Gazette No. 4581 of 14 October 2010 as ultra vires the Allied Health Professionals Act, and hence unconstitutional and unlawful; and
>
> 3. Directing and ordering the First Respondent to register the Applicant as a Physiotherapist in Namibia.'

Background

[9] The applicant had been in the employment of the State working as a physiotherapist at the Katutura State Hospital and on referral, also at the Windhoek Central Hospital from 25 August 2011 to 14 June 2016. Prior to commencing her employment with the State, the applicant applied for and obtained authorization from the minister, in terms of ss 58(1), 58(2) and 58(2)*(c)*(i) of the Act, to work as physiotherapist in State hospitals. This authorization was granted in consultation with the council, in terms of s 58(4). The applicant's authorization was done in that manner because of the bilateral co-operation agreement mentioned earlier.

[10] During June 2016, the applicant lodged an application in terms of s 20(1) of the Act to be registered as a physiotherapist in Namibia. On 5 July 2017 application was declined and the council advised the applicant to supplement her application for reconsideration if she so desired. The applicant opted to amplify her application as advised by the council and thereafter submitted an amplified application to the council for its consideration. Thereafter on or about 24 January 2019, having considered the application, the council again declined the applicant's application. The council's reasons for the declining of the application appeared to be two-fold: firstly, that the applicant's qualification had not covered or she had not studied certain subjects as required by regulation 2(2); and secondly, that her 1000 hours of practical training also did not cover the area of 'orthopedic physiotherapy'.

Applicant's case

[11] The applicant asserts that the council's decision to refuse to register her as a physiotherapist in Namibia, was unfair and unreasonable and should thus be reviewed and corrected or set aside for the following reasons:

*Unfair or unreasonable administrative action:*

[12] In this regard the applicant alleges that the council failed to apply its mind when it made the decision not to register her. She alleges further that the council failed to take into account the fact that, prior to filing her application to be registered, she had received authorization from the minister in terms of s 58 to work as a physiotherapist in the Katutura State Hospital and on referral, in the Windhoek Central Hospital and had served in that capacity from 25 August 2011 to June 2016. The applicant argues that, when the minister authorised her to serve as physiotherapist in those hospitals in terms of s 58, he must have satisfied himself then already that she was satisfactorily qualified and endowed with the requisite standard of professional education. Furthermore, that her qualification had been certified by the South African Qualification Authority as comparable and equivalent to a Bachelor of Science in physiotherapy obtained in South Africa and this in itself accords with the prescribed qualification in terms of s 19 of the Act.

*Declaring regulations 2(2), 2(3) and 3 ultra-virus ss 19 and 55 (1)(d)(iv) of the Act and unconstitutional:*

[13] In support of this declarator sought, the applicant argues that when the minister made those regulations he improperly and impermissibly delegated his power to the council to approve institutions, education, tuition and training to be undertaken by any person who is a holder of a Baccalaureus Degree in Physiotherapy. The applicant points out that the Act vests the minister with these very powers, subject to recommendation by the council, which powers the minister has by regulations delegated to the very council which should make recommendations to him. It is for this reason that the applicant seeks an order that

the regulations be declared unconstitutional as they are inconsistent with the provisions of ss 19 and 55 of the Act.

The respondents' opposition

[14] The respondents raise two *points in limine*. First, that the applicant has failed to exhaust internal remedies before approaching this court as provided by ss 52 and 53 of the Act. Secondly, that the applicant had failed to satisfy the minimum requisite requirements of study as set out in the relevant regulations.

[15] As regards the first point, the respondents contend that the applicant has failed to make out a case as to why she opted to approach the court without first exhausting the internal remedies provided for by the Act. In this connection the respondents assert that the action by the applicant is impermissible as it undermines the autonomy of the administrative process.

[16] In respect of the second point the respondents point out that the applicant's application was evaluated twice at the instance of the council, by two separate panels of professionals whom both independently found that the applicant's qualification did not meet the requirements as stipulated by the regulations and as such does not warrant her to be registered as a physiotherapist in Namibia.

[17] The respondents point out further that s 58 upon which the applicant relies for her demand to be registered, provides that when certain conditions and requirements are met, a person may be authorized by the minister to practice in State hospitals only and for a specified time. During this period of service at State hospitals, such a person is subject to certain restrictions and conditions, including working under supervision. Persons so authorized are usually foreigners, employed pursuant to a bi-lateral agreement between the two States. The respondents further point out that the reason why s 58 was inserted in the Act, is to assist with shortages of health care workers in Namibian State hospitals. Furthermore, the considerations at play for authorization and registration are different. The respondents submit further that applicant's authorization by the minister in pursuit of satisfying the nation's obligations under the bi-lateral agreement, does not and cannot be said to

have evoked a legitimate expectation in the applicant's mind for her to be registered in terms of s 20 of the Act.

[18] The respondents point out further that the authorization granted in terms of s 58 of the Act is granted by the minister, and is for service only in State hospitals. On the other hand registration in terms of s 20 of the Act is however granted by the council. Furthermore that the purpose of s 20, is to protect, maintain and enhance the integrity and effectiveness of the profession. After a person has been registered in terms of s 20, he or she would be free to practise in State hospitals, private hospitals and may even if he or she so wishes open a private practice and practise independently.

[19] So much of the parties' respective cases.

[20] The applicant was represented by Mr Namandje. The first respondent was represented by Mr Coleman. The second and third respondents were represented by Ms Kahengombe. Counsel filed extensive and detailed heads of argument for which the court wish to express its appreciation.

Point *in limine*: Failure to exhaust internal remedies

[21] The respondents jointly raise the point *in limine* that the applicant has failed to exhaust internal remedies available to her. The first respondent in addition raised a second point *in limine* that the applicant failed to establish that she has met the minimum requirements relating to study and qualifications as required by regulations 2(2) and 3.

[22] In response to the point *in limine* raised the applicant states first with regard to the first point *in limine* that the mere fact that there are internal remedied available that does not oust the court's jurisdiction. This is because, so the argument goes, Article 80(2) of the Constitution vests this court with original jurisdiction to hear and adjudicate all civil disputes including the interpretation, implementation and upholding fundamental rights. The applicant submits that the point *in limine* is bad in law because she is seeking various orders including declarators. The applicant argues further that this court is the appropriate forum of convenience because it

avoid the situation where she would have partly challenged the first and second respondents' decisions on a piecemeal basis in two fora.

[23] As regards the point that the applicant has failed to prove that she have the minimum qualification requirements necessary for her to be registered as a physiotherapist, the applicant asserts that she possess the minimum qualifications; that she has been subjected to an assessment; and that she has worked for the State for a number of years attending to thousands of patients.

[24] I will proceed to consider the points *in limine* first the joint point relating to the alleged failure to exhaust internal remedies and thereafter, if necessary, the second point *in limine* raised by the first respondent. Should both points *in limine* fail, I will move to consider the merits. However in the event any of the points *in limine* is upheld, it goes without saying that that would be the end on the matter: there would be no need to consider the remaining point *in limine* or the merits.

Applicable law and analysis

[25] Section 52(1)*(a)* of the Act provides that -

'Any person who is aggrieved by - (i) a finding or a decision made; or (ii) a penalty imposed; or (iii) the refusal or failure to make a finding or a decision, by the Council or by the professional conduct committee, may appeal, in the prescribed form and manner, to the appeal committee against such a finding or a decision made, or such a penalty imposed or such a failure to make a finding or a decision.'

[26] Section 53, of the Act deals with appeals to the High Court. It provides as follows -

'(1) Any person who is aggrieved by any decision of the appeal committee in terms of section 52 may appeal to the High Court against such decision.

(2) A notice of appeal relating to an appeal in terms of subsection (1) must be lodged, in the prescribed form and manner, with the registrar of the High Court within a period of 30 days after the date upon which the decision appealed against was made.

(3) The High Court may allow, on good cause shown, an appeal to be lodged after the expiry of the period of 30 days specified in subsection (2).

(4) The Minister may prescribe the procedures relating to the conducting of an appeal to the High Court in terms of this section, including the form of the notice of appeal concerned and the manner in which such notice must be lodged.

(5) The High Court may -

(a) request the appeal committee in writing to furnish the High Court with such documents or particulars as it may require;
(b) refer the matter to the appeal committee for further consideration;
(c) allow or dismiss an appeal lodged in terms of this section;
(d) make an order reversing or amending the decision of the appeal committee appealed against, if it is of the opinion that such committee has not acted in accordance with this Act;
(e) make an order relating to the payment of costs; or
(f) make such other order as it may consider appropriate.'

[27] The question this court has to answer is, whether in terms of ss 52 and 53 of the Act, the applicant ought first to have exhausted internal remedies before approaching this court for the review of the council's decision. The doctrine of exhaustion of domestic remedies before approaching the court for relief is well established in our law. In this regard, the Supreme Court in Namibia *Competition Commission and Another v Wal-Mart Stores Incorporated*[1] endorsed the two stage approach at para 45 of the judgment in the following words:

'The first is the wording of the relevant statutory provision; and the second is whether the internal remedy would be stuffiest to afford practical relief in the circumstances.'

[28] Earlier in this judgment, I quoted the provisions s 52 of the Act. The wording of the section does not require an elaborated interpretation. It provides in clear and precise language a right of appeal to an aggrieved person, such as the applicant in the present matter, against 'a refusal' or 'a decision of the council' to an appeal committee. Section 12(3) of the Act prescribes the composition of the appeal committee as follows:

[1] 2012 (1) NR 69 (SC) at para 45.

'A retired Judge, or a retired magistrate, or a retired Senior Counsel, or a Senior Counsel, who will be the chairperson of the appeal committee; (ii) one or more members of the Council as the Council may determine; (iii) one person who is a member of any Professional Council established in Namibia by or in terms of any law relating to any health profession to which this Act does not apply; and (iv) one person who is not a registered person in terms of this Act or in terms of any law referred to in subparagraph (c) two co-opt registered persons practising the profession of the registered person who appealed to such committee against the decision or the finding made, or the penalty imposed, or the refusal or failure to make a decision, as the case may be, by the Council or by the professional conduct committee, to act as members of the appeal committee for the purpose of such appeal; (d) If the profession referred to in paragraph (c) does not have two registered members who may be co-opted as members of the appeal committee in terms of that paragraph, such committee must so co-opt two other persons who have, in the opinion of such committee, sufficient knowledge of the scope of practice, and sufficient experience in the practising, of such profession.'

[29] What is clear in this matter is that the applicant is aggrieved by the decision of the council as envisaged by s 52 of the Act. She ought to have appealed against the council's decision to the appeal committee. Mr Coleman correctly submitted in his written submissions, that the realm of health professionals is specialized and potentially complicated in particular the registration of health professionals should be treated with deference. It is a further well established approach that judiciary should not be allowed undermine statutory internal remedies provided by the legislature.

[30] This view is further fortified if regard is had to the provisions of 53 which specifically provides for appeals to this court where a person is aggrieved by the decision of the appeal committee. Furthermore, if regard is had to the composition of the appeal committee quoted in para 26 above, the powers of the appeal committee and the legislative intent respectively, it is clear that the appeal committee as the specialized body is best suited to hear a challenge against the decisions of the council whether a person who claims to be a qualified physiotherapist is indeed so qualified. This would place the court in a better position when considering the appeal against the decision of the appeal committee. The court would benefit from the reasoning of that specialized body by request *inter alia*, the record of the proceedings which served before the appeal committee.

[31] It is my considered view that this interpretation of the Act, not only accords with the legislative intent, but also affords the applicant an opportunity to have her grievance heard by a specialized body and only if she still was not satisfied with the decision of the appeal committee, than she may thereafter approach this court. A contrary interpretation would to my mind create absurd results and fly in the face of the legislative intent.

[32] It is correct that in some very exceptional cases a litigant may be allowed to bypass some internal remedies, but that will only happen where the legislature clearly intended that to be the case. I think it is fair to say that the present case fits hand in glove with the legislative intent namely where a person is aggrieved by the decision of the council he or she has been provided with internal remedies and must first exhaust those internal remedies before approaching this court. After all, in the end he or she will reach this court, through the path provided by the legislature, should he or she not be happy with the appeal committee's decision.

[33] For all those reasons this court finds that the point *in limine* succeeds. The applicant ought to have first exhausted her internal remedies. Accordingly, the application stands to be struck from the roll.

[34] In the result, I make the following order:

1. The review application is struck from the roll.

2. The applicant is to pay the respondents' costs who opposed the application such costs, where applicable to include the costs of one instructed counsel and one instructing counsel.

3. The matter is removed from the roll and regarded finalized.

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H Angula

Deputy-Judge President

APPEARANCES:

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|---|---|
| APPLICANT: | S NAMANDJE<br>Of Sisa Namandje & Co. Inc.,<br>Windhoek |
| FIRST RESPONDENT: | G B COLEMAN<br>Instructed by Kangueehi & Kavendjii Inc.,<br>Windhoek |
| SECOND, THIRD and<br>FOURTH RESPONDENTS: | S T M KAHENGOMBE<br>Of Office of the Government Attorney,<br>Windhoek |