



REPORTABLE

CASE NO: SA 29/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RIHUPIISA JUSTUS KANDANDO

Appellant

and

MEDICAL AND DENTAL COUNCIL OF NAMIBIA

First Respondent

MINISTER OF HEALTH AND SOCIAL SERVICES

Second Respondent

Coram: DAMASEB DCJ, MAINGA JA and FRANK AJA

Heard: 31 March 2020

Delivered: 07 May 2020

Summary: This appeal involves the interpretation of regulation 10(c) of the regulations, *inter alia*, relating to clinical biochemists made in terms of s 59 of the Medical and Dental Act 10 of 2004. Appellant holds the view that the use of the word 'may' in reg 10(c) allows him to examine and conduct tests on a patient who approaches him directly while the respondents maintain that appellant can only examine and conduct tests on a patient referred to him by a medical practitioner, as requested by that medical practitioner in the referral.

During October 2009, the secretariat of the first respondent (registrar and the assistant) and a legal consultant from the Ministry of Health and Social Services (MOHSS) had a consultative meeting with the appellant. At that meeting, they sought written views from the appellant what the scope of practice for clinical biochemists should entail. He could not provide his written view immediately as he had to travel. During his absence the first respondent came up with drafts. When appellant returned during March 2010 the drafts were made available to him and he was invited to another meeting where he made his views known.

Subsequent to that meeting, he received by email the revised regulations which were to be recommended to the Minister for his approval and signature and later to be gazetted into law. The revised regulations met appellant's approval.

Once the regulations were published on 16 June 2010, reg 10(c) was no longer couched in its original form, which appellant had sanctioned. Regulation 10(c) in its original form read:

'A specialist clinical biochemist may treat without a referral any person who approaches him or her directly for a consultation.'

The promulgated reg 10(c), the subject matter of this appeal reads:-

'A specialist clinical biochemist may examine and conduct tests on a patient referred to him or her by medical practitioner, as requested by that medical practitioner in the referral.'

After some serious consideration, he resolved that there was no difference between the enacted reg 10(c) and the draft reg 10(c) as the word 'may' was discretionary and not mandatory. In other words, he could still practice his profession as provided by the original or draft reg 10(c). Notwithstanding that resolve, he continued to engage the first respondent on the interpretation of reg 10(c), but first respondent remained fixed on the wording of reg 10(c).

On 5 July 2010, appellant wrote to the Minister seeking an amendment to reg 10(c). In that letter he made comparisons with other professions, where specialists are allowed to consult patients directly. The Minister declined the invitation and among other things stated that appellant's comparisons with other unrelated professions was farfetched and that before he signed the recommendations from the first respondent he had submitted the draft regulations to the Ministry's highest policy making body (PMDRC) for a thorough scrutiny and that the first respondent had prerogative powers to alter the recommendations. On 29 September 2010, appellant wrote to the Ombudsman's office to complain about the first respondent. After its own investigation, the Ombudsman's office informed the appellant that the first respondent made out a good case and closed their file. In the letter to the Ombudsman's office, the first respondent made it clear that it did not enter into an agreement with the first respondent to recommend everything he proposed on the scope of practice of clinical biochemists as appellant never dealt with the first respondent, but with its secretariat.

About 3 October 2017, appellant approached the High Court in terms of rule 76 of that court to review and seek an order declaring the interpretation of the first respondent on the scope of practice of specialist clinical biochemists as unlawful, irrational and invalid, alternatively declaring the process followed by the first respondent leading up to the enactment of reg 10(c), which altered the original reg 10(c), unlawful.

The respondents raised two preliminary points, namely unreasonable delay in instituting the review proceedings and the incompetent relief sought pertaining to the interpretation of the regulations.

On 3 May 2018, the High Court dismissed the application with costs on the first preliminary issue of unreasonable delay without dealing with the merits.

In the present case, appellant filed his notice of appeal out of time when it was filed on 6 June 2018. Rule 7(1) requires the notice of appeal to be filed within 21 days or such longer period as may be allowed on good cause shown after the

judgment or order appealed against has been pronounced. No condonation application for the non-compliance was filed. The record was filed just on time on 2 August 2018. But appellant failed to enter into good and sufficient security for the first respondent's costs of appeal before the record was lodged with the registrar as per rule 14(2) and failed to comply with rule 14 (3)(a) and (b). On 14 August 2018, the registrar wrote to appellant informing him that his appeal was deemed to have been withdrawn. Appellant deposited good and sufficient security after a year on 19 August 2019. No condonation application was filed, the application was filed 6 months later on 20 February 2020. No reasonable explanation for non-compliance was offered. Worse still, appellant omitted to seek reinstatement of the appeal.

The court reiterated the principles governing condonation applications and held that there was no reasonable explanation for non-compliance with rule 14. In fact, there was no appeal before court and condonation was not warranted.

Regarding the prospect of success, the court held that there were no prospects of success. The wording of reg 10(c) was clear and unambiguous, and it had to be given its literal or grammatical meaning, which is, appellant or any specialist clinical biochemist can only examine and conduct tests on a patient referred by a medical practitioner, as requested by that medical practitioner in the referral.

On the alternative argument, the court held that the process followed by the first respondent leading up to the enactment of reg 10(c) could not be faulted.

The court struck the appeal from the roll with costs.

APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and FRANK AJA concurring):

Introduction

[1] Appellant holds the view that regulation 10(c)¹ (*infra*) of the regulations, *inter alia*, relating to clinical biochemists made in terms of s 59 of the Medical and Dental Act 10 of 2004 allows him, or the use of the word 'may' in the regulation, allows him to examine and conduct tests on a patient who approaches him directly while the respondents are of the view that, appellant can only see a patient referred to him by a medical practitioner.

[2] Whether these divergent views are correct rests on the interpretation of reg 10(c) and it is the appeal before us.

[3] The background history of appellant's case is in this form:

On 18 October 2009, he had a consultative meeting with the Registrar, Assistant Registrar and a legal consultant from the Ministry of Health and Social Services (MOHSS). At that meeting, appellant was requested to make his views known in writing on what the scope of practice for clinical biochemists entailed.

[4] He was consulted, as at the time he was the only registered clinical biochemist and there were no regulations in place. He could not attend to the request as he had to leave for Canada on 15 November 2009 and only returned on 15 March 2010.

¹ Regulations relating to registration of Clinical Biochemists and Clinical Biochemists Interns, registration of specialities and additional qualifications, maintaining of registers of Clinical Biochemists and Clinical Biochemist Interns, and restoration of name to register: Medical and Dental Act, 2004. Government Notice (GN) No 126, Government Gazette (GG) No 4503 of 16 June 2010.

[5] While he was away, the first respondent came up with drafts, one of 1 February 2010 and another of 2 March 2010. When he arrived the drafts were made available to him and was invited to a meeting for a discussion of the said drafts between the appellant, Assistant Registrar (Mr C Weyulu) and Messrs L K Mafwila and J Burger of the first respondent. At that meeting, appellant made his suggestions on clinical biochemist's scope of practice known.

[6] Subsequent to that meeting, on 6 April 2010, he received by e-mail the revised regulations which he sanctioned. The regulations which he agreed with, were supposed to be recommended by the first respondent to the second respondent herein referred to as the Minister for his/her approval and signature and later to be gazetted into law.

[7] When it came to his attention that the Minister has appended his signature to the regulations and that they were at the Ministry of Justice for publication, he approached Mr Burger of the first respondent to make available the regulations, the first respondent had recommended to the Minister, alternatively to confirm the regulations were the ones agreed upon by the parties, but Mr Burger refused to enlighten him.

[8] At some point, he made a further enquiry at the first respondent and the MOHSS as to the status of the regulations. He was informed that the draft regulations were submitted to the Policy Management and Development Review Committee (PMDRC) of the MOHSS for scrutiny before further submission to the Minister.

[9] Once the regulations were published it turned out that reg 10(c) was not coached in the wording agreed upon with the appellant. The wording agreed upon was in this form:

‘A specialist clinical biochemist may treat without a referral, any person who approaches him or her directly for a consultation.’

[10] Regulation 10(c) reads as follows:

‘A specialist clinical biochemist may examine and conduct tests on a patient referred to him or her by medical practitioner, as requested by that medical practitioner in the referral.’

[11] After some serious considerations, appellant convinced himself that there was no difference between the agreed upon draft reg 10(c) and the enacted one of 16 June 2010, because the wording was discretionary and not mandatory or prohibitory by the use of the word ‘may’ contrary to what the first respondent in the letter addressed to the appellant contended for was the interpretation of reg 10(c).

[12] Despite that resolution, appellant continued to engage the first and second respondents on the interpretation of reg 10(c). He made an argument that reg 2(a)² of the regulations relating to the scope of practice of clinical biochemists

² Regulations relating to scope of practice of Clinical Biochemist: Medical and Dental Act, 2004. GN 124, GG 4503, 16 June 2010. Regulations 2(a) in full provides: Government Notice No 124, Government Gazette No 4503 of 16 June 2010. Regulation 2 (a) in full provides:

Scope of practice of clinical biochemist

2. For the purpose of the practising of his or her profession a clinical biochemist may perform the following acts relating to the development and application of biochemical principles, procedures and techniques involving human tissue or body fluids, or excretion in the case of an in vitro investigation, regarding the diagnosis and treatment of diseases and the monitoring of health –

under s 59 of the Medical and Dental Act, among other things provides that, 'consultation with the patient or other registered persons relating to the development and application of those biochemical principles, procedures and techniques. . .'. He further argues that first respondent ignores the provisions of reg 2(a) and conveniently relies on reg 10(c) and hold that he is only permitted to see patients referred to him by medical practitioners. Appellant further makes a comparison or relies on conditions that are applicable to all specialists under the Medical and Dental Act, namely a specialist medical practitioner³, a specialist psychologist⁴, a specialist pharmacist⁵, a specialist nurse or midwife or accoucheur⁶ and a specialist dentist⁷ to state that there is a commonality of conditions with his profession and yet the above mentioned specialists may directly see patients approaching them.

³ Regulation 9(4) of GG No 4455 of 2010 of 12 April 2010. Regulations relating to the registration of medical practitioners, qualifications that may be registered as specialists and additional qualifications, the maintaining of registers of medical practitioners and the restoration of name to the register: Medical and Dental Act, 2004. GN 71, GG 4454, 12 April 2010, regulation 9(4).

- (a) consultation with the patient or other registered persons relating to the development and application of those biochemical principles, procedures and techniques; and
- (b) the –
 - (i) interpretation, consultation and advising relating to the information obtained as a result of;
 - (ii) quality control relating to;
 - (iii) teaching, training and research relating to, the acts so performed.

⁴ Regulation 13(1)(b) of GG No 3795 of 22 February 2006. Regulations relating to the registration of psychologists, specialists and interns and to the restoration of a name to a register: Social work and Psychology Act, 2004 – GN 33, GG 3795, 22 February 2006, regulation 13(1)(b).

⁵ Regulation 14(4) of GG No 4000 of 27 February 2008. Regulations relating to the registration of pharmacists: qualifications registered as specialists and additional qualifications: registration as pharmacist intern: maintaining of registers and the restoration of a name to the register: Pharmacy Act, 2004. GN 51, GG 4000, 27 February 2008, regulation 14(4).

⁶ Regulation 7(5) of GG 4140 of 17 October 2008. Regulations relating to the registration of nurses, midwives and accoucheur specialists and additional qualifications: the listing of subject and courses; the maintaining of registers and the restoration of a name to a register: The Nursing Act, 2004. GN 250, GG 4140, 17 October 2008, regulation 7(5).

⁷ Regulation 8(4) of GG No 4068 of 18 June 2008. Regulations relating to registration of dentists: qualifications that may be registered as specialists and additional qualifications: maintain of registration of dentists and restoration of name to register: Medical and dental Act, 2004, GN 155, GG 4068, 18 June 2008, regulation 8(4).

[13] On 5 July 2010, appellant addressed a letter to the second respondent seeking an amendment to the regulations in question, particularly 10(c) as it was the only bone of contention. On 2 August 2010 the Minister responded and the relevant portions of his letter reads:

‘Despite the above provision of the Act, I was informed by the Council that as part of its administrative procedure and in appreciation of the principles of participatory democracy, the Council normally consults with persons from the profession for which regulations are to be recommended and it was in pursuance of the same procedure and principles that you were consulted.

Seeing that the responsibility to make recommendation to the Minister solely rests with the Council, it is common course that despite having consulted you, in the final analysis the Council has vested prerogative to decide what to include and not to include in the recommendation.

.....

Please be informed that the regulations recommended to me by the Council were thoroughly scrutinized and endorsed by my Ministry’s highest policy making body, the Policy Management, Development and Review Committee (PMDRC) before I signed them into law.

I was informed that the Health Professions Councils of Namibia and for the purpose of this response, particularly the Medical and Dental Council, have no **standard practice** applicable to all specialists across professions. Standard practice are (sic) normally driven by scope of practice and thereby profession specific. In this respect, comparing your profession to other unrelated professions would be farfetched.

The regulation in question is applicable to the profession of Clinical Biochemist. That being the case, I find it perplexing for you to claim that it was aimed at a particular individual. I could also not comprehend the basis of your conclusion that

the same regulation is impliedly limiting your fundamental rights and freedoms as enshrined in the Namibian Constitution.

I do not only perceive your attack on the regulations as unfounded but also extremely unfair especially in view of the fact that you have been relentlessly putting my Ministry and Council under pressure to come up with the same, but having done so, sadly we received no joy from yourself.

Seeing that these regulations were recently published, I urge you to allow time for their implementation and only then one may reasonably justify their negative impact if any. It also makes no economic sense to have them immediately amended and reprinted.

Yours sincerely,

Dr Richard Nchabi Kamwi, MP
Minister'

[14] On 29 September 2010, appellant approached the Office of the Ombudsman and laid a complaint against the first respondent. The Ombudsman's office did its own investigation by addressing a letter to the first respondent regarding the appellant's complaint. The registrar of the first respondent replied on 27 October 2010. Crucial in the first respondent's reply is the following:

'As it was indicated to you during our deliberation on the matter, allow us to reiterate the position the Council and in the process deal with some issues raised by Dr Kandando as reflected in your letter to the Council dated 13 October 2010.

1. It is not true that your client was part of the Council members who compiled a final draft of the regulations concerned as claimed by Dr Kandando simply because he was dealing exclusively with officials from the secretariat and never met with Council members.

2. It is also not true that there was an agreement of some sort with Dr Kandando in this respect as he was merely consulted for his input and not to enter into an agreement with him.
3. The Council is under no obligation to ensure that Dr Kandando agrees to contents of its final recommendations to the Minister.
4. It is not correct that Dr Kandando was not informed about the rationale as to what necessitated the inclusion of the regulation concerned. As we mentioned above, both the office of the Registrar and the Minister himself offered substantial explanations to him in this respect.
5. Dr Kandando's problem is neither that he was not consulted as he now claims, nor because he was not informed about the rationale as to what necessitated the inclusion of the regulation as he wants your office to believe, his actual problem is that **he wants to examine and or conduct tests on patients not referred to him by a medical practitioner** and this is where the Council differs with him for the following reasons:
 - (a) Clinical Biochemistry is a diagnostic and analytical field responsible for producing and interpreting results and biochemical analyses performed on blood and other body fluids **to help a** medical doctor in diagnosis and management of a disease.
 - (b) The work of a Clinical Biochemist is purely to analyze and interpret data relating to patient/client samples to **assist** with the investigation, diagnosis and treatment of diseases.
 - (c) Clinical Biochemist's findings **must** be reported to the requesting medical doctor who is **trained** and **duly registered** to initiate treatment plan should there be a need.
 - (d) A Clinical Biochemist is generally **not trained and expected by Council** to diagnose and initiate treatment plan for a patient in an event of abnormal result.
 - (e) The Council's mandate is to **protect the public** and it is for this very reason that Council **cannot** allow a Clinical Biochemist to do what he/she is not trained to do.
 - (f) The Regulation concerned was made to regulate the profession of Clinical Biochemistry and not aimed at disadvantaging Dr Kandando as a person.'

[15] On 10 January 2011, the Office of the Ombudsman wrote to appellant to say the first appellant made a good case and it closed its file on the issue.

[16] Despite the position of the respondents on reg 10(c) which they made so clear on 2 August 2011, appellant addressed a letter to the first respondent reiterating his understanding and interpretation of reg 10(c). This time he stated that in terms of s 17(2)(b) and (c)⁸ of the Medical and Dental Act, he was entitled and qualified to perform those central functions and that he derives that authority and mandate with patients directly or through referral by virtue of reg 2 above.

[17] On 20 September 2011, the first respondent in its reply refuted his interpretation of s 17(2)(b), (c) as permitting a clinical biochemist to consult with patients without being referred by a medical practitioner.

⁸ Section 17(2) provides-

(2) Unless otherwise provided in this Act and except in so far as it is authorised by the laws relating to the nursing profession, the pharmacy profession, the social work profession, the psychology profession, the allied and complementary health professions and the traditional healers, no person is entitled to practice for gain any profession, the practice of which mainly consists of –

- (a) the physical and mental examination of persons;
- (b) the diagnosis, treatment or prevention of physical defects, illnesses, diseases or deficiencies in persons;
- (c) the giving of advice in regard to the defects, illnesses, diseases or deficiencies referred to in paragraph (b);
- (d) the prescribing or providing of medicine or any artificial denture or other dental appliance in connection with the defects, illnesses, diseases or deficiencies, as the case may be, referred to in paragraph (b);
- (e) the prescribing, compounding or dispensing of a medicine for consumption by any human;
or
- (f) the rendering of pharmaceutical care,
unless that person is registered by the Council for such purpose.

[18] From the record, the communication of 20 September 2011 was the last such to the appellant and for a period of over six years appellant remained quiet on the issue.

[19] About 3 October 2017, he launched an application in the High Court, amended in January 2018, in terms of Rule 76⁹ of the Rules of that Court, claiming an order-

- '1. Declaring the interpretation of the Medical and Dental Council of Namibia on the scope of practice of Specialist Clinical Biochemist as unlawful, irrational and invalid;
2. *Alternatively* declaring that the process followed by the Medical and Dental Council of Namibia that resulted in the regulation which is interpreted is unlawful;
3. *Alternatively*, declaring that the process followed and which changed the original version of regulation 10(c) to a new one after the consultation between applicant and first respondent was concluded and ready for recommendation to the Minister is unlawful;
4. Ordering the respondents who oppose this application, jointly and severally to be liable to pay applicant's costs including the costs of two counsel; and

⁹ Rule 76 of the High Court Rules provides for review applications.

5. Ordering such further and/or alternative relief as this Honourable Court may deem meet.'

[20] Mr Chrispin Kabuna Mafwila, the Assistant Registrar at the first respondent, and the Acting Registrar at the time disposed to an affidavit. He narrates in brief how the regulations relating to clinical biochemists came into being. He then raises two preliminary issues, namely, unreasonable delay in instituting the review proceedings and the incompetent relief sought pertaining to the interpretation of the regulations.

[21] On the unreasonable delay, he states that appellant seeks to review a process some seven odd years later since the regulations were published in June 2010 and offers no reasonable explanations for the delay. He argues that the relief sought is brought way out of time and that the first respondent is bound to suffer prejudice.

[22] On the second preliminary issue he states that the first two prayers of the relief sought are for a declarator and that the first respondent did not provide any interpretation, the first respondent recommended draft regulations, to the second respondent, who in turn gazetted the said regulations.

[23] As for the rest of the appellant's case, first respondent denies the allegations and states that no constitutional rights had been infringed in the process of promulgating the regulations and submits that appellant made no case and the application should be dismissed with costs.

[24] On 3 May 2018, the High Court per Geier J, dismissed the application with costs on the first preliminary issue of unreasonable delay raised by the first respondent, the court holding that taking all the main steps appellant took before the launch of the application it emerges inescapably that the appellant failed to explain his inactivity for various lengthy periods in any satisfactory manner whatsoever. On the declaratory order, the court held the view that it was dependent on the survival of the review and that for the reason of the delay and the prejudice which would ensue to the respondents, the manner in which appellant had pleaded his case, it is not a proper case for the court to exercise its discretion in favour of the appellant.

[25] Appellant appeals against this order.

[26] Appellant failed to file his notice of appeal on time as required by rule 7(1) when it was filed on 6 June 2018. That rule requires notice of appeal to be filed with the registrar and the registrar of the court appealed from and a copy of the notice served on the respondent or his or her legal practitioner within 21 days or such longer period as may be allowed on good cause shown after the judgment or order appealed against . . . has been pronounced. No longer period more than 21 days was allowed, nor was there any request or application to that effect. No application for condonation was filed with the non-compliance. In my opinion, the appeal should not have been received when it was out of time without a condonation application.

[27] The record was filed just on time, when it was filed on 2 August 2018, but appellant failed to enter into good and sufficient security for the first respondent's costs of the appeal before the record was lodged with the registrar as is required by rule 14(2), failed to inform the registrar in writing whether he had entered into security in terms of the rule as per rule 14(3)(a), or had been released from the security obligation, either by virtue of a waiver by the respondent or released by the court appealed from as per rule 14(3)(b).

[28] What the appellant did though was that on 21 June 2018 he wrote to the legal representatives of first respondent seeking a waiver of costs which request was declined on 25 June 2018. He also, on 2 August 2018 together with the notice of appeal filed an application by notice with the registrar of this court stating that he had made an application to the court below to be released from the obligation of furnishing security and that the unopposed matter was set down for determination on 10 August 2018.

[29] None of the above efforts came close to complying with rule 14. In a letter dated 14 August 2018, the registrar of this court informed him that due to non-compliance with rule 14 his appeal was deemed to have been withdrawn. On 3 September 2018, he filed a condonation application admitting that he has done everything possible, including the efforts above, but had no luck and could not comply with rule 14. He mentioned without giving reasons that his appeal was in the public interest and had good prospects of success on appeal. That application was worth nothing as appellant was still non-compliant with the rule.

[30] On 19 August 2019, appellant deposited N\$50 000 for security and filed yet another condonation application six months later on 20 February 2020 for non-compliance with rule 14 and still insisted without giving reasons that his appeal had good prospects of success on appeal. He omitted to seek reinstatement of the appeal as it was deemed to have been withdrawn.

[31] In the 35 page heads of argument appellant does not, except for saying the condonation application should be condoned, address his non-compliance with rule 14. The heads of argument are directed at attacking the judgment of the court below or amplifying the 13 or 16 grounds of appeal he raised against the judgment of the court below. Appellant's argument in paragraphs 22 and 23 of his heads is that the court below abdicated its constitutional duty as is required by Article 80(2) of the Constitution of the Republic. He further contends that failure on the part of the court below to comply with its constitutional obligation is not only a violation of the constitution, but also infringement on the appellant's fundamental right of fair hearing as is provided by Article 12(1) of the Constitution. This attack is based on the fact that in the joint case management report, paragraph 6 thereof, it was agreed that the interpretation of reg 10(c) was a precedent condition before the ventilation of the review application and that since that arrangement was not altered by way of an order, it was assumed that the court would abide by that understanding. And further that when the court below considered the review application first, it was a misdirection and non-compliance with the pre-agreed arrangement.

[32] He further contends that the purpose of his application was primarily for the court to determine whether the interpretation of reg 10(c) by the first

respondent was correct, and if not, to declare the same unlawful, irrational and invalid - to have no legal force and effect. Alternatively, so went the argument, if the first respondent's interpretation was found to be correct, the court should review the process that led to the gazetting of the regulation and if found irregular and flawed, it should be set aside.

[33] The respondent argued that appellant failed to comply with rule 14 of this court and therefore there was no appeal before court and that the appeal should be struck from the roll. He refers to numerous similar cases of this court. Counsel for the first respondent points out that the factors, except for the PMDRC appellant alludes to as having contributed to the dispute are new issues raised on appeal, they were not raised in the court below. On the attack of the court below's judgment, having considered the review and not the main purpose of the application, respondent argued that the application was brought in terms of rule 76 of the court below which provides for review applications and that court was justified to decide on the point *in limine* raised by the respondents. On the issues of the prerogative powers of the Minister, referral of the draft regulations to the PMDRC, recommendations by the first respondent and legitimate expectations of the appellant, first respondent argued that the final decision in the promulgation of the regulations ended with the Minister. He could not have rubberstamped the recommendations of the first respondent, or the PMDRC usurping his powers, the referral to the PMDRC is an internal arrangement falling well within regular practice, a tool to assist in effective implementation of legislation by the Minister. Appellant was consulted and the final product of the draft regulations was that of

the Minister and not the first respondent and therefore the subjective expectations¹⁰ of the appellant do not give rise to legitimate expectations.

[34] On the interpretation of reg 10(c) in determining the intention of the legislature, first respondent argued that the first rule of interpretation of statutes is the literal rule, ie the language of the text and that in applying that rule to the wording of reg 10(c) there is no ambiguity in the regulation and the wording of the regulation means what it says and requires no other constructions. Counsel went on to say the distinction between the draft 10(c) and the promulgated one is so clear and appellant could not resolve that they bear the same meaning. On reg 2(a), counsel argued that it provides for or relates to the scope of practice of a clinical biochemist while reg 10(c) relates to conditions applicable to the practicing of a specialty.

[35] The principles governing condonation applications have been stated and restated and they require no repetition here. In short, the application for condonation must be lodged without delay and must provide a full, detailed and accurate explanation for it. The factors relevant to determine whether an application for condonation be granted, include – the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience

¹⁰ *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) paras 18 and 21, where it was held that subjective confusion or misinterpretation cannot give rise to a legitimate expectation.

of the court and the avoidance of unnecessary delay in the administration of justice.

[36] These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, where this court will not consider the prospects of success in determining the application, because the non-compliance with the rules has been glaring, flagrant and inexplicable.¹¹

[37] In this case there is no explanation offered for the non-compliance with rule 14(2) and (3), so is rule 7(1). Judgment of the court below was delivered on 3 May 2018 and the notice of appeal should have been filed within 21 days from the date of judgment, but the notice of appeal was only filed on 6 June 2018. Compliance with rule 14 should have been at the time the record was filed with the registrar of this court, which is 2 August 2018, but a deposit for security was only made on 15 August 2019 which is over 12 months from 2 August 2018. This matter should have been struck from the roll in the third term of this court in 2018 or at the latest in the first term of 2019. But it survived three terms before security was deposited in August 2019.

[38] No condonation application was filed at the time; the application was filed 6 months later, on 20 February 2020. The explanation for the non-compliance is that appellant had sought a waiver for security from the first respondent whose

¹¹ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at 639H-640A-B; *Balzer v Vries* 2015 (2) NR 547 (SC) at 351I-352F; *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190 para 5.

members' term of office had expired on 31 March 2018 and his request could not be attended to and he attaches a letter from the registrar of the first respondent dated 25 June 2018. No mention is made when the first respondent was constituted or when the amount of security was agreed upon. Appellant further states that when he could not get assistance from the respondent he applied to the court below to be relieved from the obligations of rule 14. He says the request was not granted on the basis that invoking rule 14(2)(a) is a prerequisite. What follows in paragraph 5 does not make sense to me. He says he disagreed with the interpretation of the court below in paragraph 4 of its judgment and sought leave to appeal, but that simultaneously he filled an application for condonation for non-compliance with rule 14 while he was awaiting the determination of the matter (I suppose the appeal against the refusal to be relieved from the obligation under 14(2)(b)).

[39] While his court battle was going on, the first respondent was properly constituted and the security discussions commenced and fixed by the registrar at the amount deposited.

[40] He states that he exhausted legal avenues at his disposal under the rules to prosecute his appeal, that the appeal is not vexatious and has good prospects of success, and that he has made out a case and seeks condonation for non-compliance with rule 14.

[41] As I have already stated, none of the efforts made by appellant come close to compliance with rule 14. Rule 14(2) is very clear; the good and sufficient

security for the first respondent's costs should have been entered into before the record was filed. The efforts undertaken after the record was filed or security satisfied after a year do not meet the dictates of rule 14 and do not amount to an explanation let alone reasonable explanation. The efforts are side issues and do not make an explanation. At the time the application was launched, appellant was gainfully employed at the School of Medicine as the head of pathology and perhaps was still running a side practice as he is a registered specialist clinical biochemist. Notwithstanding the removal of the word 'directly' from reg 10(c), he could practice on referrals required in reg 10(c). There is just no explanation why he could not comply with rule 14. Worse still for the appellant, there is no condonation application for non-compliance with rule 7(1). Even more worse appellant failed to apply to resurrect the appeal which had lapsed and deemed to have been withdrawn. In these instances as the first respondent correctly argued, there is no appeal before court, and condonation is not warranted.

[42] We have stated that in circumstances of flagrant transgressions of the rule, a court may not even consider the prospects of success when deciding a condonation application. But for the attack directed at the court below in its approach to appellant's application and his insistence in the interpretation of reg 10(c), it is appropriate that we consider prospects and briefly so.

[43] In my opinion, there are no prospects of success in appellant's appeal at all. Regulation 10(c) speaks for itself – there is nothing ambiguous in the regulation that requires the interpretation contended for by appellant. By any stretch of imagination I cannot fathom how appellant could resolve that the draft

reg 10(c) (*supra*) that he would have wanted to see as the end product and the one that was enacted to carry the same meaning. The draft version which was altered provided, 'A specialist clinical biochemist may treat without a referral, any person who approaches him or her directly for a consultation', while reg 10(c) the subject matter of this appeal, provides, 'may examine and conduct tests on, a patient referred to him or her by medical practitioner, as requested by that medical practitioner in the referral.'

[44] The words in the draft and enacted regulations carrying the distinction in the two are underlined below:-

'- draft 10(c) may treat without referral any person who approaches him/her directly for a consultation.

- enacted 10(c) may examine and conduct tests on a patient referred by medical practitioner as requested by that medical practitioner in the referral'.

[45] The distinction between the two is so obvious and an argument to the contrary is without merit. As the first respondent correctly argued, it does not require the wisdom of King Solomon in the Old Testament of the Bible to see the distinction. The literal interpretation (sometimes called the ordinary or dictionary meaning) is the paramount rule where words should be given their ordinary and grammatical or natural and ordinary meaning as the first step in the process of interpretation.¹² In other words, if the words of a statute are in themselves precise and unambiguous, then nothing more is necessary than to expound those words in

¹² GE Devenish: *Interpretation of Statutes*. (1996) p 26; *Mwadingi v Minister of Defense* 1990 NR 363 (HC) at 370C; *S v Zuma* 1995 (2) SA 642 (CC) para 18.

their natural and ordinary sense. Applying this principle to the wording of reg 10(c) it becomes abundantly clear that the framers of reg 10(c) intended a specialist clinical biochemist to consult and conduct tests on patients referred to him by a medical practitioner as requested by that medical practitioner in the referral.

[46] It was argued that the first respondent ignores reg 2 to rely on reg 10(c). Regulation 2 provides for the scope of practice of clinical biochemist while 10(c) provides for conditions applicable to the practicing of a specialty like the appellant. It is not appellant's case that because the words 'without referral' and 'directly' are no longer the content of the enacted 10(c) he can no longer perform all acts as contemplated in reg 2. His case is about the interpretation of reg 10(c).

[47] The word 'may' in reg 10(a) does not relate to the distinction between the directory tone in the word 'may' or the peremptory or mandatory tone of 'shall' or 'must'. Rather 'may' has become the style of legislative drafting unless the provision requires a mandatory tone. Take for example reg 10, it has five subsections and three of the five, are preceded by 'may' including 10(c). Regulation 10(a) and (b) are preceded by 'must'. The two were and should be couched in the command language, i.e. 'must confine his or her practice . . .', must report to the medical practitioner . . .'. The use of 'may' would have allowed a specialist clinical biochemist a discretion not to confine the practice to the specialty registered in his or her name and not report the result of the tests to the referral doctor. In 10(c) the word 'must' could not have been used, for the reason, that there are patients on moral grounds, for example (blood close relatives) the specialist may not examine or conduct tests on them, but to refer them to other specialists. The word 'must'

would have meant to examine and conduct tests on every patient referred even where morally or medically is impermissible. Therefore 'may' in 10(c) does not mean appellant could see patients directly, not even by any stretch of imagination.

[48] The comparisons appellant makes with other professions in para [12] above is well explained in the letters of the Minister and the first respondent in paras [13] and [14] above respectively and I find nothing to add to their explanations.

[49] It is argued in the alternative that if this court should find that the interpretation of reg 10(c) by the first respondent is correct, we should find that the process leading up to the enactment of reg 10(c) which altered the original draft 10(c) agreed upon with appellant is unlawful.

[50] The procedure adopted by the respondents to enact reg 10(c) cannot be faulted. The first respondent recommended to the Minister who eventually promulgated the regulations. The referral of the recommendations of the first respondent to the PMDRC or the Executive Committee (which should comprise of the Executive Director, the deputy and directors of the various departments in the Ministry) could only enhance the quality and correctness of the regulations before the Minister's signature and the attack on the process leading up to the enactment of the regulations is without merit. There is no evidence that the first respondent entered into an agreement with appellant to recommend everything appellant had suggested in the draft regulations. The first respondent had prerogative powers to alter and change the draft regulations as it deemed fit. That much is clear from the

Minister's letter to the appellant and in the first respondent's to the Ombudsman's office.

[51] Therefore the argument on prospects of success also fail.

[52] It is left to speak on costs. I have laboured this judgment with unnecessary references but for a lay-litigant it was necessary to address most of the issues he raised. I am not going to record arguments for and against costs. Suffice to say award of costs in favour of the first respondent is warranted.

Order

[53] In the result I make the following order.

The appeal is struck from the roll with costs.

MAINGA JA

I agree

DAMASEB DCJ

FRANK AJA

APPEARANCES:

Appellant:

In Person

First Respondent

K Kanguuehi

Kanguuehi & Kavendjii Inc., Windhoek

