C. of A. (CIV) No. 22 of 1989

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:

KELELLO MOJELA LEROTHOLI — Appellant

and

THE REGISTRAR OF THE MEDICAL, DENTAL AND PHARMACY COUNCIL OF LESOTHO — First Respondent

THE MEDICAL, DENTAL AND PHARMACY COUNCIL OF LESOTHO — Second Respondent

THE MINISTER OF HEALTH — Third Respondent

THE ATTORNEY GENERAL — Fourth Respondent

Held at Maseru

Coram:

Schutz, P
Aaron, JA
Ackermann, JA

JUDGMENT

Ackermann, JA

In essence this appeal is concerned with the right of appellant, who holds the degree of Doctor of Medicine (granted to him by the American University of the Caribbean on the 15th October 1988), to be registered as an intern on the register prescribed in s. 14(1)(c) of the Medical, Dental and Pharmacy Order, No 13 of 1970, as amended, ("the Order") for all medical practitioners undergoing training as interns in terms of s.16(1A) of the Order. The applicant caused an urgent

application to be launched in the High Court against the respondents in which a rule nisi was sought in the following terms:

"1. That a Rule Nisi be issued and returnable at the time and date to be fixed by this Honourable Court, calling upon the respondents to show cause why:

(a) First and Second respondents shall not be ordered to register the applicant as an intern at Queen Elizabeth II Hospital in accordance with the provisions of the Medical, Dental and Pharmacy Order of 1970 as amended, such registration taking effect from the date Applicant applied for registration;

(b) First and Second Respondents shall not be restrained from imposing illegal re-examination of Applicant as a condition for registration, by which First and Second Respondents are acting ultra vires;

(c) Third Respondent or any of his servants shall not be restrained from removing or in any way tampering with the Applicant in doing his practicals at Queen Elizabeth II Hospital as medical intern;

2. Directing the Respondents to pay the costs of this application jointly and severally, the one paying the other being absolved:

3. Granting the applicant such further and/or alternative relief.

4. That prayer 1 (a), (b) and (c) operate with immediate effect as an interim order pending the outcome of this application."

On the 27th September 1989 a rule a nisi was granted in terms of paragraphs 1,2 and 3 of the Notice of Motion, which rule was discharged by Molai, J on the 23rd October 1989.

The facts are not in dispute, the main issue being the construction of various provisions of the Order and the duties of the first two respondents in terms thereof.

S. 17 of the Order provides that:

> "The Minister may from time to time, after considering any recommendation of the Council, prescribe by regulation the degrees, diplomas or certificates granted after examination by a university medical school, dental school or pharmaceutical society or other examining authority, which, when held singly or conjointly with any other degree, diploma or certificate shall qualify the holder thereof for registration in the several registers under this order" (emphasis supplied).

In terms of s.17 of the Order regulations were duly promulgated by Legal Notice No. 3 of 1972, and amended from time to time thereafter (the "regulations") prescribing degrees, diplomas and certificates which would qualify such holder for registration. It is common cause that neither the degree held by appellant nor the university medical school which had granted it had been prescribed in the regulations. In clause 3 of Legal Notice No. 3 of 1972 the following provisions are set forth:

"(a) no person shall be so registered unless the degrees, diplomas or certificates held singly or conjointly by him show that he has passed qualifying examinations in medicine, surgery and midwifery; and

(b) such degrees, diplomas or certificates shall be recognised for registration only if the course of study in professional subjects covered a period of at least five academic years and, in addition, the last three years of professional study for admission to the examination for such degree, diploma or certificate were taken at a university or medical school in the country or state in which the degree, diploma or certificate was granted; and

(c) the holder of such a degree, diploma or certificate furnishes proof to the satisfaction of the Council that he has, before or in connection with or after the obtaining of the said degree, diploma or certificate, undergone training as an intern or training of a like nature for a total period of at least twelve months after obtaining any of the degrees, diplomas or certificates entitling him to registration as a medical practitioner in terms of these regulations, save that this proviso shall not apply to the holder of any such degree, diploma or certificate obtained prior to the 1st November, 1948; and

(d) if the holder of such degree, diploma or certificate is not a Lesotho citizen, he shall before registration furnish proof to the satisfaction of the Council that he is registered with the recognised registering authority of that country or state of which he is a national or in which the degree, diploma or certificate was granted, to practice his profession there by virtue of his qualifications."

Nowhere is it alleged by appellant that his medical degree complies with provisos (a) or (b) above.

Ss. 14(1) of the Order, as amended, provides that:

"The Council shall maintain in its office;

(a) a provisional register of all persons who have applied to be registered in terms of this section but who cannot be registered for the reason that their certificates or degrees or diplomas or other

certificates relating to their qualifications have not yet been approved by the Minister in terms of Section 17;

(b) a register of all medical practitioners, dental surgeons and pharmacists practising in Lesotho, and

(c) a register of all Medical practitioners undergoing training as interns in terms of Section 16 (1A)"

Ss. 14(4) states that

"There shall be entered into the provisional register, the names, addresses, qualifications, dates of application and any other particulars relating to the applicants"

Ss. 16(1) prescribes that

"Subject to subsection (1A) any person who wishes to be registered shall submit

(a) the certificate of his degree, diploma or other certificate on which he relies as a qualification for registration;

(b) such evidence of identity, of good character, reputation and of the authenticity and validity of a degree, diploma or certificate submitted, as Council may require"

Ss. 16(1A) provides that

"A person who wishes to be registered as an intern shall apply to the Registrar and shall be issued with a certificate set out in Part A of the Ninth Schedule"

On the 26th January 1989 appellant submitted an application for registration as an intern at Queen Elizabeth II government hospital.

On the 8th March 1989 first respondent addressed a letter to the appellant informing him that the "Pre-registration Examination" for March 1989 would be held on the 28th and 29th March 1989 at second respondent's office. The attitude of the first two respondents was that inasmuch as the university medical school which had granted appellant his degree had not been prescribed in the aforementioned regulations and because applicant could not be registered in the relevant registers without the university medical school being so prescribed, second respondent was obliged to evaluate the courses of the American University of the Caribbean in order for it to recommend to third respondent that this university be prescribed in the regulations. In order to make such recommendation the second respondent decided to evaluate the courses of the university in question by means of an examination of the appellant. Appellant declined to sit for such an examination. In a letter dated 26 April 1989 appellant adopted the attitude that such an examination

> "would be an inappropriate method to evaluate the courses offered by a Medical School, for which information may be obtained otherwise. It transgresses the functions of the Medical Superintendent and the Hospital Medical Supervisors whose role is to assess the capabilities of an intern during the prescribed period of fifteen months, which is not the role of the Medical Council"

The appellant makes the further point in this letter that he has also not been placed on the provisional register as provided for in ss. 14(1)(a) (wrongly referred to by appellant

as "Section 3(a)") of the Order. It must be remembered, however, that the relief sought be appellant in paragraph (a) of his Notice of Motion is not for registration on this provisional register but only for registration "as an intern."

In argument, however, the appellant under his prayer for alternative relief sought an order placing him on the provisional register but only if paragraph 1(a) of his Notice of Motion were granted and not otherwise.

Second respondent persisted in its attitude, however, and in a letter dated 24 August 1989 informed the appellant that

> "The Council can only register applicants who have graduated at gazetted institutions"

and that at a meeting on August 10, 1989 it had

> "unanimously agreed that since you received your training at an ungazetted institution you should sit a qualifying examination before registration".

The second respondent informed the appellant that the next such examination would be held on the 28th and 29th September, 1989.

The appellant declined to sit such an examination and instead launched the application which is the subject of the present appeal.

One of the main contentions advanced by appellant on the papers, and persisted in on appeal, is that first and second respondents misdirected themselves in claiming an arbitrary right to re-examine the appellant notwithstanding that these

respondents are not designated as the examining authority in terms of the law and that the relevant law does not provide for re-examining of the holder of a certificate for a medical degree. Appellant argues that the imposition of these examinations constitutes a gross misuse of power by a statutory body inasmuch as the extent of the authority of this body is circumscribed in the Order and may be altered only by the law-making organ of the state. In my view this argument misconceives the purpose and intent of the examinations which the first and second respondents invited the appellant to write.

The Minister may, in terms of s.17, only prescribe a university medical school "after considering any recommendation of the Council." The effect of the above qualification in the context of the other provisions to which I have referred is that the registrar, upon receipt of an application for registration, must, in the case of an applicant who relies on a degree granted by a university medical school not prescribed by the Minister in the regulations, register the applicant in the provisional register (the "provisional register") required by ss. 14(1)(a) of the order. The provisions of this ss. are mandatory, requiring that "The Council shall maintain in its office ... a provisional register of all persons" who fall in the above category of applicants, such applicants being hereinafter referred to as "provisional applicants". The provisions of ss. 14(4) are also mandatory stipulating that certain prescribed information concerning provisional applicant and their applications "shall be entered in the provisional register" by (inferentially) the registrar. Although the order is silent as to the next step in the application for

provisional registration it follows (by necessary implication) that the Council is then obliged to make the recommendation to the Minister referred to in s.17 in order that the Minister can decide whether or not to prescribe by regulation the university medical school degree relied upon by the provisional applicant.

The Council is clearly not empowered to prescribe examinations as an additional condition for registration. It is clear on the papers, however, that in calling on appellant to write such further examinations the second respondent was not purporting to lay down additional conditions of registration, but merely investigating the appellant's competence in order to make its recommendation to third respondent (the Minister). It has been argued that this is not an appropriate way of evaluating the quality of the university medical school degree in question. That may or may not be so. It is premature, however, to decide such a matter at the present stage of appellant's application for registration. The recommendation which the Council makes to the Minister is not an act which affects the appellant or his rights. It is merely an act imparting information and an opinion to the Minister. The Minister must still consider the recommendation and come to a decision concerning the recognition of appellant's medical degree. It is only the Minister's decision which can effect any rights or expectations of the applicant. The fact that second respondent may not be using the correct or most appropriate means to evaluate the standard or quality of appellant's degree is not a fact which grounds any action at this stage.

In second respondent's answering affidavit deposed to by its President, it is stated that

> "The only satisfactory method that Second Respondent, in line with the practice of most of the world, is aware of of assessing that standard, is to subject the holders of such degree to an examination considered fair for the holders of recognised degrees."

This averment is not challenged on the papers. For purposes of this appeal it would therefore be impermissible for this Court, whose members are lay persons as far as the science or practice of medicine is concerned, not to accept this statement. At the same time, however, it must be stated that it is difficult to understand how this can be the only satisfactory method for assessing the standard of the degree in question. There seem to be many other avenues which it would be appropriate to explore, for example whether the medical degree of the university in question is recognised by any other country and, if so, in which countries; who the members of the medical school faculty were and are and what their qualifications are; whether graduates of the university practice outside the country in which the university medical school in question is situate; what the standing of such graduates is in the eyes of the leaders of the international medical profession, and how the quality of the medical school is viewed by other medical councils in other countries. It must be borne in mind that the ultimate function of the Minister in terms of s.17 of the Order is to determine the quality of the medical degree conferred by this particular university medical school and not the competence of the applicant. One can conceive of a case where a graduate of this particular medical school receives further training at some other medical school without receiving any formal degree,

diploma or certificate from this other school. In any subsequent examination such graduate may perform exceptionally well, in which case it would be difficult, if not impossible to decide, whether such performance was due to the instruction at the first medical school. I refrain from any further comment because, as I have already indicated, this issue does not fall to be determined at this stage. I think it necessary and advisable to point out, however, that if, on a proper construction of the Order, the appellant is entitled to be registered as an intern in terms of ss. 14(12) (c) read with ss. 16(1A), such right may not be frustrated by the second respondent obliging the appellant to undergo any further examination, or indeed to comply with any further condition, before so registering him.

This clears the way for considering the crucial issue in the appeal, but before doing so it is necessary, in order to avoid possible confusion, to allude to the way in which the words "application" and "apply" are used in the Order and in this judgment. Ss. 14(1)(a) refers to "a provisional register of all persons who have applied to be registered in terms of this section but who cannot immediately be registered because ..." (emphasis added). Ss 16(1) requires that "subject to subsection (1A), any person who wishes to be registered shall submit" certain prescribed documents and evidence. Ss. 16(1A) stipulates that a person who wishes to be registered as an intern "shall apply to the registrar ...". On a proper construction the Order does not require different applications for registration on the ss. 14(1)(a) register (the "provisional register"), the ss. 14(1)(b) register (for present purposes the "register of medical practitioners") or the ss. 14(1)(c) register (the "internship register"). There

is no express provision for separate applications. The phrases I have emphasized above in the quotation from ss. 14(1)(a) refer to a general application directed at obtaining registration on the register for medical practitioners. The registration on the provisional and internship registers are but different stages (or a possible stage in the case of provisional registration) leading to the final goal of registration on the register for medical practitioners. The submission of certain documents and evidence required by ss. 16(1) relates to the very first stage of the application directed to the above final goal. Provisional registration requires no further application, documents or evidence. It takes place automatically in the circumstances detailed in ss. 14(1)(a) to which reference has already been made. Similarly internship requires no further application or documentation but follows on the initial application with its documentation and evidence.

The cardinal question to be decided in this appeal is whether the first and second respondents can be compelled to register the appellant's name in the internship register at a stage when the degree held by appellant has not yet been prescribed by the Minister.

Mr. Hlaoli, who appeared on behalf of the appellant, presented his argument on the following lines. The appellant was in possession of a medical degree granted to him by a university medical school. He has applied for registration in terms of s. 14(1). He cannot immediately be registered on the ss. 14(1)(b) register because the Minister has not yet prescribed the appellant's degree. Nevertheless he is thereby qualified to be registered on the provisional register. Ss. 14(1)(c)

refers to "all medical practitioners" who are undergoing internship training. "Medical practitioner" is defined in s.2 as "a person registered as such under this order". Appellant is entitled to provisional registration. Upon such registration (which the first and second are denying him) he will be a person registered under this order and therefore, in terms of the s. 2 definition a medical practitioner. Accordingly he is entitled as a medical practitioner to be registered as an intern in terms of ss. 14(1)(c), inasmuch as being a medical practitioner is the only prerequisite for such registration. Accordingly he will also be entitled to the certificate referred to in ss. 16(1A).

Mr. Sello, on behalf of the second respondent (there being no appearance for the other respondents) contended that the "medical practitioner" referred to in ss. 14(1)(c) and the person entitled to the issue of a 9th Schedule Part A certificate could only be a person in possession of a degree prescribed by the Minister in terms of s. 17, but who is precluded from registration as a medical practitioner in terms of ss. 14(1)(b) only because he had not yet obtained a certificate that he has completed his internship.

Inasmuch as the issues raised are not capable of obviously easy solution, depending as they do on the construction of various provisions of the Order and regulations, it is necessary to trace their history, to determine the present scheme of the Order and Regulations and, in the light thereof, to construe them in their present amended form. In embarking on this task it is necessary to keep in mind certain principles of statutory construction. One of these principles is that "no clause, sentence or word shall prove superfluous,

void or insignificant, if by any other construction they may all be made useful and pertinent." (Craies on Statute Law, 7th ed. p. 105 relying on R. v Berchet (1690) 1 Show. 108 and see also East London Ry. v. Whitechurch (1874) L.R.H.L. 81 at 91). Another relates to the avoidance of absurdity, which rule was succinctly expressed as follows by Finnemore, J. in Holmes v Bradfield R.D.C. (1949) 2KB 1 at 7:

> "The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things."

In Hatch v Koopoomal 1936 A.D. 190 at 209 Stratford, JA observed that:

> "... the degree of absurdity or repugnance is of importance as it bears upon the intention of the enactment under discussion. If, examining results, you find absurdity or repugnance of a kind, which, from a study of the enactment as a whole, you conclude the Legislature never could have intended, then you are entitled so to interpret the enactment as to remove the absurdity or repugnance and give effect to the intention of the Legislature."

Moreover in construing the provisions of the order as amended we must consider

> "1) what was the law before the measure was passed; 2) what was the mischief or defect for which the law had not provided; 3) what was the remedy the legislator had appointed; and 4) the reason for the remedy." (Hleka v Johannesburg City Council 1949 (1) SA 842 A at 852).

According to its long title the object of the Order, is inter alia "To provide for a Medical, Dental and Pharmacy Council." S.3 duly mandates the establishment of such a council and other sections provide for its composition, membership, operation, duties and other matters related thereto.

While provisions enacted for medical practitioners in the Order are in most, if not all, cases made simultaneously applicable to dental surgeons and pharmacists I shall only refer to the provisions insofar as they relate to medical practitioners.

In terms of ss. 14(1) the Council is mandated to maintain registers of all registered medical practitioners, dental surgeons and pharmacists practising in Lesotho. Ss. 14(2) provides for, but does not mandate, the establishment and maintenance of a register of paramedical personnel. The object of s.secs. 15(1) and 15(2) is to prohibit persons other than Lesotho residents from being registered as medical practitioners but in terms of ss 15(3) provision is made for the registration in a separate register, for such periods and on such conditions as the Council might determine, of medical practitioners entering Lesotho for employment, either in the capacity of a locum tenens or for a salary or for purposes of private practice. Save for this register, there was originally only one register for medical practitioners, namely that provided for in ss. 14(1), a register of "medical practitioners ... practising in Lesotho." When, however, "medical practitioner" was originally defined in s.2 as meaning "a person registered as such under this Order" the "as such" could not be construed as meaning only a medical practitioner registered on the ss 14(1) register, i.e. a medical practitioner registered as one "practising in Lesotho" but had of necessity also to include a medical practitioner registered in the ss. 15(3) register. If this were not so, the ss. 15(3) practitioner would fall foul of the penal provisions in s.24 which, inter alia, render it an offence for

any person not registered as a medical practitioner to practice for gain as a medical practitioner.

In the 1970 Order, as it stood prior to the 1988 amendment, no provision was made for the registration of medical (or any other) interns, nor indeed for the institution of medical (or any other) internship.

In terms of ss. 16(1) before its amendment every person who wished to be registered (in any of the registers) had to apply in writing to the registrar and had to submit the certificate of his degree, diploma or other certificate on which he relied as a qualification for registration and, in addition, such evidence of identity, of good character, reputation and of the authenticity and validity, of the degree, diploma, or certificate submitted as the Council required.

In terms of ss. 16(3), (which was not amended) if the Registrar is not satisfied as to the documents or facts submitted he has to submit them to the Council for decision. In terms of ss. 16(5), (also unamended) if the Registrar is satisfied (and by necessary implication if the Council is satisfied in the event of a ss. 16(3) submission to the Council) the Registrar is obliged, upon payment by the applicant of the prescribed registration fee, to

> "register the applicant and issue to him a certificate that he is registered in the register applicable to him."

In terms of clause 2 of the Order as it stood in 1970 "register" was defined as meaning

> "when used as a noun, a register kept in accordance with the provisions of this Order, and when used in relation to any class or member of any class of persons in respect of which a register is kept, means the register kept for that class, and when used as a verb means to enter in such register; and the words "registered," "registrable", "registration" and all other words formed with or derived from the word "register" shall have a corresponding meaning".

I refer to the former definition of "register" at this stage in order to point out that, even in 1970, the definition was ambiguous when applied to other provisions of the Order and could not in all respect be taken strictly literally. Whereas the phrase "class or member of any class of persons in respect of which a register is kept" in the context clearly relates to the three different professions dealt with in the Order and the different registers kept for each profession, the singular use of the word "register" in the phrases "a register" and "the register" cannot be taken literally, because the Order unambiguously provided, at that time, for two registers in respect of each class, namely the ss. 14(1) register and the ss. 15(3) "separate register" for a person not intending to reside permanently in Lesotho.

Whereas the Order makes provision for a Council, for professional registers, for applications for registration and for acts of registration, the Order itself does not lay down the qualifications or training that a person must possess which would entitle him to registration. The authority do so has been entrusted by s.17 to the Minister of Health, after considering any recommendation of the Council. The important provisions of s.17 were not been amended by the 1988 Order.

For present purposes the relevant part of s.17 provides that -

> "The Minister may from time to time ... prescribe by regulation the degrees, diplomas or certificates granted after examination by a university medical school ... or other examining authority which, when held singly or conjointly with any other degree, diploma or certificate, shall qualify the holder thereof for registration in the several registers under this order"

Quite clearly, as the Order was enacted in 1970, the phrase "shall qualify the holder thereof for registration in the several registers under this order" then referred to all the registers referred to in the order at that date, namely the two registers for residents and non residents of Lesotho respectively, referred to above, in respect of each of the three professions.

When the words "degrees, diplomas or certificates" are used in the first part of s.17 they are qualified by the words "granted after examination by a university medical school, dental school or pharmaceutical society or other examining authority" (which bodies are hereinafter collectively referred to as the "examining authority") but when used in the latter part of the section in the phrase "when held singly or conjointly with any other degree, diploma or certificate" no such qualification is added. This second use of the words "degree, diploma or certificate" is also not qualified in any way (as, for example, if the words "such" had appeared between the words "other" and "degree") to indicate that these documents are the same as those referred to in the first part of the section. It follows, therefore, that the degree, diploma and certificate mentioned in the latter part of the section need not be a degree, diploma or certificate granted "after examination" nor even by an examining authority. The further implication of this construction is that while the

minister may prescribe another degree, diploma or certificate (without examination) as a qualifying condition for registration, he may only do so conjointly with a degree, diploma or certificate "granted after examination" by an examining authority. In other words he may not as sole qualification prescribe a document which has not been granted by an examining authority of if granted by an examining authority has not been granted after examination.

Whether or not the American University of the Caribbean is a prescribed examining authority, in the present case the appellant's degree certificate does not even indicate that the degree was granted after examination, nor is there any such allegation in the papers. The fact that appellant's degree was granted after examination was however formally admitted by Mr. Sello.

At a stage in the argument the Court expressed some doubt as to whether proviso (c) ("the internship proviso") to clause 3 of the regulations was intra vires the Minister's powers in terms of s.17 which only empowers him to prescribe documents, namely "degrees, diplomas or certificates". The internship proviso requires the furnishing of "proof" which is a wider concept than that embodied in the phrase "degree, diploma or certificate".

In construing the internship proviso as a piece of delegated legislation the Court ought to avoid, if possible, a construction which will render it invalid on the grounds of it being ultra vires. (See R v Vayi, 1946 NPD 791 at 792 and R. v. Pretoria Timber Co. (Pty) Ltd. and others 1950(3) SA 163(A) at 170). The present is in my view a proper case for

construing the word "proof" in the internship proviso as meaning "proof by a degree, diploma or certificate", which will avoid a conclusion that the internship proviso is ultra vires.

This clears the way for considering the effect of the amendments to the Order introduced by the 1988 Order and for construing the Order as amended.

The effect of the amendments is two-fold. Firstly they introduced the concept of internship into the Order itself (a) by providing for an application for registration as an intern, (b) by prescribing certain certificates when dealing with the internship application and internship training (all the aforegoing by means of the new s. secs. 16(1A), 16(1B) and 16(1C) and (c) by providing for the maintenance of an internship register by means of the new s.s. 14(1)(c). Secondly the concepts of a provisional register and provisional registration were introduced through the new ss. 14(1)(a) and ss. 14(4). The definition of "register" in s.2 was replaced by a new definition of "registers" meaning:

> "when used as a noun, a register or provisional register kept in accordance with the provisions of this Order, and when used in relation to a class or member of any class of persons in respect of which a register or provisional register is kept, means the register or provisional register kept for that class, and when used as a verb, means to enter in such register or provisional register"

The only effect of this amendment, for present purposes, was to bring the definition in line with the fact that there were now provisional registers in addition to registers.

The task of construing the amended Order has been considerably complicated by the singularly inept draftsmanship of the amendment. It is true that ss. 14(1)(c) provides for a register "of all medical practitioners who are undergoing training as interns in terms of section 16(1A)"; ss. 16(1A) for an application by "a person who wishes to be registered as an intern", and for the issue to such applicant of a 9th Schedule Part A certificate; ss. 16(1B) for prescribed forms, duly completed, to be submitted to the registrar by a person "who has completed training as an intern"; ss. 16 (1c) for the Council to "withdraw its approval and require alternative or additional training"; ss. 16(6) for the Council to "exempt" under certain conditions" a person from the requirements of training as an intern" and ss. 16(7) for a person "who was recognized as an intern by the Council before the coming into operation of this Order" not having "to undergo training in terms of subsection (1B)." This notwithstanding, there are no provisions in the amended Order which actually prescribe internship training, (such as, for example, in s.20 of the pharmacy Act No 53 of 1974 in the Republic of South Africa), institute an activity such as internship training or define internship training. The reference to "training in terms of subsection (1B)" in ss. 16(7) is a meaningless expression inasmuch as no training takes place "in terms of" ss. 16(1B); this latter sub-section only provides for the completion and submission of particular forms to the Registrar. Nevertheless it appears from the provisions of the Order that persons were recognized as interns prior to the coming into operation of the amending Order. The power given to the Council in ss. 16(6) to exempt a person "from the requirements of training as an intern" is the clearest possible indication that the legislature intended

to institute by statute, or regularise by statute, internship training in Lesotho. Moreover, the power granted to the Council in this same sub-section to grant such exemption and to register the person exempted under ss. 14(5) (which is the final step in the registration of a person as a medical practitioner) is likewise a clear indication that the legislature intended to make internship training a qualifying requirement for registration as a medical practitioner in terms of ss. 16(5) read with ss 14(1)(b).

The principles according to which a term may be implied in a contract are well established. Two classic statements are to be found respectively in Reigate v Union Manufacturing Co (Ramsbottom) (1918) 1 KB 592 where Scrutton LJ said that:

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?"' they would both have replied: 'Of course so and so will happen; we did not trouble to say that; it is too clear.'

and in Shirlaw v Southern Foundries (1926) Ltd (1939) 2KB 206 at 227 where MacKinnon L.J. remarked as follows:

> "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'

This principle is clearly established in the same terms in South African law (see, for example, Mullings (Pty) Ltd v Benade Ltd 1952(1) SA 211 (A) at 214F-215C).

The principle also finds application in statutory construction, although it is to be kept in mind that, in the case of a clear casus omissus, a court may not supplement the provisions of a statute:

> "The intention of the legislature, however obvious it may be, must no doubt in the construction of statutes be defeated where the language it has chosen compels to that result, but only where it compels it"

(London and India Docks Co. v. Thames Steam Tug, etc. Co. (1909) AC 15 at 23 per Lord Atkinson).

Nevertheless, words may by implication be introduced into a statute if it is necessary to do so to give the language sense and meaning in its context (see Maxwell on Interpretation of Statutes 11th ed. p. 12).

In South African Medical Council v Maytham 1931 TPD 45 at 47 Greenberg, J. expressed the view that he

> "(did) not see any reason why the principle which applies to the interpretation of contracts should not be applied to the interpretation of a statute, namely, that you must only make such an implication as is a necessary implication"

and then referred with to approval to various cases on contract, including Reigate's case, supra, in order to establish the applicable principles.

In my view these principles must be applied in the present case for, if not, the establishment of a register of medical practitioners undergoing training as interns will be rendered nugatory as well as all the other provisions in the Order that I have referred to.

The Court is, in the instant case, obliged to imply a provision in the Order which institutes a system of internship training as a qualifying prerequisite for registration as a medical practitioner in terms of ss 16(5). By implication this training is -

(a) to be undertaken in an institution recognized and approved by the Council (as referred to in the second proviso of ss 16(1B);

(b) for the periods and in the manner detailed in the remaining provisions of ss 16(1B); and

(c) subject to the conditions and rights of the Council referred to in the remaining sub-sections of section 16.

If such provisions are implied the difficulties I have referred to disappear and it is possible to harmonise all the provisions in section 14 and 16 with each other and with the remaining provisions of the Order. In short, it will avoid the absurdity of having provisions for applications, the issuing of certificates and the registration of applicants and successful trainees hanging in limbo because no system of training has been instituted.

The next matter to consider is the legislature's intention in amending the Order so as to introduce the concepts of a provisional register and the act of provisional registration. Quite apart from any other reasons for the introduction of the amendments it seems to met that a sufficient reason for the

amendment would have been the desire of the Council to have a proper record of persons who have submitted applications for registration as medical practitioners but whose applications can proceed no further because of the fact that their degrees or other documents have not yet been approved by the Minister in terms of s.17. There would be advantages to such a provisional register in the sense that if constitutes a permanent, official and incontrovertible record of the fact that an application has been made and that degrees and other documents have been submitted in support thereof.

Against this background I turn to the final question to be answered, namely, what qualifications, in the broad sense of the word, must a person possess to qualify for registration as an intern in terms of ss. 14(1)(c) and 16(1A)?

The Order contains no express provision stipulating these requirements. Ss. 16(1A) provides no assistance, for it simply refers to "a person" who wishes to be registered. The Council is obliged to issue a 9th schedule certificate to such person. Clearly it cannot be any person, including a lay person. Some limitation is necessary, but where does one draw the line? The only other indication in the Order is the description of the internship register in ss. 14(1)(c) namely, a register "of all medical practitioners who are undergoing training as interns" in terms of ss. 16(1A). The Court experienced some initial difficulty in ascribing a sensible meaning to the words "undergoing training" in this phrase. On reflection it can only mean that a 9th Schedule Part A certificate has, in terms of ss. 16(1A) been issued to an applicant. In such certificate the applicant's registration for a period of not less than fifteen (15) calendar months is

recorded at a particular hospital specified in the certificate. The only sensible construction is to regard the issue of this certificate as the commencement of the applicant's "training as an intern".

Possible assistance may be gained, in the absence of any other indication, from the meaning to be ascribed to "medical practitioners" in ss. 14(1)(c).

In terms of s.2 "medical practitioner" means "a person registered as such under this Order." It would lead to absurdity if this literally meant a person registered in the s.14(1)(c) register of medical practitioners " ...practising in Lesotho" because this would mean a person who had already completed an internship satisfactorily and been registered. It cannot refer grammatically to a person registered on the provisional register, because this register is not a register of "medical practitioners" but simply a register of "persons", who do not yet qualify to be put on the ss 14(1)(b) register of "medical practitioners".

In the end we are left with nothing but the words "medical practitioners" themselves in ss. 14(1)(c). This can only mean something less than a person already registered as a medical practitioner and something more than a lay person who has no degree or other prescribed document from an examining body. A totally lay person would not be able to proceed to the internship registration stage of an application for registration because he would have been unable to comply with the provisions of ss. 16(1)(a) of the Order, i.e. he would have been unable to have submitted to the registrar any medical degree, diploma or other certificate.

To permit a person to be registered as a medical intern, and thus to undergo training as a medical intern, before the degree, diploma or certificate or the examining authority which granted such document, has been approved and prescribed by the Minister could lead to most unsatisfactory consequences. Although there is no evidence before Court as to why a medical internship is necessary and what it involves, these facts are, at least in general, so notorious that a court is entitled to take judicial notice thereof. An internship is necessary because a medical graduate lacks the necessary practical experience immediately after receiving his degree from an examining authority to be allowed to practice as a medical practitioner without further practical experience and training. Such a person is required, in the public interest, to undergo a further period of practical training, duly supervised, at a recognised hospital or other medical institution which has the necessary patients and facilities for this purpose. Although generally supervised by experienced medical practitioners in his dealing with patients, there are not infrequently occasions when the intern must deal with patients unassisted and unsupervised. In such situations he may be required, in an emergency, to perform active preliminary intervening steps on a patient before a suitably qualified practitioner can be summonsed. Perhaps even more important, he is required, in such a situation, to be able to assess the condition of a patient with sufficient skill to be able to detect when the condition of the patient is such that the attention of an experienced medical practitioner is necessary. To allow a person to perform these important functions when the Minister has not yet decided upon the competence of the examining authority which has granted

such person his degree is to run the risk that such person may be quite unqualified to perform these important duties as an intern and to place the health and even the lives of patients at risk. Such a situation appears to me to be decidedly against public policy. It is very difficult to conceive that this could have been the legislature's intention, when the very purpose of the Order is to ensure, inter alia, that only properly qualified persons should serve the public as medical practitioners, unless such intention is clearly expressed in the Order. This entire judgment is indicative that far from being clear, such intention has been shrouded in obscurity.

The only reasonable construction which, in the circumstances, can be given to the sub-sections in question, and this is the construction we are driven to place on them, is the following: apart from the other requirements set forth in ss. 14(1)(c) and 16(1A) of the Medical Dental and Pharmacy (Amendment), Order, 1988, no applicant may be registered as an intern in terms of these sections until the applicant's degree, diploma or certificate, in the sense used in s.17 of the Order, has been prescribed by the Minister by regulation in terms of s.17.

It follows from the aforegoing that the appellant is not entitled to any of the relief sought by him in his Notice of Motion and that his appeal can accordingly not succeed.

The consequence hereof is that the appellant, due in part at least to the obscurities in the Order resulting from inept draftsmanship (which we trust will be speedily and suitably rectified) has pursued an abortive application for registration as an intern. He finds himself in the invidious

position that, until the Minister has come to a decision as to whether he ought, in terms of s.17, to prescribe the appellant's degree, he cannot proceed to his internship and will suffer prejudice so long as this uncertainty persists. We have indicated the difficulties we have with the Council's approach, namely that an examination is the only satisfactory method of qualifying itself to advise the Minister for the purpose of s.17. It is difficult to understand why the Council could not, by means of the speediest possible communication with the medical bodies of control or the medical schools in the Southern African states, the United Kingdom or the United States of America (many of which medical schools and their degrees have been prescribed by regulation pursuant to the provisions of s.17), qualify itself to advise the Minister.

We also have some difficulty with the attitude adopted by the appellant. While we are not persuaded that the examination proposed by the Council is the only method it could adopt, if this will satisfy them that the university which granted him his degree is an acceptable examination authority, we see no good reason why he should not have acceded to their request. It is to be hoped that both sides will adopt a more flexible attitude.

In the result the appeal is dismissed with costs.

L.W.H. ACKERMANN
JUDGE OF APPEAL

Lucy H. Ackermann
for W.P. Schutz.

W.P. SCHUTZ
PRESIDENT

Lucy H. Ackermann
for S. Aaron.

S. AARON
JUDGE OF APPEAL

Delivered at Maseru this 13th day of March 1990.

For appellant: M. T. Mbaki

For respondent: Mr K. Sello.

B.P. Cullinan
Chief Justice