CRI/T/50/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

DOMITILLA KOKUTEKELEZA BARAKA-MUSOKE

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 20th June, 1994

The Accused is charged with contravening Section 24(b) of the Medical, Dental and Pharmacy Order of 1970 (as amended):

> "In that from the period 6th July 1990 to date, the said accused, not being a person who is registered as a medical practitioner in Lesotho under the Medical, Dental and Pharmacy Order No.13 of 1990 (as amended), did unlawfully and intentionally pretend or hold herself out to be a medical practitioner in Lesotho; and did further pretend or hold herself out that she is registered as a medical practitioner under the Order, and thus did contravene Section 24(1) of the Order."

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The Accused pleaded not guilty to the charge.

The Accused applied for registration as a medical practitioner while she was a foreigner. She is now a citizen of Lesotho.

It is common cause that the accused was registered, put on the provisional register intended for non-residents and temporary residents under Section 15 (3) of the Medical, Dental and Pharmacy Order of 1970.

Both the Crown and the Defence were reticent about what a provisional register is and what it was intended for.

The impression I was given was that the term had crept into the records of the Medical, Dental and Pharmacy Council by mistake. The Court of Appeal case of K.M. Lerotholi v Registrar Medical, Dental, and Pharmacy Council of Lesotho and Others C of A (CIV) No.22 of 1989 (unreported) was not particularly found relevant by both parties.

My difficulties were increased by the fact that the Medical, Dental and Pharmacy Proclamation No.17 of 1921 does not seem to have been repealed although it has been

almost completely replaced by the Medical, Dental and Pharmacy Order of 1970. The problems I met were also compounded by the fact that this Order was amended by Order No.15 of 1988 which in turn was amended by Order No.15 of 1991.

Of interest is the fact that in Proclamation 17 of 1921, the Government Secretary was the authority charged with the keeping of a register of names and qualifications of all persons qualified to practice as medical practitioners, interns and others. See Section 4 of Proclamation 17 of 1921. Qualification for registration was meeting the requirements for registration of the United Kingdom of Great Britain and Northern Ireland or the Union of South Africa. Applications for registration were made to the Director of Medical Services, approval or refusal were matters for the Resident Commissioner. Appeals on the questions of registration were to the High Commissioner. All these functions have been assumed by the Medical, Dental and Pharmacy Council of 1970. Appeals are ow to this Court.

The Medical, Dental and Pharmacy Council (hereinafter called the Council) is a professional body. It is no more obliged to follow the United Kingdom of Great Britain and Northern Ireland or the Union of South Africa (now called

the Republic of South Africa) in matters of registration. It is expected to take its own decisions. Lesotho has no medical schools of its own. The legislature has charged the Council with registration of suitably qualified people to practice medicine.

The Medical, Dental and Pharmacy Council is a professional body which is building the medical profession from where the British left it. In my view it has to apply the Medical, Dental and Pharmacy Order of 1970 so far as the circumstances of the country permit in order that the medical profession may take off. Lesotho has to rely on medical schools in other countries to train its professionals. It does not have its own medical schools.

The *stare decisis* doctrine has no application in respect of this case when read together with the case of K.M. Lerotholi v Registrar Medical, Dental and Pharmacy Council of Lesotho and Others C of A (CIV) No.22 of 1989 (unreported) in respect of Section 17 of the Medical, Dental and Pharmacy Order of 1970. The reason being that in the K.M. Lerotholi case the thrust of the argument presented by the Appellant was directed at justifying the Appellant's refusal to write examinations and complying with procedures set by the Council to enable the Council to evaluate qualifications of medical schools of universities

that were not yet prescribed by the Minister. Counsel for appellant in that case was also arguing that the Council was prescribing an examination to K.M. Lerotholi in order to impose an illegal examination requirement not provided for by statute. It was being argued that it was not true (as the Council submitted) that the examination was being set in order that the Council could be enabled to advise the Minister on the issue of prescription of such medical schools by regulation. In this case the Court is having to face the issue squarely of whether or not the Council has been correct in registering all along medical practitioners who hold degrees and diplomas from university medical schools that are not yet prescribed by regulation by the Minister.

Section 14 of the Interpretation Act of 1977 provides that "may" shall be construed as permissive and empowering. Classen in Dictionary of Legal Words and Phrases Vol.2 at page 396 concludes:

> "It is only after considering the general provisions of the law in question and the purview of the whole legislation on the subject that we can tell whether "may" confers a discretionary power or imposes an obligatory duty. No definite rule can be laid down..."

Section 7(1) of the General Interpretation

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Proclamation No.13 of 1942 which was then the law in terms of which Section 17 of Medical, Dental and Pharmacy Act of 1970 should have been initially interpreted provided,

> "Where any law confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

This section is almost identical to Section 31(1) of the Interpretation Act of 1977.

It seems to me that the Council has a duty to approach the Minister when the need arises with a recommendation for the Minister to prescribe by regulation degrees and diplomas from university medical schools which shall qualify the holder thereof for registration in the several registers under this order. The Order provides that the "Minister may from time to time" on the recommendation of the Council prescribe certain university medical schools by regulation as recognised for the purpose of registering medical practitioners. The view I take is that if the Council feels it can register a fitting individual case on objective grounds it can register such a person. Nowhere in the Order is the Council forbidden to register an applicant merely because the Council has not yet made a

recommendation to the Minister and that the Minister has not yet approved the university medical school at which the Applicant qualified. The understanding of Section 17 (which I have) is that it makes candidates from the prescribed medical schools automatically registrable if they have served their internship. If those from prescribed medical schools have not yet served their internship, they are entitled to serve it without any question asked as to their knowledge of medical science.

Ackermann JA in K.M. Lerotholi v Registrar Medical, Dental and Pharmacy Council of Lesotho & Others C of A (CIV) No.22 of 1989 concluded:

> "Whereas the Order makes provision 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."

Ackermann JA was not called upon to decide whether the Council was right from 1973 up to 1989 to register medical practitioners who hold degrees from university medical schools of countries that have not yet been prescribed by regulation by the Minister in terms of Section 17. The amendment of the Order by Order No.15 of 1988 provided for

a provisional register and the amendment Order No.15 of 1991 revoked the requirement of having a provisional register. This abolition of the provisional register has obliged me to decide this question of validity of the registration of applicants' from these ministerially unapproved university medical schools that have been registered between 1973 up to 1994. This has to be done because those medical schools are not yet prescribed by regulation in terms of Section 17.

Section 15 of the Interpretation Act of 1977 provides that:

> "Every enactment shall be deemed remedial and shall be given a fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

In order to understand what the Council is about, we have to look outside the Medical, Dental and Pharmacy Order of 1970 because the practice of medicine world-wide is based on a tradition that began in ancient Greece over 2500 years ago. In Lesotho this tradition is less than one hundred years old, but it was supported and natured by the British Colonial Government of Lesotho until Lesotho gained independence in 1966. Hence the infancy of the Medical, Dental and Pharmacy Council of Lesotho.

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Referring to Great Britain, Keith Simpson in Forensic Medicine 8th Edition at page 247 says:-

> "It is of importance that the public shall be able to distinguish between a qualified medical practitioner and an unqualified person professing some skill in healing, and for this reason the Medical Act of 1858 instituted the General Medical Council to:
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> (a) Supervise medical education.
> (b) Establish a Medical Register of duly qualified persons."

This is true of the Medical, Dental and Pharmacy Council of Lesotho. Despite the difficulties under which it operates, its duty towards seeing that properly qualified people are enrolled implies that it of necessity supervises medical education. At the moment, it can only screen people who have been educated in university medical schools from other countries.

In South Africa, according to Joubert and Scott in The Law of South Africa Volume 17, the South African Medical and Dental Council has control over the medical register, the conducting of examination, the appointment of examiners, as well as power to approve training schools and to recognise local or foreign qualifications. Furthermore the Council has wide powers to recommend regulations to the Minister concerning the exercise of its functions under

their Act. Lesotho (as already stated) does not have the capability as yet to run its own medical schools and thereby to appoint its own examiners. That, unfortunately cannot be interpreted as relieving it of responsibility for the education of the medical profession.

For what the Council can do, and cannot do, we have to look in and outside the legislation establishing it. The reason being that the legislation itself implies that the medical profession has a long tradition therefore it need not spell out everything. The duties of the Council are not clearly set out. The Council's central function is registering medical practitioners. The rest of its functions can be inferred from reading the Order as a whole. Even here too everything revolves on the register. The ultimate sanction of the council against, misconduct, incompetence, and negligence is the erasure of a medical practitioner from the register.

The interpretation of Section 17 of the Medical, Dental and Pharmacy Order of 1970 has given us great problems. This has been compounded by the enactment and subsequent repeal of portions of Medical, Dental and Pharmacy Order No.15 of 1988 published on 26th August, 1988. The Crown advised me to ignore Order No.15 of 1988. I noted nothing is said about when this Order was to come

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into operation. In terms of the Section 16(b) of the Interpretation Act of 1977 this amendment is deemed by law to have come into force the day next preceding the publication of the amendment Order. I am of the view that Section 17 does not as framed prohibit the Council from recognising the medical training of an individual on an *ad hoc* basis regardless of where or how he was trained provided the training is at a university medical school. University training is implied throughout the Order to introduce some objectivity in the Council's assessment. If satisfied the Medical council can then register such an individual as a medical practitioner. This investigation would of course have to be done objectively, and the university in question investigated and properly assessed.

The requirement (in my view) is that the Council must have been well advised before registering medical practitioners whose qualifications are not prescribed in terms of Section 17 and are consequently not yet authorised (in general) in terms of Order No.13 of 1970. To try to regularise what was believed to be the position, a provisional register was established by Order No.15 of 1988 when it was realised there were several practitioners who had over the year been registered although general approval had not yet been given by the Minister. The understanding was that prescription by regulation by the Minister would

follow in the not so distant future. We can only assume that the legislature revoked the provisional register by Order No.15 of 1991 because it was found unnecessary or uncalled for.

The deletion and repeal of the new Section 14(1)(a) introduced by Order No.15 of 1988 by Section 3 of the medical, Dental and Pharmacy (Amendment) Order No.15 of 1991 should be deemed remedial. Consequently in terms of Section 15 of the Interpretation Act of 1977 should be given a fair large and liberal interpretation to ensure the registration of fitting persons as medical practitioners. It therefore means all people who were provisionally registered in terms of Section 14 (1) and Section 15(3) of the Medical, Dental and Pharmacy Order of 1970 as (amended) have in fact been registered in the two medical registers that the Council was obliged to keep. This, in my view, is a recognition and an acknowledgement that the Council had all along been doing the right thing in registering medical graduates from the former Soviet Block Eastern European university medical schools once it has satisfied itself that they had the fitness, medical knowledge and competence to practice medicine.

In other words nothing in Section 17 of the Medical, Dental and Pharmacy Order of 1970 precluded or was intended

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by the legislature to preclude the Council from registering medical school university graduates from any country provided the Council had objectively satisfied itself that they had the requisite knowledge, medical science and possessed the requisite medical skill. The view I take is that the canon of construction that no enactment contains invalid and purposeless provision should apply to the Medical, Dental and Pharmacy (Amendment) Order No.15 of 1991. I therefore hold that it repealed the new Section 14(1)(a) of the Medical, Dental and Pharmacy Order of 1970 (as amended by Order No.15 of 1988 because it was superfluous. That is the only fair and large interpretation of Order No.15 of 1991 that promotes the public interest.

In reaching this conclusion I am following Ackermann JA and the authorities quoted in K.M. Lerotholi v The Registrar Medical, Dental and Pharmacy Council of Lesotho C of A (CIV) No.22 of 1989 and his rulings in the matter. I shall proceed to quote from them and from Ackermann JA. Ackermann JA in the K.M. Lerotholi case dealing with the gaps in the Medical, Dental and Pharmacy Order of 1970 as amended said:

> "Nevertheless, words may by implication be introduced into a statute if it is necessary to do so to give the language

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> sense and meaning in its context... In my view these principles must be applied in the present case for, if not the establishment of a register of medical practitioners...will be rendered nugatory as well as other provisions in the Order..."

These words were quoted with reference to training of interns, but they are of general application.

I have chosen an interpretation of Section 17 that would not render it absurd because:

> "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."
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> Per Finamore J in Holmes v Bradfield R.D.C.
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> (1949) 2 KB 1 at page 7.

It would be harsh on the Council, unreasonable and dangerous to the lives of the general public for the Council to be obliged to recommend ministerial prescription by regulation, of university medical schools on meagre information, merely because one student from one such institution was outstanding both in medical science and skill. The reason being one swallow does not make a summer. Yet it would be unfair, unjust and unethical not

to register such a student as a medical practitioner merely because the Council has still not found it proper or wise to recommend such a university medical school for prescription by regulation by the Minister in terms of Section 17.

The new requirement of a provisional register for perpetual use, merely because the Council claimed to have problems of one kind or the other had to be abandoned. Order No.15 of 1988 which was putting those medical practitioners in *limbo* (perpetual suspense) on a provisional register was repealed by Order No.15 of 1991 to remove what would have been a potential abuse.

I do not know why I am being directed to ignore Order Number 15 of 1988 and Order No.15 of 1991 when they have a bearing on this case and consequently put this case in its proper historical context. The Accused was registered when the Medical, Dental and Pharmacy Order of 1988 was already in operation. All people on the provisional registers under Sections 14 and 15(3) are now deemed to be on the register of all the other practitioners in their category.

This 1988 provisional register was criticised a great deal by Ackermann JA in the K.M. Lerotholi case. In my view the criticism was justified. This provisional

register was meant for medical practitioners who had been registered by the Council over the years but whose medical degrees are from universities not prescribed by the Minister as qualifying them for registration. Among them are Dr. Nyapisi PW.4 a member of the Council. He qualified in 1980 at Wittenberg University, East Germany. There is also Dr. Rathabaneng DW.2 a Consultant at Queen Elizabeth II Hospital. She did her basic medical degree at Volvograd University in the Soviet Union now Russia. Their universities have never been prescribed by regulation in terms of Section 17 of the Medical, Dental and Pharmacy Order of 1970. It emerged that all former satellites of the Soviet Union, including Cuba, were all subjected to the same treatment. Their medical schools were not being officially recognised but their graduates were being registered subject to conditions that the Medical, Dental and Pharmacy Council had set on an *ad hoc* basis as they came.

It will be observed that Dr. Nyapisi (PW.4) who qualified in Wittenberg University in the former communist East Germany had not done his internship. He had to do it in Lesotho. Internship has to be done at a training hospital. His position was different from that of Dr. Rathabaneng (DW.2) who had already done her internship in Tanzania. The only thing Dr. Rathabaneng and Dr. Nyapisi

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had in common was that they had qualified in a former communist country which the Council had not recommended for approval by prescription by the Minister by regulation.

Dr. Rathabaneng was registered in less than six months after the Council had (after going through her internship record) directed that she should supplement it where there are gaps. Dr. 'Monahali, who was also from a former communist Eastern Block country, did about three months internship. Here too the decisive factor was the internship she had done in Uganda. From this it will be observed that the Crown was wrong in assuming that internship from foreign countries was not recognised in respect of graduates from universities from countries not yet prescribed under Section 17. If the Council chose to accept the Botswana's internship in its entirety, there was nothing wrong, irregular or contrary to precedent, if the Council registered Accused straight away. People who had not served any internship anywhere like Dr. Nyapisi would have had to serve it in Lesotho. This would have been the position even under the Medical, Dental and Pharmacy Proclamation No.17 of 1921.

What emerge from the aforegoing is that *de facto* and on an *ad hoc* basis qualification from unprescribed medical universities were recognised by the Medical Council.

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Indeed Dr. Molapo, the current President of the Council, confirmed that the medical Council had over the years recognised internships served in other countries even for people trained in countries whose university medical schools have not yet been prescribed by the Minister.

I was invited by the Crown to direct my attention to the registration of Applicant alone because it was the matter with which I was seized. The Crown submitted that what transpired when the Accused was registered was a mistake. It was stated (as this argument went) that the registrations of Dr. Nyapisi, Dr. Rathabaneng and others like them whose qualifications were not recognised in terms of Section 17 of the Order were illegally registered. The illegality of their registrations was technical, so argument went. In their case the mistake was deliberate while the registration of the Accused was done inadvertently.

Evidence disclosed that the Minister had and still has not included a single university medical school from the former communist countries. These countries are the former Soviet Union, its satellite Eastern European countries and they included Cuba in Latin America. I was told there were no "Cold War" ideological grounds for not doing so. It was not a question of politics but rather one of communication

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and synchronisation of standards. The former communist countries were not helpful when curricula and other relevant information was sought from them in order to slot their training in what the Medical, Dental and Pharmacy Council considers to be internationally accepted categories. They claimed to have tried to solve this problem for years.

The Accused left the Court in no doubt that in her view the Medical, Dental and Pharmacy Council was not only playing politics (with recognition of medical qualifications from former communist countries) but was being downright discriminatory. She felt she herself was a victim of direct discrimination.

There is a danger of over-simplifying the difficult task of the Medical, Dental and Pharmacy Council. They had (and continue to have) a very difficult task of building Lesotho's medical profession from scratch. If they have made errors of judgment, here and there, this Court can understand. Twenty-one years of failure to evaluate medical qualifications of this block of countries seems to give the impression dilatoriness. I will nevertheless avoid going into what became a bitter confrontation between the Accused and the Council.

From this it will be observed that the Council is central to this order. It is clear that the function of the Council is not just to register, maintain the register of medical practitioners, and keep discipline in the medical profession. It is in fact to protect the health of the nation as a whole. While the paying of dues and the protection of the market for local practitioners is important, the real job of the Council is to see that medical practitioners abide by their Hippocratic Oath. the essence of that is to save an protect lives from destruction, treating all human ailments whether from natural causes or from the hands of men.

From the above, it will be seen the registration and keeping a roll of practitioners is a method of registering and licensing of medical practitioners in the public interest.

All Section 17 provides is that the Minister may prescribe by regulation from time to time that qualifications from medical schools shall qualify the holder to registration. If Council is hesitant to make a definitive recommendation that candidates from a medical school of a particular university should get automatic registration, I do not think it cannot register such a candidate if it is satisfied he has the requisite knowledge

of medical science, skill and competence to heal the sick and save lives.

It seems to me that without Professor Mohapeloa we cannot know for certain that the registration of the Accused was effected by mistake. The reason for this conclusion is that Dr. Rathabaneng says the Council fully registered her within six months of her working in Queen Elizabeth II hospital although they had originally said they were "provisionally" registering her for 12 months. Asked why the period was suddenly reduced to six months, Dr. Rathabaneng says she cannot speak for the Medical Council. Dr. Rathabaneng says she had done her housemanship in Tanzania for 12 months in 1970. She says in her view, she served for a short time before registration because of the documents she presented. According to Dr. Rathabaneng, Dr. 'Monahali served internship of three months because she had done her housemanship in Uganda. She was put in the paediatrics department for three months on the basis of her papers from Uganda. Dr. Rathabaneng, Dr. 'Monahali and the Accused were all trained in former Soviet Eastern Block countries.

Dr. Lepoqo Molapo (a court witness) who is the current President of the Medical Council said he was not responsible for this prosecution. He said the Medical,

Dental and Pharmacy Council recognises internships from other countries and scrutinizes them on merit. He said he had been in the medical Council from its inception in 1970 up to the present. He said (in respect of Soviet Block medical school graduates) to his knowledge their internships were recognised on merit after being checked if they covered all the essentials of internship. Therefore the internship that the Accused served in Botswana would have been recognised if it satisfied recognised requirements in accordance with past practice of the Council after appropriate scrutiny.

If there was reference to the internship of the Accused in Botswana in the correspondence that followed, there could be no doubt that Accused was being treated like other people that were trained in university medical schools from Eastern European former Soviet Block countries. If we go by what Doctor Molapo said, then there was a departure from what had been the practice in the past.

In so saying, I am fortified by the fact that there are no minutes of the Medical, Dental and Pharmacy Council to back up what really transpired in the meeting of the Council. According to Dr. Maitin PW.1 the President of the Council between 1987 and 1990 provisional registration was

granted as a matter of course because the University medical school of Bucharest, where Accused qualified, was not recognised. Therefore Dr. Mosoke would be provisionally registered for one year and would then be required to serve an internship at a hospital for one year.

I have already said this is a wrong description of the provisional register. It had been meant for Dr. Rathabaneng DW.2, Dr. Nyapisi PW.4 and others trained in the unprescribed medical schools. Therefore PW.1 Dr. Maitin is definitely wrong about what a provisional register was meant for. Nothing was said throughout PW.1's evidence about the internship served in Botswana and the three years' experience Accused had. According to PW.1 Dr. Maitin the Registrar only brought a matter to the Council if there were problems. If the Registrar did not bring the matter to the Council and proceeded to register the Accused it seems to me the Council could not just impose fresh conditions that had not been originally imposed. Dr. Maitin PW.1 is not sure whether Accused's application was ever brought to Council for special decision. If there were minutes, everybody could have the assurance of what really transpired.

There was considerable confusion about the purpose of the provisional register. The Council itself described it

in obscure terms. Perhaps colloquially speaking one could speak of provisional registration. There was as it turned out, a provisional register that was established by law between 1988 and 1991.

In K.M. Lerotholi v Registrar Medical, Dental and Pharmacy Council of Lesotho and Others CIV/APN/242/89 (unreported) before Molai J, the Council was arguing that Lerotholi was:

> "The first graduate of the American University of the Caribbean to apply for registration in this country. The Respondents do not therefore know whether or not the standard of medical courses taken at that university is comparable to the standard of similar courses taken at other approved medical universities."

We have already seen that Ackermann JA at the appellate stage of the case held the Council was clearly not empowered to prescribe examinations as an additional condition for registration, but nothing prevented the Council in setting an examination as an investigatory mechanism to aid it in reaching certain decisions. Even at that stage it was argued that the Council was setting an examination so that the university where Lerotholi had qualified could be recommended to the Minister. It emerged in evidence that although Lerotholi passed the examination,

his university was never recommended for prescription by regulation. I have already said the Council cannot be faulted for doing so. What is however unsettling is that the Council did not do what it had given the Court the impression that it would do. If there was no delay of over twenty-one years on the recognition of former communist Eastern Block countries including Cuba, this failure to register K.M. Lerotholi after passing the examination would not invite any comment.

We have to accept that the registration of the Accused was the same as that of Dr. Rathabaneng (DW.2) and Dr. Nyapisi (PW.4). They should have been on the provisional register but for its abolition by the amendment Order No.15 of 1991.

What I have no doubt about (having gone through Order No.15 of 1988) is that provisional registration in terms of that amendment was full registration but for the fact that university medical schools from which such medical practitioners qualified had not yet been given general recognition. All doctors trained in Soviet Eastern Block countries were to be in this provisional register awaiting Ministerial recognition of those medical schools by prescription by regulation in terms of Section 17.

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It cannot be correct that provisional registration did not exist in October and November 1988 when the Accused was registered . The attaching of conditions to Accused's registration was based on the misunderstanding of what provisional registration meant and was intended to achieve. If both Counsel had read amendment Order No.15 of 1988 this case might have proceeded on a different footing. This provisional register was abolished by another amendment Order No.15 of 1991. It is my view that Accused was subjected to demands to serve internship by mistake having regard to what PW.1 Dr. Maitin, PW.2 Professor Bam and PW.3 Miss Mohapeloa thought.

Accused as evidence shows was asked to go and serve an internship at a hospital. She claims there were no vacancies. There is a letter that directed her to practise under supervision of a fully registered Medical practitioner. This was written by the Director General of Health Services. It is marked Exhibit I. She got Dr. Rathabaneng DW.2, a consultant, to supervise her. The Council insisted the Accused should go to serve her internship at a hospital. The explanation given is that that letter was written by mistake. By this time relations between her and the Council had been strained to breaking point. The Council was insisting on rules which were far from clear and consistent.

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From what appears in Exhibits "C" and "D" the Accused was registered under Section 15(3) of the Medical, Dental and Pharmacy Order of 1970. This registration was in a separate register intended for medical practitioners who do not intend to reside permanently in Lesotho. No conditions were set. Since these proceedings are criminal ones and strict liability is the essence of penal statutory provisions, I am obliged to interpret them as such. The Council is throwing the book at the Accused, the Accused is doing the same to the Council.

Mr. Mphalane's major premise is that the Council cannot in the circumstances claim Accused was not registered, the Court ought to regard the Accused as having been registered. They are obliged to apply to the High Court to have the name of the Accused removed from the roll in terms of Section 34 of the Medical, Dental and Pharmacy Order of 1970. Therefore to have charged the Accused while his name was on the register was premature.

Mr. Mdhluli argued that in the circumstances of the case, the Accused had infringed the Law and should be found guilty and cautioned in order to uphold the authority of the Council and thereby prevent anarchy. There is a lot to say for what Mr. Mdhluli submits. The point is whether the technical procedural steps Mr. Mphalane raises ought not to

be followed.

The other question that is in issue is whether the Council in its decisions on the questions of registration is not a *quasi judicial* body? It would certainly not be *functus officio* if there was fraud or dishonesty. Here none is alleged. In Veriava v President Medical and Dental Council 1985 (3) SA 293 at page 306 Boshoff JP made the following general remarks:-

> "The object and policy of the legislature is to give the Council substantial power over the practice of the medical profession by a system of registration. In order to enable it to exercise control over the conduct of registered practitioners the Council is entrusted with *quasi judicial* functions which can be only exercised by itself."

It would seem to me that even when it decides whether to register a practitioner it is obliged to go through the Applicant's papers judiciously in order to determine whether to register such a practitioner straight away or to decide what further period to prescribe for further training to meet its requirements for registration.

The Council would be *functus officio* if it were to cancel the registration unless it follows the provisions of Section 34 of the Medical, Dental and Pharmacy Order of

1970. In that event an application has to be made to the High Court. An erasure to a registration made in error or through fraudulent representations in terms of the procedure laid down in Section 20(2) of the Order was never attempted. It would have involved in this case and invitation to the Accused to show cause why her name should not be erased from the register. What has been done through out was to tell applicant that her registration was conditional. Annexures "C" and "D" do not have any such conditions.

In Transair (Pty) Ltd. v National Transport Commission 1977 (3) SA 784 at 792 to 793 Jansen JA discussed what is expected of a licensing authority which acted *quasi* judicially. A *quasi*-judicial body is equated with a court of law in that it cannot alter or withdraw a prior act whether right or wrong except where it was induced by fraud. Having regard to Section 34 of the Medical, Dental and Pharmacy Order of 1970 the words of Jansen JA in Transair (Pty) Ltd v National Transport Commission at page 793 AB are apposite:

> "It seems obvious, that although an administrative body may be neither equipped nor competent to investigate the validity of its own prior acts, it may by the nature of its functions be entitled and obliged to call upon the Court to pronounce upon such acts."

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Because the Council is *functus officio* and because of Section 34 of the Order, the particular legislation governing its acts, the Accused's registration could not be altered, cancelled or reversed by Council without calling upon the High Court to pronounce upon it.

It will be observed that the Medical, Dental and Pharmacy (Amendment) Order No.15 of 1991 has repealed the provision that a provisional register should be kept for people whose degrees are not prescribed in Section 17 of the Medical, Dental and Pharmacy Order of 1970. Therefore the Order with reference to the register

> "unambiguously provided at that time, for two registers in respect of each class, namely the Section 14(1) register and the Section 15(3) separate register for a person not intending to reside in Lesotho permanently." (see K.M. Lerotholi v The Registrar Medical, Dental and Pharmacy Council & Ors C of A (CIV) No.22 of 1989.

In the above-mentioned case Ackermann JA had been puzzled by the whole idea of provisional registration of interns from universities that the Minister had not approved and prescribed in terms of Section 17. It was for that reason that Ackermann JA stated that the intention of the legislature was shrouded in obscurity.

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The view I take is that a provisional register was meant for people already registered or intended for the registers under Section 14 and Section 15(3) while the Minister had not decided to prescribe their university schools by regulation. That is where Accused and others from unrecognised universities were being belatedly catered for.

The crisp question for determination by this Court is whether the non-resident provisional registration in terms of Section 15(3) accorded to the Accused can be deemed a proper registration on the basis of which Accused can escape being regarded as having contravened Section 24 of the Medical, Dental and Pharmacy Order of 1970? This question has already been answered above.

The Accused says she had indicated she was going to practise privately in Lesotho when she applied for registration. Her provisional registration is indefinite and unconditional. Her annual registration fee was not accepted by Council.

Provisional registration (whether for internship purposes or for medical practitioners and the suggestion that everything depended on the Minister's prescription) has always been the subject of controversy. Ackermann JA

in the K.M. Lerotholi dealing with interns voiced his concern as follows:

> "Although generally supervised by medical practitioners in dealing with patients, there are not infrequently, occasions when the intern must deal with patients unassisted and unsupervised... 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 a person his degree is to run the risk that such a 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."

Once the general powers of Council are interpreted to include decision making on medical qualification of applicants for registration and internship, the the whole problem becomes manageable.

I therefore hold that the Accused was registered under Section 15(3) of the Medical, Dental and Pharmacy Order of 1970. I come to this conclusion because properly qualified and reliable medical practitioners are expected to be registered under both Sections 14 and 15 read along with Section 16 of the Medical, Dental and Pharmacy Order of 1970 (as amended).

/...

Now that the Accused is a citizen of Lesotho, permanently resident in Lesotho there is no obstacle to her being automatically deemed registered under Section 14 of the Medical and Dental and Pharmacy Order of 1970.

Most reluctantly (I am duty bound) to point out to the Medical, Dental and Pharmacy Council and the Minister of Health that the present position can no longer be defended. The fact that not a single university medical school from the former Soviet Eastern Block has been approved and prescribed under Section 17 is a serious indictment on our health authorities. The Council has avoided a decision on the matter for over 21 years. This case was a painful crucifixion of the most valuable professional body this country has.

In the light of the aforegoing:

I find the Accused not guilty and she is discharged.

W.C.M. MAQUTU
JUDGE

For the Crown : Mr. S. Mdhluli
For the Accused : Mr. S. Mphalane