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IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM

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MISC. CIVIL CAUSE NO. 21 OF 2003

DR. MATONGO BENARD SHIJA ..... APPLICANT  
VERSUS  
THE HON. THE MINISTER FOR  
HEALTH & ANOTHER ..... RESPONDENTS

RULING

MLAY, J.

DR. MATONGO BENARD SHIJA through the services of MAKUNJA C.B & CO. Advocates, has filed an application by Chamber Summons, under section 2 (2) of the Judicature and Application of Laws Ordinance Cap.453 and section 17 of the law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance.

The Respondents in the application, are Hon. MINISTER FOR HEALTH (1<sup>st</sup> Respondent ) and Hon. ATTORNEY GENERAL, 2<sup>nd</sup> Respondent). In the Chamber Summons, the applicant has prayed to be heard for orders that:

*“(i) Application for certiorari and mandamus be granted.*

*(ii) Costs of this application be provided for “*

The application is supported by the affidavit of Christopher B. Makunja, the applicants advocate and accompanied by a statement. In paragraph 5 of the said statement, it is stated that *“the relief sought in this application is”:-*

*“An order of CERTIORARI and MANDAMUS to move to this Honourable Court to quash and revised the decision of the Minister of Health made on 2<sup>nd</sup> May, 2001 censuring the applicant”.*

Paragraph 6 of the said statement also states:

6. The grounds upon which the said relief is sought are:-

- i) *That the first respondent's Medical Council of Tanganyika was constituted by three members namely; Dr. Sabina Mnaliwa, Prof. V. P. Kimati and Dr. A.G. Chanji who had previously conducted a probe committee against the applicant and did actually submit their findings which among others found the applicant guilty. See Preliminary Report on investigations of 3 maternal deaths at Tumbi Hospital appended and marked "A".*
- ii) *That the decision of the Medical Council of Tanganyika is tainted with error of law in that it failed (sic) or refused to address itself to the PATIENT'S RECORD hence relied on extraneous evidence see Tumbi Special Hospital's patient record. "B".*
- iii) *That the decision of the Medical Council of Tanganyika which purports to revise its earlier decision is full of contradictions and misleading. Appended and marked "(C)".*

In the supporting affidavit, Mr. Christopher B. Makunja has deponed as follows:

1. *That I am an advocate of the Applicant who he is a medical practitioner in this matter.*
2. *That the decision of the medical Council of Tanganyika who supports (sic) to revise its earlier decision is full of contradictions and misleading.*
3. *The members of the Medical Council of Tanganyika were the same who had previously conducted a probe committee against the applicant, therefore were biased.*
4. *The medical Council of Tanganyika did not take into consideration, the contradictions and constitution of the Medical Council.*

The Applicant is represented by Mr. Makunja, Advocate while Ms. Mwaikambo State Attorney appeared for the Respondents and both counsels have filed written submissions on this application.

In the submissions, Mr. Makunja has contended that, "this application emanates from the clarification decision of the Medical Council of Tanganyika dated 27<sup>th</sup> April 2001, purporting to clarify its own earlier decision delivered on 9<sup>th</sup> June 2000". He further contended that "the members of the Medical Council of Tanganyika most of them are members who had earlier constituted the preliminary investigation ordered by the Registrar Medical Council of Tanganyika. The said report of the preliminary investigation was conducted between 26/6/1999 and 27/7/1999". (Annexure "A" to the application). The learned advocate argued that "the core issues in this application are:

i) Was Dr. Matongo Shija convicted on negligence in planning an emergency surgery without proper resuscitation measures.

Or

Was Dr. Matongo Shija convicted on the offence of negligence for operating on the patient without resuscitation and measures.

ii) Was the Medical Council of Tanganyika properly constituted"

In his written submissions on what he has termed the “*core issues*”, Mr. Makunja has decided to “*merge and argue them interchangeably*”. He submitted that, “*in reading the two verdict (sic) delivered by the Medical Council of Tanganyika, it is obvious that negligence in planning an emergency surgery without proper resuscitation measures is not semantic to the offence of negligence for operating on patient without resuscitation and blood for transfusion*”.(emphasis his). He argued that “*these are two different offences and the Council could not in law have made such clarification which it had no power to clarify*”. The learned advocate further contended that “*Dr. Matongo Shija was charged by the Medical Council of Tanganyika for infamous conduct in professional respect*” and that the particulars of the charge stated:

*“Between 24<sup>th</sup> day of November 1998 and 24<sup>th</sup> day November 1998 at Tumbi Special Hospital in Kibaha District Coast Region, due to professional negligence and mismanagement while attending Tabia Juma who was admitted with labour pains*

*and moderate contraction. As a result of such negligence and mismanagement caused the death of Tabia Juma"*

Mr. Makunja has contended that "upon completion of the proceedings by Medical council of Tanganyika, Dr. Matongo Shija was convicted adversely. For being negligence for operating on the patient without resuscitation and blood for transfusion and Dr. Matongo Shija was convicted on the offence of negligence for planning an emergency surgery without proper resuscitation measures". Mr. Makunja listed the Members of the medical Council involved as:

1. Dr. Kyaruzi - Chairman
2. Dr. Muya - Member
3. Prof. Kimati - Member
4. Prof. Mashalla - Member
5. Dr. Berege - Member
6. Dr. Changi - Member
7. One representative form the Attorney General's Chambers.

Mr. Makunja submitted that, *"It is this decision that carries diverse offences that your humble applicant craves this Honourable Court to be moved so as to quash and revise the decision of the Minister for Health made on 9<sup>th</sup> June 2000 and 2<sup>nd</sup> May 2001 which censured the applicant"*.

The applicants advocate has further submitted that the grounds upon which the applicant is seeking relief are:-

1. *The Medical Council included three members who had been previously constituted a probe committee which come up with a report on preliminary investigation.*
2. *The three Members Dr. Chanji, Prof. Kimati and Sabina Mnalwa the Registrar of the Council composed a report of their investigations and according to their opinion, found the applicant guilty as charged (report Annexure "AI" and the said members participated in the proceedings of the Council and as such were biased or had reason to influence other members to support the finding of their investigation report.*



Mr. Makunja submitted that “ *if an administrative authority is acting within its jurisdiction or intra vires and an appeal from it is provided by statute, then it is immune from control by a Court of law. However, if it exceeds its power or abuses then like in this case, a court of law can quash its decision and declare it to be legally invalid*”. He invited this court to determine “*whether the respondents acted intra vires*”. He posed the question:

*Does the Medical Practitioners and Dentists (sic) Chapter 409 or any law authorize the Minister to appoint members to a committee to conduct an investigation and later appoint them on a medical council to justify their previous report?. He answered the question by submitting that, “it follows, therefore the appointment of Prof. Kimati Dr. Chanji and Sabina Mnaliwa on the council was ultra vires against principles of National Justice”*. He cited the case of JAMA YUSUFU VS MINISTER FOR HOME AFFAIRS (1990) TLR 80 as one authority in the chain of authorities, supporting his views.

Mr. Makunja has also submitted that *"the second ground of the application is that the councils decision is tainted with error of law"* in that, *"the decision of the medical council of Tanganyika did not address itself to the patients record appendix P "1" (which is appended to the application as appendix "A2"*. He contended that, *"from this appendix A"2" the chronological events which appear on the report from 24/11/1998, do not support the change sheet"*. He contended further that, *"The deceased patient does not appear on the record to have been at Tumbi Hospital from 21<sup>st</sup> day of November 1998 nor 23<sup>rd</sup> day of November 1998. thus it is clear therefore that applicant is being charged for something which never existed"*. Mr. Makunja further contended that ..... *"The attendance record Annexure "B" from 24<sup>th</sup> day of November, 1998 at 1.15 am at 0705 am does not indicate any negligence committed by the applicant what is on record is that the clinical conference which sat on 4<sup>th</sup> day of December 1998 observed that the deceased was intoxicated by local medicine"*. He submitted that, *"the medical Council sailed away from the facts by finding that the applicant was guilty of the offence of negligence for operating on the patient without resuscitation and blood transfusion"*. Mr. Makunja contended that, *"the applicant did not operate the patient at all.*

*The patient was operated by a gynecologist. All this is on the proceedings of the council".*

Lastly Mr. Makunja submitted that:

*"..... The last ground of your humble applicant is the contradiction and legality of the two findings in P3 and annexure 'C' attached to the application itself demand legal determination".*

That was the end of the submissions made by the applicants advocate Mr. Makunja.

The Respondents submissions were filed by the Attorney Generals Chambers.

The respondents contended that, *"there is no difference on the verdict given to the applicant as explanation was clearly given to him"*.

On the first ground of the application, the Respondents contended that the members who conducted the preliminary investigation in relation to complaints on the deaths of three mothers

and 2 children, the said members did not deal with the issue concerning the Applicant alone. They argued that the presence of some of the members of the Medical Council at the hearing "*could not bar the Applicant to tell his side of story and bring witness. The appointment of these members to be in the Medical Council is not a bar to natural justice as the applicant was given opportunity to be heard, gave his evidence and even to mitigate on the last minute*". The Respondents further contended that, "*the members of the committee were not there to justify anything only to make sure justice is done*". They submitted that the case of JAMA YUSUFU VS MINISTER FOR HOME AFFAIRS 1990 TLR 80, cited by the applicant, "*does not support the allegation raised by the applicant*".

On the second ground of the application that the decision of the Medical Council is tainted with error of law, the Respondents contended, "*that the deceased was at Tumbi Hospital from 21/1998 onward*". They stated that this can be proved by "*looking at the record on her file annexed as Appendix "B" which shows that on 21/11/1998 was the date of admission of the deceased in the Hospital*". They further

contended that, *"the fact that the deceased cause of death was due to intoxicated by local medicine or the fact that she was not operated by the Applicant does not clear the Applicant on the negligence done by him on the deceased"*. They further found that *"it is strange that the Applicant raised this issue now while he had the opportunity to give this evidence during the hearing at the Medical Council Board"*.

On the third ground on the legality of two findings in P "3" and Annexure "C", the Respondents argued that it *"does not raise any legal determination by this court as it has already been cleared and explained why there was a mix up. The letter dated 27/4/2002 is a mere clarification of the verdict from the Medical Council of Tanganyika and that pronounced by the Chairman"*. The Respondents contended that *"the verdict is the same from the beginning and there is no difference whatsoever and looking at both verdicts one can see that does not differ can see that does not differ with the change itself"*.

For the above reasons the Respondent prayed that the applicants for order of certiorari and mandamus by the Applicant be dismissed with costs.

This application is for the prerogative orders of certiorari and mandamus. Both orders have been sought against the Minister of Health and the Attorney General. For reasons which will be apparent shortly, I propose to start with the prayer for the granting of the order of mandamus. In the book titled JUDICIAL REMEDIES IN PUBLIC LAW by Chile Lewis . First Edition, the learned author discusses the use of the prerogative order of mandamus at page 192, as follows:

*“The most common use of mandamus in modern times is to compel a public body to exercise a jurisdiction to hear and determine a case, or to consider exercising discretionary power”.*

The conditions necessary for the granting of mandamus were stated in the case of JOHN MWOMBEKI BYOMBALIRWA VS. THE

REGIONAL COMMISSIONER AND REGIONAL POLICE  
COMMANDER, BUKOBA [1986] T.L.R 75, and these are:

- 1) *The Applicant must have demanded performance and the respondents must have refused to perform.*
- 2) *The respondents as public officers must have a public duty to perform imposed on them by statute or any other law but it should not be a duty owned solely to the state but should be a duty owned as well to the individual citizen.*
- 3) *The Public duty imposed should be of an imperative nature and not a discretionary one.*
- 4) *The Applicant must have a locus standi: that is, he must have sufficient interest in the matter he is applying for*
- 5) *There should be no other appropriate remedy available to the applicant.*

Although the above conditions may not be "*immutable and fixed*" as stated by Mwalusanya, J in the above quoted case, in the present application, the applicant has not demonstrated that there is

any public duty imposed upon the Minister or the Medical Council, to perform any act in which the applicant has interest, and which the applicant has demanded performance and the demand was refused either by the Minister or by the Medical Council. There is absolutely nothing in the supporting affidavit or statement or even in the written submissions by the Applicants advocate, which can form the basis for the granting of the prerogative order of mandamus. The only complaint leveled against the Minister of Health, is that he appointed members of the Medical Council who allegedly, included members who had made a preliminary enquiry into the conduct of the applicant. As for the Medical Council, the complaint against it is that it did not take into account certain matters and that its clarifying decision, contradicts a previous finding. There is no allegation whatsoever that the two authorities refused to perform any public duty conferred by law or otherwise, after the applicant had demanded such performance. The order of mandamus does not lie and cannot therefore be granted to compel the Minister or the Medical council to perform a non existing public duty and which performance has not been demanded by the applicant.



We are left with the prayer for the order of certiorari. The prerogative remedy of certiorari is available for the purpose of quashing unlawful decisions. Clive Lewis in the treatise earlier cited states at page 172; as follows:

*"The Primary purpose of certiorari in modern administrative law is to quash an ultra vires decision. Certiorari is technically an order bringing a decision of a public body to the High Court so that the court may determine whether the decision is valid. Where the decision is ultra vires, certiorari will issue to quash the decision....."*

In the present application the applicant has applied to this court, for "An Order of certiorari .... to move to this Honourable Court to quash and revise the decision of the Minister for Health made on 2<sup>nd</sup> May, 2001 censuring the applicants".

The alleged decision of the Minister made on 2<sup>nd</sup> May 2001, is contained in Appendix "C" to the application. Upon scrutiny, Appendix C happens to be a letter Ref. HEM/20/24 dated 27<sup>th</sup> April, 2001 from the Medical Council of Tanganyika to M.C Makunja of Makunja CB Advocates, who are the applicants advocates. The said letter is titled, *"E - CLARIFICATION OF THE APPARENT INCONSISTENCY OF THE VERDICT AGAINST DR. MATONGO SHIJA IN THE MATTER OF AN ENQUIRY ON DR. MATONGO SHIJA, LICENSED MEDICAL PRACTITIONER AND IN THE MATTER OF THE MEDICAL PARTITIONERS AND DENTISTS ORDINANCE, CAP 409"*.

The said letter is a reply to another letter from Mr. C. B. Makunja of Reference No.CB/ADV/MED/T/2001 dated 3<sup>rd</sup> March 2001, which was received by the Registrar who is also the Secretary of the Medical Council on 3<sup>rd</sup> April 2001.

The letter Annexure "C" was signed by the Acting Chairman and the Registrar on 2/5/2001.

On the face of this letter (Annexure "C"), it does not relate to or contain any decision made by the Minister of Health. The letter was written and signed by the Acting chairman of the Medical Council and the Registrar of Medical Practitioners and Dentists. The Medical Council is a Statutory body established by section 3 of the Medical Practitioners and Dentists Ordinance Cap 409, (Currently, Cap152 R.E 2002), while the Registrar who is also the Secretary to the Medical Council, is appointed by the Chairman of the Medical Council pursuant to section 8 of the Ordinance. The Medical Council has full mandate to enquire into misconducts by Medical Practitioners and Dentists pursuant to section 27 of the Ordinance and if the Medical Council finds them "*guilty of infamous conduct in any professional respect*", the council may caution or censure such medical practitioner or dentist or may order his suspension from practice, pursuant to its statutory power under Section 26 of the said Ordinance.

The decisions of the Medical Council are not therefore the decisions of the Minister of Health or attributable to the Minister. In the circumstances, if the Medical council made any decision in which the applicant has an interest pursuant to its powers under the Medical Practitioners and Dentists. Ordinance, the order of certiorari will lie to quash the decision of the Medical Council which has been granted statutory powers and public duties by the Ordinance. The order of certiorari does not lie to quash the decision of the Medical Council through the Minister for Health, as the Minister for Health has not made any decision or performed any public duty conferred by the Medical Practitiners and Dentists Ordinance, just because some of the members of the Medical Council which made the decision, are appointed by the Minister. The application which has been bought for the purpose of quashing the decision of the Minister, is therefore misconceived.

The application for the order of certiorari in so far as it relates to the decision of the Medical Council, it is based on the letter Annexature "C".

The question is whether the said letter is a proceeding of the Medical Council or is a decision of the Council the validity of which can be enquired into by this court, in the exercise of its powers of judicial review. The grounds on which certiorari is sought as stated in the statement, are:-

- ii) *That the decision of the Medical Council of Tanganyika is tainted with error of law if (sic) failed or refused to adduce itself to the PATIENTS RECORD hence relied on extraneous evidence. See Tumbi Special Hospitals patients record "B".*
- iii) *That the decision of the Medical Council of Tanganyika which purports to revise its earlier decision is full of contradictions and misleading. Appended and marked "C".*

I have already shown that the basis of the order of certiorari sought against the Medical Council, is the letter Appendix "C". As shown earlier, Appendix C is a letter signed by the Acting Chairman and Registrar who is replying to a letter by the Applicants advocate,

Mr. Makunja. The applicant did not make available the proceedings of the council, the charge which he was facing and the verdict of the medical council, which issued from those proceedings. Section 29 of the Medical Practitioners and Dentists Ordinance provides as follows:-

*“As soon as practicable after the conclusion of an enquiry by the council the Registrar shall serve notice of the determination of the Council on the medical practitioner concerned”.*

It appears from the contents of Appendix “C”, that after the verdict was communicated to the applicant pursuant to section 29 above, he consulted his advocate who wrote a letter to the medical council to seek a clarification and the medical council replied by Appendix “C”. Appendix “C” is therefore not part of the proceedings of the medical council and in the absence of the proceedings and the verdict, it is not possible to determine what the medical council took into consideration or that it took into

consideration extraneous matters, as alleged by the applicant. Reference by the applicant was been made to Appendix "A" which is titled: "REPORT OF PRELIMINARY INVESTIGATIONS OF 3 MATERNAL DEATHS AND TWO CHILDREN AT TUMBI HOSPITAL KIBAHA WITHIN ONE WEEK IN NOVEMBER 1998". The introductory paragraph of the Report states in part, as follows:-

*"The office of the Registrar Medical Council of Tanganyika was commissioned to probe and effect preliminary investigation in relation to the deaths of 3 mothers and 2 children as it was published in the newspapers on 28/11/1998, 14/4/1999 and 15/4/1999 respectively..... The Registrar with the company of two council members (Prof. V.P. Kimati and D.A. G Chanji) conducted preliminary investigation between 26/6/1999 - 25/7/1999".*

Reference to the patient "TABIA JUMA" appears at page 6 of the Report and the manner in which the applicant Dr. Matongo Shija

dealt with the patient is at page 7 of the said report and the opinion of the probe Committee as regards the conduct of the applicant, is at page 9 of the said report. The report is not signed by any of the three members and the photocopy which has been appended to this application, has not been certified. The authenticity of the said preliminary report is therefore not established. However, even if it is assumed that the preliminary report is authentic, the preliminary report is not in law, a report or enquiry made by the medical council. This is a preliminary enquiry carried out by the Registrar in accordance with Rule 6 (1) of the Tanganyika Medical Council Rules after receiving a complaint through newspapers.

The rule authorises the Registrar to obtain "*such advice and assistance as he thinks fit*". In the circumstances if the Registrar obtained the assistance of the two council Members, he was in law, entitled to obtain such assistance. Rule 6 (2) of the said Rules provide that, "*when he has completed his preliminary examination the Registrar shall report to the council and the council shall determine whether or not to hold an enquiry*". Under Rule 8, "*if the Council is of the opinion that a*



*prima facie case for inquiry is disclosed, the council shall direct that an enquiry shall be held".*

In the circumstances of this application, it appears that the Medical Council directed an inquiry to be held, but the proceedings of that enquiry and its findings or verdict, have not been made available to this court for the purposes of determining this application . It is not therefore possible for this court to determine what the Medical Council took into consideration or failed to take to consideration to reach its decision. There is not even a record of the verdict of the medical council after its enquiry was completed. The applicant has alleged there is an error of law on the face of the record but such record has not been made available. In JUDICIAL REMEDIES IN PUBLIC LAW BY CLIVE LEWIS it is stated:

*"if an error is classified as an intra vires error of law, the error must appear on the face of the record for the courts to be able to intervene  
..... The record includes the document*

*initiating the proceedings, the pleadings and the adjudication".*

In the present application neither the charge nor the pleadings or proceedings and the adjudication have been made available. The applicant has relied entirely on the preliminary enquiry, (Appendix "A"), which was carried out by the Registrar and the letter of clarification of the decision of the council Appendix "C". These do not constitute the record of the proceedings of the Medical Council upon which this court can determine if there was an error of law on the record or contradictions for that matter.

MS/ In the circumstances, the order of certiorari does not lie on grounds of an error on the face of the record, where the record is entirely missing or unavailable to the court.

The order of certiorari has apparently also been sought against the Minister of Health for allegedly appointing members of the Committee which carried out the preliminary enquiry to the Medical

Council. First, as Appendix "A" shows in the introductory paragraph quoted above, the two members Professor Kimati and Dr. Chanji were already members of the Council when they accompanied or assisted the Registrar to carry out the preliminary enquiry. The Minister of Health did not therefore appoint them to the Medical Council after they had carried out the preliminary enquiry. Secondly, the Medical Council consists of the Chief Medical Officer, who is the Chairman, the Attorney General and not less than 5 members appointed by the Minister. (See Section 3 of the Ordinance). Under Section 3 (6), "*At any meeting of the council, four members of the council shall constitute a quorum*" and the decision of the council is reached by "*the majority of the members present and voting at a meeting of the Council*" (section 4 (1)).

In the present case, in the absence of the record of the proceedings of the Medical Council in which the applicant was convicted and censured, there is no evidence to prove that the two members complained of took part in the proceedings or that they influenced the decision of the council.

After due consideration of this application, the grounds upon which it is founded and for the reasons given above, the applicant has not established any grounds for the granting of the orders of certiorari and mandamus.

The application is accordingly dismissed, with costs.

  
J. I. Mlay,  
JUDGE

Delivered in the presence of Ms. JANETH MAKONDO State Attorney also holding brief for Mr. Makunja advocate for the Respondent this 9<sup>th</sup> day of September.

  
J.I. Mlay,  
JUDGE

09/09/2008.

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