

SOUTH AFRICA / JUDGMENT

De Vries Ambulance Academy (Pty) Ltd v Professional Board for Emergency Care and Others (70434/16) [2017] ZAGPPHC 392 (28 April 2017)

[2017] ZAGPPHC 392

COURT

North Gauteng High Court, Pretoria

BEFORE

V.V. Tlhapi

CASE / FILE NUMBER

70434/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NUMBER: 70434/15

DATE:

28/4/2017

In

the matter between:

DE

VRIES AMBULANCE ACADEMY

(PTY) LTD

APPLICANT

And

THE

PROFESSIONAL BOARD FOR

EMERGENCY CARE

FIRST RESPONDENT

HEALTH

PROFESSIONS COUNCIL OF SOUTH AFRICA

SECOND RESPONDENT

THE

MINISTER OF

HEALTH

THIRD RESPONDENT

JUDGMENT

TLHAPI J:

[1] The applicant launched a review application against the respondents. This is therefore an interlocutory application to compel, in particular the first and second respondent to provide the record of the proceedings and reasons which resulted in a request to the third respondent to publish regulations in terms of section 24 the Health Professions Act, Act 55 of 1974 ("the Act"). The third respondent published the proposed regulations in Government Notice ("Notice")

No. R 870 of 4 November 2014.

[2] In the answering affidavit the first and second respondent launched a counter application seeking a dismissal of the review application on the basis that it was premature. The counter application was opposed on the basis that in itself was premature and not proper to be heard during this interlocutory application.

[3] Section 24 of the Act provides:

"Qualifications prescribed for registration

The Minister may, on the recommendation of the council, prescribe the qualifications obtained by virtue of examinations conducted by an accredited university, or education institution or examining authority in the Republic, which, when held singly or conjointly with any other qualification, shall entitle any holder thereof to registration in a registration category in terms of this Act if he or she has, before or in connection with or after acquisition of the qualification in question, complied with such conditions or requirements as may be prescribed.

The notice reads:

"The Minister of Health intends, under section 24 of the Health Professions Act of 1974 ... and on the recommendation of the Health Professions Council of South Africa, to make regulations in the Schedule.

Interested persons are invited to submit any substantiated comments in writing on the proposed amendments to the Director-General: Health, Private Bag..., within three months from date of publication of this notice" (my emphasis)

[4] An extension of time was granted as per Order of Court of 2 February 2015 to the Applicant for a period of 90 working days to submit written representations to the third respondent, after applicant was in receipt of the first respondent's recommendations to the third respondent and source documents. On 24 June 2015 the applicant's made demand for the draft regulations to be withdrawn and this request was not acceded to by the third respondent. The application for review was subsequently launched on 1 September 2015 and on 13 October 2015 the applicant submitted its representations to the third respondent as

called for in the notice. I was informed that the review application sought to review and set aside the publication of the draft regulation on 4 November 2014, where the third respondent had called for public comment. The parties did not make the application available for scrutiny during this hearing.

- [5] At this hearing the first and second respondent applied for the admission of a further affidavit which was served on the applicant on 6 April 2017. There was no objection raised by the applicant to such admission. The purpose of the affidavit was to inform the Court that the third respondent had promulgated the "final regulations" in Government Gazette No. 40577 of 27 January 2017, under Government Notice 49. Furthermore, the applicant had been approached on 13 March 2017 to withdraw this application and the review application contending that the promulgation of the final Regulations rendered moot any review of the draft Regulations. The applicant did not accede to this request.
- [6] In opposing this application the respondents contended that:
- (a) the review application was premature and legally incompetent in that none of the decisions of the respondents had any effect on the rights of the applicant or rights of any other person;
 - (b) the draft Regulations were published for public comment and that the recommendations of the first and second respondent were not determinative of the 'applicant's rights or the substance of the regulations';
 - (c) the third respondent still intended to consider the written representations and had not taken any decision to promulgate the draft Regulations in their 'present form or at all; that a review application was appropriate when the third respondent published the final regulations ' if the applicant continued to believe that the process was flawed;
 - (d) the applicant had failed to show that there were exceptional reasons and also failed to establish irreparable harm if relief is denied before the legislative process had been concluded;
 - (e) That 'Rule 53 does not require slavish and pointless adherence';
- [7] Mr Ferreira for the applicant argued that Rule 53 obliged the production of the record and reasons for the recommendation to the

third respondent; the applicant was entitled to examine the record and reasons to examine if the process was flawed. He relied on the description of the two stage process as unfolded in the making of regulations in *Minister of Health and Another N.O v New Clicks South Africa (Pty) Ltd and Others (treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC), ("New Clicks").

- [8] As argued for the respondents, the facts in 'New Clicks' are distinguishable on many grounds however I shall deal with the one which I think is relevant to these proceedings. In both matters the Regulations were sought to be promulgated under an 'empowering provision' (sections 24 Act 55 of 1974 and section 22G of the Medicines Act) respectively. As I

see it, the legislative process in 'New Clicks' had been finalized when the review application was launched. The Regulations were promulgated in a two stage process, being the recommendation to the Minister by the Pricing Committee and, the final promulgation of the Regulation into law. It was correctly found that the process was interlinked. If the decision to recommend the Regulations was flawed then the whole process would be tainted because it is these regulations which were found to have 'direct, external legal effect' which 'adversely affected 'the rights of pharmacists and persons in the pharmaceutical industry'.

- [9] In this matter a review application was launched before the two stage legislative process envisaged by the third respondent was finalized. Mr Burger argued that in this instance the review application was premature and legally incompetent in that the legislative process engaged by the third respondent had not been finalized. In *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006
- (6) SA 416 CC Ngcobo J recognized the right in a constitutional democracy, of the public to political participation in the legislative process.
- [10] In this instance the third respondent engaged all interested parties by inviting them to make representations on the proposed Regulations before deciding to promulgate them 'in present form, or at all'. The applicant went further by launching an application to protect its right to participation by applying to an extension of time within which to lodge its representations. The applicant was given time to exercise such right and, it launched the review application before it exercised its right to make

representations, which it finally did. It was argued for the respondents that the third respondent was in turn obliged to consider

the written representations. In my view, this had to happen before embarking on the two stage process alluded to in *New Clicks Supra*, to promulgate the regulations. The representations constituted the participation by the public and inclusion by the third respondent of the applicant and other in the legislative process.

- [11] The question therefore is when the legislative process has not been completed under what circumstances would it be appropriate to launch review proceedings and what has the approach of our courts been. It was held in *Doctors for Life International supra* at 446 C-E:

"The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process.

The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or 'settled practice'. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object."

[12] It is my view that even though this is a simple application to compel the first and the second respondents, the legislative process has not been completed. The applicant after launching the review application made representations to the third respondent. I am not certain of how many interested parties responded to the call, however the applicant is among many other interested parties listed in the notice. The third respondent is therefore obliged to consider the representations before promulgating the Regulations. It would not be correct to speculate or assume that the representations would not be considered or, that the draft or proposed Regulations would be promulgated without change, thereby disregarding the constitutional obligations of public participation as was engaged by the third respondent; *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC) para [51].

[13] The Regulations were finally published on 27 January 2017 thereby completing the legislative process. It was contended by the

respondents that since the purpose of the review application was to set aside the draft regulations, 'the final regulations render moot any review of the draft regulations' and I agree with this contention. This then brings this court to consider whether the

peremptory language in Rule 53(1)(b) still obliged the Court to order that the record and reasons be furnished. In *Jockey Club of South Africa v Forbes* [1992] ZASCA 228; 1993 (1) SA 639 (A) at 661 E-H Kriegler AJA pointed out that the use of peremptory language 'cannot be overlooked, but equally clearly it is to be understood conceptually and contextually....'. It was not necessary to slavishly observe the rule,; *Xhobani Security Catering and Distribution Agency CC v Amathole District Municipality and Another* [2015] JOL 32823 (ECG) The circumstances of each case will determine whether or not there is a need 'to invoke the facilitative

procedure of the rule'. The applicants have not satisfied me that there were exceptional circumstances or irreparable harm 'if relief is denied before conclusion of the legislative process. I am therefore of the view that this application should fail.

THE COUNTER APPLICATION

[14] I indicated at commencement of the hearing that I would not be dealing with the counter application and further advised the parties that the review application itself was not before court. It was however argued that even though the review papers were not before me, technically this application was launched under the same case number as the review application and that the applicants have failed to make out a case for this court to intervene

in the legislative process. I am still of the view not to deal with the counter application in the instance.

[15] In the result the following order is given:

1. The main application is dismissed with costs;
2. The applicant is ordered to pay costs of the respondents which include costs of two counsel;
3. No order is made in respect of the counter application;

V.V. TLHAPI

(JUDGE OF THE HIGH COURT)

DATE HEARD

: 24 APRIL 2017

DATE DELIVERED

: 28 APRIL 2017

ATTORNEYS FOR THE RESPONDENTS :

GELDENHUYS MALATJI INC.

ATTORNEYS FOR THE APPLICANT :

SCHOEMAN & ASSOCIATES

COUNSEL FOR THE APPLICANT : ADV. FERREIRA, SC ADV.GOUWS

COUNSEL FOR THE RESPONDENTS :

ADV. BURGER, SC

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