

SOUTH AFRICA / JUDGMENT

Jamine and Another v Health Professions Council of South Africa and Another (40395/2016) [2017] ZAGPPHC 1037 (3 July 2017) [2017] ZAGPPHC 1037

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka

CASE / FILE NUMBER

40395/2016

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Not

Reportable

Not of

interest

to other Judges

CASE

NO: 40395/2016

3/07/2017

In

the matter between:

NICOLE

JAMMINE

First

Applicant

XANDER

LOUBSER

Second

Applicant

and

THE

HEALTH

PROFESSIONS COUNCIL

OF

SOUTH AFRICA

First
Respondent
THE
MINISTER OF HEALTH
Second
Respondent

Summary:

Health profession
- application for registration as
paramedics -
applicants qualifying
for a diploma
the accreditation of which withdrawn by
regulatory body-
application pending
in another division
of the high
court to interdict regulatory body from
enforcing its withdrawal
of accreditation- applicants seeking order compelling
the regulatory body
to register
them as paramedics in
spite of the
pending application -
such application incompetent
without the
withdrawal of accreditation
being first reviewed and set aside.

JUDGMENT

MAKGOKA,J

- [1] On Friday, 30 June 2017 I made an order dismissing with costs, the applicants' application. I undertook to furnish reasons for that order later. These are the reasons.
- [2] This is an opposed application in which the applicants seek an order directing the first respondent, the Health Professions Council of South Africa (the council) to register them as Advance Life Support Paramedics. The application was initially brought on an urgent basis on 24 May 2016. It was struck off the roll for lack of urgency by Ms Justice Tlhapi.
- [3] The application has its genesis in the withdrawal, by the council, of the accreditation of a National Diploma: Emergency Medical Care (MDip: EMC) (the diploma) offered by the Central University of Technology Free State (CUT). Because of the withdrawal of the accreditation of the diploma, the council declines to register the students who passed the diploma, as paramedics. The applicants are directly affected by the council's decision and their applications for registration have been specifically been declined by the council.

The parties

- [4] The applicants were among the students who had enrolled for the diploma at CUT in 2013, which was offered over three years. For the purpose of this judgment, I assume that they have satisfied the requirements of the diploma. As stated above, their applications for registration as paramedics have been declined by the council on the basis that their qualification is not accredited.
- [5] The council is a statutory body established in terms of the Health Professions Act 56 of 1974 (the Act). It has a legislative mandate in terms of the Act to ensure, among others, the registration of appropriately qualified emergency care providers. The council has twelve professional boards, in conjunction with, among others, it determines the standards of professional education and training. This application concerns one of its professional boards, the Professional Board for Emergency Care (the board), which regulates the paramedics occupation. The board is the custodian of the emergency medical care sector. It is responsible for, among others, ensuring that training institutions provide adequate training.
- [6] The second respondent is the Minister of Health, against whom no relief is sought. He has been cited to the extent he might have an interest in the application. The Minister has not filed any papers, and does not take part in the proceedings.

Background

facts and litigation history

- [7] On 22 May 2014 the board resolved to withdraw the accreditation of the diploma offered by CUT. Some of the factors which the council says led to its decision include lack of sufficiently experienced and qualified training staff, training equipment and student clinical placements. This, the council asserted, resulted in learners performing badly in their practical assessments. For example, the student-staff ratio at CUT was 30:1, whereas the council's prescribed ratio was 15:1. Moreover, the majority of the training staff (i.e. academics) did not have postgraduate qualifications. The council says that this problem persisted for over 10 years despite the board's constant advise and interventions. Other reasons for the council's decision were the following:
- (a) lack of quality assurance measures;
 - (b) serious curriculum gaps;
 - (c) inadequate student assessment practices;
 - (d) absence of an external moderator for the final year exit-level assessments;
 - (e) low pass rate, owing to the structural failures;
 - (f) continued allegations of management's unilateral adjustments of student failures;

- (g) allegations of racism in the grading of students;
- (h) the entire Emergency Management Care department had become completely dysfunctional.
- (I) examination paper leakages which the second applicant was apparently aware of.

[8] The council's decision to withdraw accreditation of CUT's diploma was communicated to CUT on 30 May 2014. Pursuant to that resolution, the council created a special dispensation aimed at ensuring that students registered for the diploma were afforded an adequate opportunity to finalize their studies, despite the withdrawal of the accreditation. On 15 December 2015 the council instructed CUT to immediately cease training the pipeline students.

[9] On 19 January 2016 the council released a media statement in which it made known its instruction to CUT to terminate the education and training of the pipeline students in the diploma, with immediate effect. The statement reads, in relevant parts:

'The Board [the Professional Board for Emergency Care] identified concerns regarding the quality of the National Diploma: Emergency Medical Care (EMC) programme at the Central University of Technology (CUT). As a result the accreditation of the programme was withdrawn due to non-compliance by the University with the Board's accreditation criteria. The University was afforded the opportunity to submit representation to the Board's findings. After several meetings with CUT, there was still non-compliance with the quality concerns raised by the Board and its moderators.

Based on the shortcomings identified regarding the assessment of the National Diploma: Emergency Medical care, CUT was advised to terminate the education and training of the pipeline students in the National Diploma: EMC programme with immediate effect. As a way forward, CUT should ensure arrangements are made for the placement of students at various education institutions accredited to offer this programme. [The] placements should be identified to the Board by 15 January 2016.'

[10] In response, on 28 January 2016 the Vice-Chancellor and Principal of CUT addressed a letter to affected students and their parents. The letter, in essence, confirmed what the council had stated in its media release referred to above. In addition, CUT conveyed to the affected students that because the council had spurned its efforts to resolve the matter amicably, it had sought legal advice on the legality of the council's decision. The relevant part of the letter reads:

'Given the repercussion of the HPCSA's decision, we have referred the matter to our legal team for a favourable resolution. It is the university's contention that the decision by the HPCSA, and the manner in which it was conducted, was administratively unreasonable and procedurally incorrect. The university has instituted urgent application proceedings in the High Court, seeking to interdict the HPCSA from implementing their decision, pending the finalization of a review application. The university is also engaging with the DHET regarding this matter.'

The main application

[11] On 26 January 2016 CUT and two of the students affected by the withdrawal of accreditation of the diploma, launched an application in the Free State Division of the High Court, Bloemfontein, in which they sought a rule nisi pending an application to review and set aside the council's decision to discontinue the accreditation of CUT as a tertiary institution entitled to provide education and training of students registered for the diploma. For the sake of convenience, I shall refer to the application in the Free State Division of the High Court as 'the main application'.

[12] The primary contention in the main application is that the council does not have the authority to withdraw the accreditation of its diploma because:

- (a) such authority vested with Council for Higher Education, and
- (b) the council may not refuse to register its graduates without the permission of the Minister.

[13] This view was based on CUT's interpretation of s 31(2) of the Act. On the basis of the legal opinion it had obtained, CUT exhorted its students to resume their studies and register for the 2016 academic year. The letter reads in relevant part:

'[T]herefore, CUT intends to resume with the offering of the programme to the current 'pipeline' student with immediate effect, as is its right. Therefore, I invite all students in the NDip: EMC programme to report to the university on Monday, 15 February 2016 at 08:00, to register for the 2016 academic year and continue with their studies.'

(Emphasis in the original text.)

The applicants' enrollment for the 2016 academic year and their endeavour to register as paramedics

[14] Acting in accordance with CUT's advise to the affected students to register for the 2016 academic year, the applicants registered accordingly. As stated earlier, I assume in their favour that they completed the diploma between February and April 2016. In anticipation of being registered as paramedics, they were offered employment by two private emergency care companies. Both were due to commence their duties on 1 May 2016, which date was extended to 16 May 2016 because the necessary registration forms had not been processed by CUT.

[15] On 16 May 2016, after obtaining the necessary forms from CUT, the applicants personally submitted their registration forms to the council. The forms were rejected for two reasons

- one technical and another, substantive. Technically, the forms reflected wrong dates and other technical discrepancies. Substantively, a functionary of the council informed the applicants that an internal memorandum had been issued with an instruction that no person qualifying for the diploma offered by CUT may be registered.

[16] On 17 May 2016 the applicants re-submitted to the council, their registration forms, having corrected the technical imperfections. On 18 May 2016 a functionary of the council informed the applicants through an email that they would not be registered as the issue pertaining to the accreditation of CUT's diploma was pending in court.

The urgent application

[17] On 20 May 2016 the applicants launched an urgent application in this court, referred to earlier, seeking an order compelling the council to register them as paramedics and to provide proof of such registration on or before 25 May 2016. The application was heard on 24 May 2016, on which occasion Ms Justice Tlhapi struck the matter off the roll for lack of urgency.

Relief sought in the main application amended

[18] In the meanwhile, two days later, on 26 May 2016, an order was granted in the main application in terms of which the notice of motion in that application was amended. The effect of the amended notice of motion is that whereas originally CUT and the affected students sought to review the council's decision to discontinue accreditation of CUT's diploma, they now seek, broadly, an interdict against the council from 'purporting to have the authority to withdraw the accreditation for the diploma and to instruct CUT to cease with offering the diploma.'

The applicants' case

[19] It is against the above factual matrix that the application has to be considered. The applicants' case is based on ss 16 and 31(2) of the Act. The latter section reads (with brackets indicating proposed deletions and underlining indicating words that were inserted by the proposed amendments:

'If any university (Technicon) or other educational institution referred to in subsection (I) fails or refuses to furnish any particulars requested by (the council) a Professional Board under that subsection, or if it appears to the (council) Professional Board that any provision of this Act is not being properly complied with by such university, (Technicon) or other educational institution and that such improper compliance is having or may have an adverse effect on the standards of education and training maintained at that university (Technicon) or other educational institution, the [Minister may on the recommendation of the council, by notice in the Gazette declare that any specified qualification granted by such university, Technicon or educational institution after a date specified in the notice shall not entitle any holder thereof to registration under this Act] professional Board concerned must suspend accreditation of such university or other educational institution referred to in subsection (I) until such time as the concerned university or other educational institution has complied with the conditions and terms determine d by the Board.'

- [20] The applicants argued that parts of ss 16 and 31 of the Act giving the council authority to withdraw accreditation have not been enacted. Thus, according to the applicants, s 31(2) in its current form only entitles the council to make recommendations to the Minister, should there be non-compliance by an education institution like CUT. Put differently, the applicants argued that s 31 (2) currently only entitles the council to make recommendations to the Minister should there be non-compliance by an institution such as CUT of the nature and extent as complained of by the council.
- [21] The applicants accordingly contended that if the council was concerned about the nature and quality of the qualification, it was obliged to make recommendations to the Minister. On receipt of such recommendation the Minister would publish a declaration in a government gazette. It was argued on behalf of the applicants that it seemingly being common cause (or at least undisputed) that permission from the Minister has neither been sought nor granted, and that Minister had not published a notice in any gazette prohibiting the registration of students who successfully completed the CUT diploma, the council has no authority to 'grant' or 'withdraw' accreditation and to refuse to register such students.

Discussion and analysis

- [22] I have set out in some detail the basis of the applicants' case, for the simple reason of comparing whether the relief sought here and in the main application are essentially the same. For, if they are, the applicants should be non-suited on that basis alone, as it would be impermissible for the applicants to subvert the main proceedings in the manner they seek to do in this application. Earlier I referred to a letter dated 5 February 2016 by CUT's Deputy Vice-Principal to the affected students and their parents. In that letter, CUT's basis for challenging the council's decision to withdraw accreditation of its diploma was stated as follows:

'We are pleased to inform you that we have obtained further legal advice, indicating that the Professional Board of Emergency Care (PBEC) of the Health professions Council of South Africa (HPCSA) does not possess the legislated authority to withdraw the accreditation of the EMC programme. This accreditation has not been withdrawn by the relevant body, namely the Council of Higher Education (CHE), under the auspices of the Department of Higher Education and Training (DHET). Furthermore, the HPCSA may not refuse to register graduates without permission from the Minister of Health. To the best of our knowledge, this permission has not been sought, and certainly has not been granted. Such permission would not be granted easily.'

- [23] It was on the basis of that legal opinion that CUT and two of its affected students launched the main application. It is the very same basis that informs the present application. In other words, the applicants base their application on the same basis as CUT does in the main application. The only difference is the relief sought in the respective applications. On the one hand, CUT, correctly so, in my view, recognises the importance of first impugning the council's decision before registration of its students can be considered. Both in the original and amended notice of motion, the council's decision to withdraw the accreditation of CUT's

diploma, is assailed. The court seized of the main application would, per force, be called upon to determine the legislative and procedural issues arising from ss 16 and 32 of the Act, which form the very basis of the present application. On the other hand, the applicants seek to circumvent the decision of the council.

- [24] It is thus plain that the legal and factual issues to be determined in this application and the main application are so closely connected that it would be inappropriate for this court to pronounce on an ancillary issue i.e. registration of the students, without the decision upon which the refusal to register the students, having been set aside. There is therefore no merit in the proposition by the applicants that the main application has no bearing on this application. Of course it has. It is clear, despite the amended notice of motion, that amongst the issues to be determined in the main application is whether the council is authorised to withdraw the accreditation of the diploma offered by CUT.
- [25] The absurdity of the applicants' contention (that the main application has no bearing on their application) can be illustrated by the following simple analogy. Suppose the main application was the first of the two applications to be determined, and it was determined in CUT's favour. Needless to say, the present application would be rendered nugatory and academic. Conversely, if this application succeeds, and the applicants are granted the order for the council to register them as paramedics, and the main application is eventually determined in favour of the council, it would mean that paramedics with questionable qualifications would have been set loose on the general public. In this regard, it must be borne in mind that the applicants are seeking a final interdict. The application is not pending any proceedings in the main application, or for the determination of the rights of the parties at a later stage.
- [26] Once they are registered, their registration would be irrevocable. They would in principle be entitled to work as paramedics in terms of a court order, despite that the council's objection to their registration would have been found to be properly grounded. Given the critical nature of the work performed by paramedics, it is prudent that the main application must be determined before a decision is made on whether the applicants are legible for registrations as paramedics. For all these considerations, the applicants' contention that the main application is irrelevant to this application, is both disingenuous and ephemeral.
- [27] The insurmountable hurdle for the applicants was always going to be that they cannot be registered on the basis of an unaccredited qualification. Expressed differently, the legitimacy of their qualification (which is the minimum requirement for registration) is in dispute and remains unresolved. As long as the decision by the council to withdraw accreditation to CUT's diploma has not been reviewed and set aside, the applicants do not meet the basic requirement to be registered as paramedics.
- [28] The applicants do not dispute that the council took the decision. What is disputed is the legality of the decision, in particular the competence of the council to take such a decision. They do not seek to challenge that decision in this application. What they request this court

to do, is to ignore the council's decision, or pretend that it does not exist, by ordering the council to register them as paramedics. That is impermissible, for two reasons - one practical and the other policy-based. At a practical level, the order sought by the applicants would have the effect of circumventing the main application and bring about the consequences alluded to above.

- [29] From a policy point of view, the rule of law dictates that decisions taken by relevant authorities cannot simply be ignored because they are perceived to be wrong or incompetently made. By analogy, this is the essence of the principle enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004
- (6) SA 222; [2004] 3 SA All SA (SCA). At the risk of repetition, the council's decision withdrawing accreditation for the CUT diploma and the concomitant instruction to CUT to stop training students and offering the diploma, remains valid and have a binding effect, until set aside by a court.
- [30] As correctly pointed out on behalf of the council, the applicants were aware of the dispute between CUT and the council. They elected to associate themselves with the stance adopted by CUT, which launched the main application on their behalf, to challenge the council's decision. Having made such an election, it is impermissible, if not opportunistic, for the applicants to institute parallel proceedings aimed at achieving accelerated outcome.

Requisites for an interdict

- [31] I turn now to consider the requisites for an interdict. As mentioned earlier, the applicants seek a final interdict. The applicants seek a final interdict, the requisites of which are trite, [1] and must all must be present. They are:
- (a) a clear right on the part of the applicant;
 - (b) an injury actually committed or reasonably apprehended;
 - (c) the absence of any other satisfactory remedy.
- [32] I consider whether the above requisites have been met in the present case. As to a clear right, I am not persuaded that the applicants have established a clear right to be registered as paramedics. This is because their qualifications, of which registration is a pre-requisite
- are currently not accredited and there is an unresolved dispute concerning the quality of those qualifications.
- [33] With regard to an alternative remedy, the applicants do clearly have one.

As correctly argued on behalf of the council, they may await the outcome of the main application, or apply to join in that application, and seek to challenge the council's authority to withdraw the accreditation of their qualifications. The applicants have thus failed to meet two of the requisites. On this basis too, the application falls to fail, and I do not need to determine whether there is injury committed.

[34] In sum, the application fails on two broad bases. First, it is impermissible, and extremely opportunistic, for the applicants to bring this application while the main application, where the legality of the council's decision will be determined, is pending. The applicants cannot be allowed to circumvent that application. Second, the applicants have failed to satisfy the requisites for a final interdict. They, like all other similarly placed students, have to await the

determination

of the main application. In the result the application falls to be dismissed.

Costs

[35] Finally, there remains the issue of costs. The council pressed for costs, including those consequent upon the employment of two counsel. In my view, the issues involved here did not warrant the employment of two counsel. As such, only costs of one counsel shall be ordered. When the application was struck off the roll on 24 May 2016, costs were reserved. It is not clear from the inscription on the court file why the learned judge reserved costs, because ordinarily, upon finding that the application was not urgent, the proper costs order is that the applicants have to pay the costs. I assume that the learned judge intended that the court hearing the application in due course, would make such an order. I will make that order now.

[36] The foregoing are the reasons for the order referred to in para 1 of this judgment, which, for completeness' sake, I repeat below as follows:

1. The application is dismissed with costs, which costs shall include those reserved on 24 May 2016.

TM Makgoka

Judge of the High Court

Heard: 16 March 2017

Order made: 30 June 2017

Reasons

furnished: 3 July 2017

APPEARANCES:

For the Applicants : PR Cronje I

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(Heads of argument drafted by T Motau SC and RT Tshetlo)

Gildenhuys Malatji Inc., Pretoria

[1] Setlogelo v Setlogelo 1914 AD 221.

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