

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 31525/15

Date: 7 September 2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	NO
(3) REVISED	
7/9/16	
DATE	SIGNATURE

In the matter between:

DR MARIA DA GRAÇA
AZEVEDO MENDES OLIVIERA

APPLICANT

and

SOUTH AFRICAN VETERINARY COUNCIL

RESPONDENT

JUDGMENT

DU PLESSIS, AJ

INTRODUCTION:

1.

This is a review application by the Applicant, a Veterinary Surgeon to set aside

a decision of the South African Veterinary Council (*"the Council"*) that the Applicant failed her 2014 registration examination and order the Council to register the Applicant, Dr. Oliviera as a Veterinary Surgeon.

2.

This review application has its origin in an unfortunate event that occurred on the 1st and the 2nd September 2014, when the Applicant together with twelve other candidates wrote the Respondent's computer-based 2014 registration examination (*"CBE"*), to enable permanent residents with foreign veterinary qualifications, to qualify for registration under the South African legislation (the Veterinary and Para-Veterinary Professions Act, 19 of 1982 (*"the 1982 Act"*)).

3.

Dr. Oliviera qualified in Portugal in July 2011, and now wished to practice in South Africa as a Veterinary Surgeon. She sat the special examination in 2012 and 2013, but failed. She sat the special examination again in 2014. On 2 September 2014 she received a written slip (pass-slip) from the Officials of the Respondent. The pass-slip contained a photograph of the Applicant, her name and the words *"pass"* handwritten on the slip.

4.

Two days later, on the 4th of September 2014, the Respondent notified the Applicant per e-mail that: *"We would like to confirm that you will be attending the oral/practical examination"* and therein also provided the date and time of

the oral/practical examination. Page 2 of the e-mail contained the following note in bold letters:

"Note: Only candidates who passed the CBE will be allowed to enter this examination. Candidates will be advised once the results of the CBE are available."

5.

The Applicant passed the oral/practical examination with an average of 69% and obtained a distinction of 83% in one of the panels. However, on 28 October 2014, the Council informed the Applicant that she failed the SAVC 2014 Veterinary Examination. She was informed that the Examination Officer, Dr. Dietmar Holm, allowed her to, despite failing the CBE examination with a result below the subminima of 40%, but with an aggregate mark of 50%, to take part in the oral/practical examination. She was informed that the Council decided subsequent to considering all the facts and notwithstanding the fact that she may have passed the oral examination, to adhere to the rules pertaining to the 2014 examination, according to which she did not pass the examination. On 19 June 2015, she launched these proceedings in the Pretoria High Court for an order setting aside the Council's decision that she did not pass the SAVC 2014 Veterinary Examination and requiring it to register her as a Veterinary Surgeon.

6.

Dr. Oliviera claimed in her founding affidavit that the conduct of Dr. Holm in

providing her with a so-called pass-slip and the representation and content of the e-mail presented to her and inviting her to sit for the oral/practical examination, created a legitimate expectation that she had passed the CBE Examination. She submitted that the expectation arose from the following;

- (i) that she was handed a "*pass-slip*" on 2 September 2014;
- (ii) the wording of Rule 3.16 of the Respondent's rules which provides that: "*There will be no redress of the CBE results once the practical examination commenced*";
- (iii) that the Respondent not only allowed her to enter the practical examination, but that she had completed the practical examination with success;
- (iv) An e-mail dated 4 September 2014, notifying the Respondent together with nine other candidates, per e-mail, that "*We would like to confirm that you will be attending the oral practical examination.*", and
- (v) the note that reads: "*Only candidates who passed the CBE will be allowed to enter this examination. Candidates will be advised once the results of the CBE are available.*"

7.

The Applicant admits that prior to writing the examination, she was provided with the 2014 Administrative Rules of the Council. Subsequent to her being informed that she had failed the examination, Dr. Oliveira received a further

letter from the Respondent on 31 October 2014 and was informed by the Council, that Dr. Holm:

“did not adhere to the examination Rule 3.11 when, within his own discretion, he decided to allow you to enter the oral/practical examination.”

Rule 3.11 determines:

“3.11 Subminima requirements are as follows:

A. Veterinary Examinations

There are two CBE session with a subminimum of 50% in each of the session (180 marks of each session) and a subminimum of 40% per section within a session. The two CBE sessions will contribute equally to a mark for the CBE.

There are four (4) practical/oral panels with a subminimum of 45% per panel, and a subminimum of 50% for the whole practical and oral/practical examination. No more than one (1) panel may be failed.

A final combined mark of 50% is required to pass the examination and allow registration. The final combined mark will be computed as follows:

CBE component 50%

Practical and oral/practical component 50%”

8.

Dr. Oliviera submits (and the Respondent admits) that when she received the pass-slip on 2 September 2014 from the Respondent's duly authorised Officials, the results of each section of the written examination were not provided to her. The written pass-slip was the only communication from the Respondent that she received on that day. She also submits that when the pass-slip was issued to her, she regarded this as a reasonable, unambiguous representation, devoid of relevant qualification, that she had indeed passed the written part of the CBE, that clauses 3.12 and 3.13 of the Rules of the Council have been complied with, and that she is not excluded from entering the practical examination. In addition hereto, she understood from receiving the pass-slip (so she submits), that she need not submit any queries or complaints arising from automatic exclusion, in writing to the Council as referred to in clause 3.13 of the Rules and that she need not request in writing her performance as assessed by the computer and/or to be allowed to participate in the practical examination as set out in clause 3.16 of the Rules.

Rule 3.12 determines:

"3.12 A candidate who does not at least obtain 50% in the CBE component, will be prevented from entering the practical examination. No practical roster will be issued prior to the finalisation of the CBE component."

And Rule 3.13 determines:

"3.13 Permission to enter the practical examination with any

component below the 40% subminimum or 50% CBE final mark, will not be granted. All queries or complaints arising from automatic exclusion should be submitted in writing to the SAVC Administration.”

9.

Section 24 of the Act sets out the requirements for registration in terms of the Act and provides, *inter alia*, that a person may be registered in terms of the Act to practice a Veterinary profession if that person is the holder of an appropriate degree, diploma or certificate prescribed or accepted under Section 20 of the Act.

10.

Section 25 of the Act requires that a person desiring registration in terms of the Act, shall apply to the Council for such registration in the prescribed manner and at the prescribed time and that such application shall be accompanied by the prescribed application fee and prescribed documents. Registration of any such person is subject to the provision of the Act and such further conditions as the Council may in each case determine.

11.

It is common cause that Dr. Oliviera applied to the South African Veterinary Council to be so registered and was informed by the Veterinary Council that she has to pass their registration examination. This Court was referred to a document attached to their founding affidavit as Annexure “A”, that informed

the Applicant that she has to pass their registration examination.

12.

The Council in its opposing affidavit, submitted that Dr. Holm, who provided the Plaintiff with the pass-slip, was an Examination Officer as defined in paragraph 5 of the Examination Rules as the Chairperson of the Education Committee, who is responsible for conducting the registration examination. Paragraph 5 of the Rules describes the Examination Officer's role as being:

"Appointed by Council to take responsibility to ensure that a good quality and fair examination is completed. He/she oversees all the registration examinations of the SAVC with the full support of the Examination Administrators."

13.

The Examination Officer's duties and responsibilities are then described in the Rules, whereafter the duties and responsibilities of the CBE Moderators are discussed in paragraph 3 of the Rules. It is evident that the duties of the Examination Officer and the Moderators include the requirement to calculate a candidate's marks in accordance with the provisions of the Examination Rules. Only once that has been done, can the Examination Officer and the Moderators determine if a candidate has qualified to be allowed entrance into the oral/practical examination. It is furthermore common cause that the Examination Officer, after obtaining the marks from the oral/practical examination, submits the examination results and a report to the SAVC

Education Committee, which Committee in turn makes a recommendation to the full council regarding those results.

14.

Despite the submissions of the Applicant, it is evident that the duties of both the Examination Officer (Dr. Dieter Holm) and the Moderators, are clearly circumscribed and does not afford either Dr. Holm or the Moderators a discretion.

15.

From the affidavit of the Respondent, it appears that the Examination Officer, Prof. Holm and the Moderators, met after the CBE and found that only one candidate qualified for entry in the oral/practical examination by achieving more than 50% minimum requirement for each session, as well as more than 40% for each section, in accordance with the Examination Rules. The Respondent admits that the Applicant was not provided with the actual results of each section of the CBE on 2 September 2014, but does submit that subsequent to her being allowed to take part in the oral/practical examination, it was established that the Applicant did not comply with the requirement that a subminimum of 40% be achieved in each subsection of the CBE, and more particularly, in that she obtained only 27% for the subsection of Epidemiology.

16.

The Respondent submits that it was not the Respondent who issued the pass-slip to the Applicant, but that this was done by the Examination Officer, Dr. Dieter Holm and that this decision of the Examination Officer (to condone the Applicant despite not achieving the subminimum of 40% in the subsection Epidemiology) was *ultra vires* the Examination Rules, *ultra vires* the scope of the powers of the Examination Officials, it remains factually correct that the Applicant did not comply with the required subminimum in respect of this subsection Epidemiology.

17.

The Examination Officer Dr. Holm assumed that he had a discretion to allow additional candidates access to the oral/practical examination pending acceptance of a recommendation to Council via the Education Committee. Dr. Holm had to concede and acknowledged that the decision was not in line with the Examination Rules and was subject to later ratification by the Council. Dr. Holm specifically relied in this regard on the fact that he had, prior to each CBE session, pertinently informed the candidates that they must not make enquiries as to whether they had passed or failed until the Council had made a final decision regarding the examination results at its meeting on 21 to 22 October 2014.

18.

The Respondent submitted that the word “pass” that was written on the slip, cannot be used to convey that the candidate had successfully completed the

examination in accordance with the Examination Rules, as, so the argument goes, a matter of established fact, they had not complied with all requirements and, secondly, the decision was still subject to ratification by the Council.

19.

The Respondent, however, concedes that this qualification was not conveyed to the Applicant (or to any other candidate for that matter) and also that the results of the CBE were not provided to the candidates, including the Applicant, when they were provided with the pass-slip.

20.

Although the Applicant alleges that the decision to exercise a discretion and allow the Applicant to sit for the oral/practical examination despite not attaining the subminima of 40% in one of the subjects, was not the decision of the Examination Officer Dr. Holm alone, but was a joint decision of the Examination Officer and the Examination Officials, this in itself does not justify the amending of the Rules. The Respondent makes it clear that neither the Examination Officer nor the Examination Officials, had the authority or the discretion to amend the Examination Rules.

21.

It appears that Dr. Holm sought to rely on a practice that apparently existed in 2012, in which candidates was allowed into the practical examination with

average CBE marks of between 46% and 49%, where the minimum was 50%. The Respondent submitted that in 2012, three candidates were allowed to proceed to the oral/practical examination, with two of the candidates having a 46% average and one candidate having a 49% average for paper one of the CBE. These facts were however not disclosed to the Applicant prior to her sitting for any of the exams, nor was she aware of these facts prior to or immediately subsequent to having completed the oral examination.

22.

Subjectively, this in itself could not be a basis for a legitimate expectation. The question still remains whether the conduct of Prof. Holm in passing the Applicant in the CBE and the subsequent passing of the oral/practical examination, gave rise to a legitimate expectation.

23.

The requirements relating to the legitimacy of the expectation upon which an Applicant may rely, were referred to and discussed by Heher J in National Director of Prosecutions v Phillips and Others 2002 (4) SA 60 (W) at para 28:

“The Law does not protect every expectation but only those which are ‘legitimate’. The requirements for legitimacy of the expectation, include the following:

- (i) *The representation underlying the expectation must be ‘clear, unambiguous and devoid of relevant qualification’: de Smith, Woolf and Jowell (op cit) [Judicial Review Of Administrative*

Action 5th edition] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects Public Officials against the risk that their unwitting ambiguous statements may create legitimate expectation. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

- (ii) The expectation must be reasonable: Administrator, Transvaal v Traub (supra) [1989 (4) SA 731 (A)] at 756 I – 757 B; de Smith, Woolf and Jowell (supra) at 417 para 8-037.
- (iii) The representation must have been induced by the decision maker: de Smit, Woolf and Jowell (op cit) at 422 para 8-050; Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350 h – j.
- (iv) The representation must be one which it was competent and lawful for the decision maker to make, without which the reliance cannot be legitimate: Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C) at 59 E – G.”

24.

The above principles were also supported by the decision in President of the Republic of South Africa and Others v South African Rugby Football Union and

Others 2000 (1) SA 1 (CC) at para 216, referring to the reasonableness requirement, and stating that the question is more than the factual question, whether an expectation exists in the mind of a litigant, *“but whether, viewed objectively, such expectation is, in a legal sense, legitimate.”*

25.

Subjectively, the Applicant relies on the pass-slip and the submission in the subsequent e-mail, that she would not be allowed to sit for the oral/practical examination, unless she had passed the CBE. She, however, does admit that she had knowledge of the Rules of Respondent, including the Rule 3.15, that reads:

“Council does not accept responsibility for incorrect information obtained from unauthorised persons on examination arrangements and/or results. All enquiries must be made directly to the SAVC Administration. The results will only be made known once ratified by Council.”

26.

There is no doubt that Dr. Holm and the Examination Officers acted beyond the scope of their powers, when they submitted to the candidates, including the Applicant, that they had “passed” and as such, were allowed to sit for the oral/practical examination. Dr. Holm specifically confirm in his affidavit attached to the answering affidavit of the Respondent, that:

“The decision taken on 2 September 2014 was conditional upon the

approval and ratification thereof by the Respondent at its meeting scheduled for 21 and 22 October 2014.”

This similarly confirms that it was not disclosed to the affected candidates including the Applicant, that the decision was conditional. He then provides certain reasons therefore. But he also submits that prior to the examination the candidates were informed that:

“The fact that all candidates were made aware also by virtue of the pre-examination briefings I had given on both 1 and 2 September 2014, that no results were final until they had been ratified by the full Council.”

27.

The above dictum of Heher J excludes the possibility that an expectation can be regarded as legitimate when the public authority that makes the representation, acts beyond the scope of its powers.

28.

Given the availability of the Rules of the Respondent and the particular reference to the final adjudication of the passing of the candidate by the Council, the Applicant could not reasonably rely on the lack of knowledge that the Examination Officers' decision to provide her with a pass-slip, was a conditional decision taken outside the parameters of the Rules of the Respondent.

29.

The expectation of the Applicant does not meet criteria (i) in *National Director of Public Prosecutions 2002 supra*. I have, in this regard, already referred to the nature of the pass-slip as well as the wording of the “*note*” in the subsequent e-mail inviting the Applicant to sit for the oral/practical examination above, but it cannot be said that the representation of the Respondent is devoid of qualification. Dr. Holm confirms this and I have referred to his pre-examination briefing above.

The expectation of the Applicant therefore also does not meet criteria (ii), i.e. that her expectation was reasonable and furthermore, her expectation fails to meet criteria (iv). Prof. Holm was not competent to read a discretion into the Respondent’s Rules to make a lawful decision and as such, the reliance on the decision cannot be legitimate.

30.

Cameron JA, in South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) on 50 B – D, remarks:

“[21] *It is worth emphasising that the reasonableness of the expectation operates as a pre-condition to its legitimacy. The first question is factual – whether in all the circumstances the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the Applicant claims the*

expectation arose. Only if that test is fulfilled, does the further question – whether in public law the expectation is legitimate – arise.”

It cannot be said that the expectation of the Applicant was reasonable under the circumstances. The Applicant was never informed that she passed the Veterinary Examination as meant within the Rules of the Respondent. On the contrary, on 28 October 2014, the Respondent notified the Applicant that the Respondent decided on 21 to 22 October 2014, that she had failed the SAVC 2014 examination. This decision was entirely within the parameters of the Rules of the Respondent.

31.

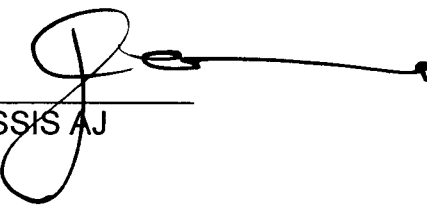
The complaint of the Applicant that she was not afforded a proper opportunity to make representations to the Respondent prior to the decision, currently on review, can also not be decided in favour of the Applicant. Subsequent to the communication to the Applicant that she failed the examination, the Applicant, through her legal representatives, made representations to the Respondent on 30 January 2015 and again on 16 February 2015. It is common cause that the issues raised by the Applicant in these representations, were fully debated at the full Council meeting of the Respondent held on 10 and 11 February 2015. It was only subsequent hereto that the Applicant was informed that the Council remains with their decision that she failed the 2014 SAVC Examination. She and the other affected candidates who had not passed the 2014 examination, were granted the opportunity to rewrite the full examination in 2015, without

having to pay the examination fee. The Applicant did not make use of this offer.

32.

In the premises, I make the following order:

The application is dismissed with costs.


DU PLESSIS AJ

Case number : 31525/15

Matter heard on : 9 May 2016

For the Applicant : Adv J Rust

Instructed by : A.V. Theron & Swanepoel

For the Respondent : Adv CH van Bergen

Instructed by : Ric Martin Incorporated

Date of Judgment : 7 September 2016