REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PRO9VINCIAL DIVISION)

REPORTABLE

CASE No: A15/2007

In the matter between:

Emergency Medical Supplies & Training CC	Appellant
And	
Health Professions Council of South Africa	First Respondent
Professional Board for Emergency Care Practitioners	Second Respondent

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Judgment delivered on 12 December 2008

__Counsel on behalf of Appellant	***:***	***ADV PAUL TREDOUX***
Attorney(s)	***:***	*Messrs* Gillan & Veldhuizen Inc
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	:	***Adv S.K. HASSIM*** *[Pretoria High Court :: chambers]*
Attorney(s)	***:***	Messrs Gildenhuys Lessing Malatji Inc
	:	c/o Jan S de Villiers P.O. Box 1474 Cape Town 8000
Date on roll	***:***	***5 SEPTEMBER 2008***
Reserved Judgment	***:***	***5 SEPTEMBER 2008***
Judgment delivered	**:**	**12 DECEMBER 2008**
Coram	**:**	**MOTALA J ET MANCA AJ**

ELMARIE JULIANA SIEVERS

SECRETARY TO MOTALA J

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO: A15/07

In the matter between:

EMERGENCY MEDICAL SUPPLIES AND TRAINING CC (trading as EMS)	Appellant

And

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	First Respondent
PROFESSIONAL BOARD FOR EMERGENCY CARE PRACTITIONERS	Second Respondent

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Judgment delivered on 12 December 2008

MANCA AJ:

[1] The appellant in this matter, Emergency Medical Supplies and Training CC, had been accredited by the Professional Board for Emergency Care Practitioners, the second respondent, to train certain levels of emergency

care practitioners. In December of 2006 that accreditation was withdrawn and the appellant now appeals against that decision.

The statutory framework

[2] The first respondent, the Health Professions Council of South Africa, was established by section 2(1) of the Health Professions Act No. 56 of 1974 ("the Act") and is the successor to what was previously known as "*The South African Medical and Dental Council*" and more recently as "*The Interim National Medical and Dental Council of South Africa*".

[3] S 15(1) of the Act now makes provision for the establishment of professional boards to carry out certain of the functions which were previously carried out by the single and all-encompassing Medical and Dental Council. The second respondent, *viz.* the board responsible for emergency care practitioners, was established in 1998 and one of its objects is to control and exercise authority in respect of all matters affecting the training of persons in the discipline of emergency care practitioners. Emergency care practitioners are colloquially referred to as "*paramedics*" who practise in the pre-hospital setting, usually at the scene of a calamity, where they stabilise the patient's condition and ferry him to a health establishment for further treatment.

[4] In terms of s 16 of the Act no person or educational institution may offer or provide training unless the training to be so effected has been approved by the relevant professional board who may attach such conditions and

requirements to the approval as deemed fit by it.

[5] The following categories of emergency care practitioners are registered under the auspices of the second respondent, *viz.*:

(i) Basic Ambulance Assistants ("BAA");

(ii) Ambulance Emergency Assistants ("AEA"); and

(iii) Critical Care Assistants ("CCA").

[6] S 20 affords an aggrieved person a right of appeal and provides as follows:

"*20. Right to appeal*

(1) Any person who is aggrieved by any decision of the council, a professional board or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision.

(2) Notice of appeal must be given within one month from the date on which such decision was given."

The decision appealed against

[7] Until December 2006 the appellant, a private college, had been accredited by the second respondent to offer training in all three of the abovementioned categories.

[8] At a meeting held on 11 December 2006 the second respondent resolved to terminate the applicant's accreditation to train BAA, AEA and CCA

courses. That decision was communicated to the appellant's attorney by the second respondent's attorney on 13 December 2006.

[9] The appellant felt aggrieved by this decision and on 12 January 2007 delivered a notice of appeal pursuant to the provisions of s 20 of the Act.

[10] On 12 January 2008 the appellant's representative, Mr Craig Northmore, deposed to an affidavit, which affidavit, he alleged, served as the record of the appeal. This affidavit was not responded to by the respondents.

The interlocutory application

[11] During June 2008 the respondents launched an application ("the interlocutory application") in which they sought an order declaring that the notice of appeal was given out of time, alternatively that the appeal has lapsed, and an order that the appeal be struck from the roll with costs.

[12] In the alternative, the respondents sought an order striking out the record filed by the applicant and substituting it with what it contended was the record of proceedings, alternatively that certain paragraphs from the affidavit deposed to by Mr Northmore be struck out on the grounds that they were irrelevant and/or argumentative and/or extraneous and/or vexatious and sought an order that the Court give directions as to the manner in which the appeal is to be dealt with which would necessitate an order postponing the appeal *sine die*.

[13] The interlocutory application is opposed and answering and replying

affidavits have been delivered.

[14] The appellant and the respondents have also delivered heads of argument. The respondents have not dealt with the merits of the appeal in their heads of argument, nor have they dealt with the factual allegations contained in Mr Northmore's affidavit, which he contends is the record of the proceedings.

The dispute

[15] The main issue that arises at this stage is what constitutes the record on which the appeal is to be adjudicated. This issue, which arises if the appeal is not struck from the roll, resolves into an enquiry whether the statutory right of appeal accorded in s 20 of the Act constitutes a strict or wide appeal. The other issues which the Court is called on to determine are whether the appellant gave its notice of appeal within one month from the date on which the impugned decision was given; whether the appellant prosecuted its appeal timeously; and whether the respondents' application to strike out is well-founded.

[16] I will deal with each of these issues separately.

Is the appeal a strict or wide appeal?

[17] The respondents contend that the appeal contemplated in s 20 of the Act

is "*an appeal in the ordinary strict sense*" and is a rehearing on the merits but is limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong. According to the respondents an appellant, in such an appeal, is not entitled to lead fresh evidence before the Court of appeal. The respondents contend that the affidavit deposed to by Mr Northmore is not the record of proceedings appealed against and contains new evidence and, as such, amounts to an attempt by the appellant to lead further evidence on appeal.

[18] The respondents contend that the appellant should have issued a notice of motion supported by an affidavit, and be accompanied by the grounds of appeal and the record of the proceedings. This, according to the respondents, was not done in this case.

[19] In support of the contention that the appeal in this case is "*an appeal in the ordinary strict sense*", *Mr Smalberger*, who appeared on behalf of the respondents, submitted that the judgment of the Supreme Court of Appeal ("the SCA") in *Health Professions Council of SA v De Bruin*[1] was authority for this proposition.

[20] In that case the respondent, Dr De Bruin, had been found guilty of disgraceful conduct by a disciplinary committee of the first respondent's predecessor, the Interim National Medical and Dental Council, and, in terms of the then applicable regulations, the disciplinary committee

[1] [2004] 4 All SA 392 (SCA) at 403.

recommended his removal from the register of practitioners. The finding and recommendation of the disciplinary committee were accepted by the then Council.

[21] Dr De Bruin then launched review proceedings against the penalty imposed and simultaneously appealed in terms of s 20 of the Act. Both the review and appeal were upheld and his punishment was substituted with a penalty of suspension from practice for three months. The Council then appealed, with the leave of the SCA, against that decision.

[22] It is apparent from the judgment that the disciplinary proceedings resulted in a full-blown hearing which lasted some five days and that a record of those proceedings was kept.

[23] The process of confirming the finding and recommendation was also recorded by the Council. It appears that Dr De Bruin made written representations to the Council and made a request that his lawyers make oral representations to the Council. That request was refused and the Council confirmed the finding and sentence.

[24] In its judgment the SCA found that the alleged grounds of review upheld by the Court *a quo* were unfounded and held that the review proceedings should not have succeeded.

[25] The SCA, however, held, that the same could not be said in respect of the appeal against the sentence. In so doing, the SCA remarked, in the

context of explaining the difference between an appeal and a review, that the appeal created by s 20 of the Act is "*an appeal in the ordinary sense*", i.e. "*a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong*".

[26] In so doing, the SCA referred to *Thuketana v Health Professions Council of South Africa* [2] which in turn referred to *De La Rouviere v SA Medical and Dental Council* [3] and *Rosenberg v South African Pharmacy Boardi* [4].

[27] On an examination of these judgments it appears that they dealt with an appellant who had sought to appeal against a decision which had been taken consequent upon a disciplinary hearing. In each case, the disciplinary proceedings had been recorded and there was no difficulty in determining what constituted the record of the proceedings.

[28] Most importantly, however, the decisions in *Thuketana* and *De la Rouviere* relied on the following passage from *Rosenberg* [5]:

"*It is true that no procedure has been laid down in the Act whereby such a person may bring his appeal before the Court, nor is there any provision in the Uniform Rules of Court specially tailored to fit precisely an appeal against the decision of a body such as the respondent. Rule 53 is designed specifically for reviews, whether from 'any inferior court' or from,*

[2] 2003 (2) SA 628 (T).

[3] 1977 (1) SA 85 (N).

[4] 1981 (1) SA 22 (A).

[5] *supra*, at 30A - 31C.

inter alia, 'any board performing quasi-judicial functions'. Rules 50 and 51 are concerned only with appeals from a magistrate's court. Rule 6, however, which is entitled 'Applications', is in extremely wide terms which are capable of covering, in effect, all forms of relief other than those specifically provided for elsewhere. Sub-rule (1) provides that every application, unless required to be brought by way of petition, shall be brought on notice of motion supported by affidavit; and sub-rule (2) requires that when relief is claimed against any person the notice of motion is to be addressed to the Registrar and such person. Sub-rule (5) provides for service, in every application other than one brought ex parte, of the notice of motion upon every party to whom notice is to be given. I can think of no valid reason why an appellant under s 45(3) cannot, in the absence of special rules regulating the manner of his access to the Court, avail himself of the provisions of Rules 6(1), (2) and (5). The notice of motion would be addressed to the Registrar and the Board and would be accompanied by an affidavit and the grounds of appeal. In addition, the record of the proceedings would accompany the notice of motion; if the appellant were otherwise unable to obtain a copy of the record he might invoke Rule 35(13) of the Uniform Rules. If the appellant relied on any ground not derived from what was contained in the record (eg an irregular act or omission on the part of the Board), that could be revealed in the accompanying affidavit, to which the respondent Board would certainly have the right to reply. The appellant could no doubt also, if he wished, institute review proceedings if there were grounds therefor and the appeal and review would no doubt be heard together."

[29] In *Rosenberg* the Appellate Division was dealing with an appeal against a finding of a disciplinary committee which had conducted a hearing into the appellant's conduct and had kept a record of such hearing. It was not dealing with the decision of a board or a committee taken at a meeting of

such board or committee in the absence of the appellant and where there is no record, in the sense understood when dealing with a hearing of a quasi-judicial nature.

[30] It is immediately apparent when looking at the provisions of s 20 of the Act that it grants a right of appeal against the decisions taken by three distinct bodies, *viz.* the Council itself, one of the professional boards created under the Act, and a disciplinary appeal committee referred to in s 10 of the Act.

[31] In each instance the form of the proceedings against which an aggrieved person seeks to appeal may be different. The most obvious difference is that between a decision taken by the Council or one of its professional bodies at an ordinary meeting in the absence of an interested party, as opposed to a decision taken at a disciplinary hearing where a record of the proceedings is kept.

[32] In my view, *De Bruin* is distinguishable from the facts of this case and is not authority for the proposition that when the appeal is against the decision of a body such as the second respondent taken in the absence of the interested person, the appeal is limited to the evidence or information on which the decision under appeal was given.

[33] I am accordingly of the view that the appeal in this case is a wide appeal and that the Court is not restricted to the information which was before the second respondent when it made its decision.

Did the appellant give its notice of appeal timeously?

[34] As I have already indicated, the decision against which the appellant appeals was taken on 11 December 2006 but only communicated to it on 13 December 2006. The appellant delivered a notice of appeal on 12 January 2007.

[35] The respondents contend that the date from which the one month period referred to in s 20(2) begins to run is the date on which the decision was "*taken*".

[36] I disagree.

[37] In *Lek v Estate Agents Board* [6] this Court held that, under the common law, a decision taken by a corporate or juristic person such as the Estate Agents Board has no legal efficacy until such time as it has been communicated to the person affected thereby and that, until such communication takes place, there is no decision which could form the subject matter of an appeal or a review.

[38] According to the Concise Oxford English Dictionary, Tenth Edition, one of the meanings of the word "*given*" is "*to communicate or impart a message*". The word "*given*", as used in s 20 of the Act, must mean communicated or imparted to the person aggrieved thereby. Any other interpretation would lead to a self-evident absurdity.

[6] 1978 (3) SA 160 (C) at 167I-168A.

[39] In the circumstances, the appellant's notice of appeal was not out of time.

Did the appellant prosecute its appeal timeously?

[40] The respondents contend that the appellant failed to prosecute the appeal timeously by taking over a year to file the record.

[41] It is not disputed that the task in preparing the record was enormous and that the appellant's representative was overseas for a considerable period of time and had practical difficulties in compiling the record.

[42] I am satisfied that, in the circumstances, the appellant did prosecute the appeal within a reasonable period and that the appeal has not lapsed by reason of the delay.

The striking-out application

[43] In their notice of motion the respondents sought, in the alternative, that the record filed by the appellant (as contained in Mr Northmore's affidavit) be struck out and replaced with what they considered to be the record of the proceedings. As a consequence of my finding that this is a wide appeal this relief must fail.

[44] The respondents, however, had a further alternative claim in which they alleged that certain specific paragraphs of Mr Northmore's affidavit fall to be struck out on the grounds that same were irrelevant and/or

argumentative and/or extraneous and/or vexatious.

[45] This aspect of the interlocutory application was not argued before us and the respondents specifically reserved the right to argue these aspects at the hearing of the appeal if we did not uphold the respondents' other contentions.

[46] In my view this was a sensible approach to the matter and I accordingly make no order in relation to this aspect of the respondents' interlocutory application which will stand over until the hearing of the appeal itself.

[47] There is one further matter. There are no prescribed rules setting out the procedure to be followed by an aggrieved person who wishes to appeal against a decision made under the Act, nor is there any provision in the Uniform Rules of Court which fit precisely an appeal in terms of the Act. In *Rosenberg*, however, the Court held that such an appeal could be prosecuted by invoking the provisions of Uniform Rule 6 and launching the appeal by way of notice of motion.

[48] In this case, the appellants chose to deliver a notice of appeal which in due course was supplemented by Mr Northmore's affidavit. Whilst this procedure is not incorrect, due to the fact that there is no laid down procedure, it would have been preferable had the appellant followed the procedure suggested in *Rosenberg*. However, in my view the notice of appeal can serve as a notice of motion.

[49] The following order is granted:

1. Save for the respondents' application to strike out portions of Mr Northmore's affidavit on the grounds that same are irrelevant and/or argumentative and/or extraneous and/or vexatious, the respondents' interlocutory application is dismissed;

2. The appeal is postponed *sine die*;

3. The appellant's notice of appeal is to stand as a notice of motion;

4. The appellant is granted leave to supplement its papers, if so advised, within twenty-one days of the date of this order;

5. The respondents are granted leave to deliver an answering affidavit to Mr Northmore's affidavit, as amplified, within two months from the date of delivery of any affidavit from the appellant, as contemplated in paragraph 4 of this order;

6. The appellant is granted leave to deliver a replying affidavit thereto within one month of the delivery of the respondents' answering affidavit;

7. The respondents are ordered to pay the appellant's costs in the interlocutory application, save for any costs that may be attributable to the alternative application to strike, which costs are to stand over for later determination.

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MANCA AJ

Acting Judge of the High Court

I agree.

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MOTALA J

Judge of the High Court