Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 16874/2013

Before: The Hon. Mr Justice Binns-Ward
Hearing: 29 August 2017
Judgment: 11 September 2017

In the matter between:

SOUTH AFRICAN SOCIETY
OF PHYSIOTHERAPY Plaintiff/Respondent

and

EQUINE LIBRIUM COLLEGE First Defendant/Excipient
THE SOUTH AFRICAN VETERINARY COUNCIL Second Defendant/Excipient
THE MINISTER OF AGRICULTURE, FORESTRY
AND FISHERIES Third Defendant/Excipient

JUDGMENT

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[1] The matter for determination at this stage of this case is the exceptions by each of the three defendants to three of the claims advanced by the plaintiff in its particulars of claim. The defendants contend that the allegations in the plaintiff's pleading do not make out a case for the relief that has been sought in terms of prayers 4 to 6 of the particulars of claim.

[2] The plaintiff is the South African Society of Physiotherapy. The Equine Librium College, the South African Veterinary Council ('the Veterinary Council') and the Minister of Agriculture, Forestry and Fisheries ('the Minister') are the first, second and third defendants, respectively.

[3] The Veterinary Council is a statutory body established under the Veterinary and Para-Veterinary Professions Act 19 of 1982 ('the Act'). The Minister is the member of Cabinet politically responsible for the administration of the Act. The plaintiff is a voluntary association that has amongst its objectives the promotion and protection of the organised physiotherapy profession.

[4] Physiotherapy is a health profession that is officially recognised in terms of Health Professions Act 56 of 1974. In terms of s 17 of that Act, '*except in so far as it is authorised by legislation regulating health care providers*',[1] only persons duly registered under that Act may practise as physiotherapists. The Health Professions Act provides for the existence a professional board to represent every health profession that is registered in terms of that Act. The health professions registered in terms of the Health Professions Act are professions concerned mainly with the treatment of human beings.[2]

[5] The plaintiff's members are professionally qualified and practise the profession of physiotherapy. They are called 'physiotherapists' and/or 'physical therapists', and it may be assumed that they are duly registered as such in terms of the Health Professions Act. According to the particulars of claim –

> Save for [the plaintiff's] members and persons trained and qualified under South African law to use these words and distinctive titles in association with the physical therapy or physiotherapy services they render
>
> 1. there is no other profession known as physiotherapy or physical therapy in South Africa; and
> 2. there are no professional people known as physiotherapists or physical therapists;
> 3. there are no other professional persons who are entitled to call themselves physiotherapy or to practice the profession of physiotherapy and/or physical therapy.

The plaintiff has also alleged that the profession of physiotherapy and those who practise it '*have acquired a high reputation and prestige amongst the public,*

[1] The expression 'health care providers' is not defined in the Health Professions Act.
[2] See s 17(1) of the Health Professions Act 56 of 1974.

including members of other branches of the medical profession'. It has also alleged that all practising physiotherapists whose area of focus is the treatment of animals must obtain a degree in physiotherapy before obtaining '*specialist qualifications through postgraduate studies to treat and perform physiotherapy on animals*'.

[6] The plaintiff has alleged in its particulars of claim that the first defendant falsely holds itself out as a tertiary education institution that offers a 4 year full-time course in 'veterinary physiotherapy' that, according to a brochure that it gives out, is '*currently in the process of being registered as a BSc Veterinary Physiotherapy degree*'. The plaintiff has alleged that no qualification called 'veterinary physiotherapy' is recognised by either the medical or veterinarian professions in South Africa. It has pleaded that '[p]*hysiotherapists whose specialist area is the treatment of animals may possess both a degree in physiotherapy offered by a higher education institution, as well as a post graduate degree in the treatment of animals*'. The plaintiff's complaint against the first defendant is that the latter has been unlawfully '*passing-off the services and qualifications it offers as those of genuinely qualified physiotherapists reposed in members of the* [plaintiff]'.

[7] In the first three of the seven heads of relief prayed for in prayers 1 to 3 of its particulars of claim the plaintiff has sought (a) a declaratory order that 'only a person who qualifies for registration with the HPCSA[3] as a physiotherapist may use the distinctive title "physiotherapist" or "physical therapist" or conduct the practice of "physiotherapy" or "physical therapist"'; (b) an interdict restraining the first defendant from calling itself a university offering degrees in physiotherapy irrespective of whether or not the word is used with the words 'animal', 'veterinary', 'equine' or 'canine'; and (c) an interdict restraining the first defendant from passing itself off as being legally competent to qualify anyone as a 'animal', 'veterinary', 'equine' or 'canine' physiotherapist or physical therapist. Those claims are not the subject of the exceptions that have been noted against the pleading. I have described them in some detail to contextualise the matters that are pertinent to the exceptions.

[8] The relief sought in terms of prayer 4 is an interdict restraining the Veterinary Council from making any recommendations to the Minister '*for the promulgation of a para-veterinary profession of "Veterinary Physiotherapy", or any profession*

[3] The Health Professions Council of South Africa, a body with juristic personality established in terms of s 2 of the Health Professions Act 56 of 1974.

containing the title "physiotherapist" or Physical therapist" whether in shortened form or not and whether in connections with the word[s] "animal", "veterinary", "equine" or "canine"". It is trite that a prohibitory interdict is not an appropriate remedy for an injury already suffered.[4] Despite its allegation that the Veterinary Council has already made pertinent recommendations to the Minister, I shall assume in its favour for present purposes that it seeks the interdict sought in prayer 4 to prevent any further recommendations of the sort complained of.

[9] In terms of prayer 5 an interdict is sought against the Minister restraining him from '*prescribing any degrees, diplomas and certificates which shall entitle the holders thereof to registration in terms of this Act* (sic) *to practice a veterinary profession or para-veterinary profession of "Veterinary Physiotherapy", or any profession containing the title "physiotherapist" or "physical therapist" whether in shortened form or not and whether in connection with the word*[s] *"animal", "veterinary", "equine" or "canine"*". I think it may be deduced in the context of the pleading read as a whole that the reference in prayer 5 to 'this Act' was intended to mean the Veterinary and Para-Veterinary Professions Act.

[10] An interdict against the Minister is also sought in terms of prayer 6 of the particulars of claim restraining him from '*declaring by way of notice in the gazette the provisions of the Veterinary and Para-Veterinary Professions Act applicable to the profession of "Veterinary Physiotherapy" or any other profession which has whether in shortened form or not and whether in connection with the word*[s] *"animal", "veterinary", "equine" or "canine" containing the title "physiotherapist" or "physical therapist"*".

[11] A consideration of the exceptions will be assisted if the import of the relief sought in terms of prayers 4 to 6 is appreciated in the pertinent statutory context.

[12] The object of the Act is apparent from its long title. It is an Act '*to provide for the establishment, powers and functions of the South African Veterinary Council; for the registration of persons practising veterinary professions and para-veterinary professions; for control over the practising of veterinary professions and para-veterinary professions; and for matters connected therewith*'.

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[4] See e.g. *Philip Morris Inc. and another v Marlboro Shirt Co SA Ltd and another* 1991 (2) SA 720 (A), at 735; [1991] 2 All SA 177 (A), at 186.

[13] Section 3 of the Act provides in broad terms for the responsibilities of the Council. The provision reads as follows:

> The objects of the council shall be—
>
> (a) to regulate the practising of the veterinary professions and para-veterinary professions and the registration of persons practising such professions;
>
> (b) to determine the minimum standards of tuition and training required for degrees, diplomas and certificates entitling the holders thereof to be registered to practise the veterinary professions and para-veterinary professions;
>
> (c) to exercise effective control over the professional conduct of persons practising the veterinary professions and para-veterinary professions;
>
> (d) to determine the standards of professional conduct of persons practising the veterinary professions and para-veterinary professions;
>
> (e) to encourage and promote efficiency in and responsibility with regard to the practice of the veterinary professions and para-veterinary professions;
>
> (f) to protect the interests of the veterinary professions and para-veterinary professions and to deal with any matter relating to such interests;
>
> (g) to maintain and enhance the prestige, status and dignity of the veterinary professions and para-veterinary professions and the integrity of persons practising such professions;
>
> (h) to advise the Minister in relation to any matter affecting a veterinary profession or a para-veterinary profession.

(Underlining for emphasis.)

In terms of s 4(f), the Council may exercise or perform any power or function conferred or imposed upon it by or under this Act or any other law.

[14] In terms of s 5(2), the Council is comprised of –

> (a) one officer of the Department of Agriculture who is a veterinarian or veterinary specialist, designated by the Minister;
>
> (b) six veterinarians or veterinary specialists from the ten persons elected as contemplated in subsection (1)(a)(i), of whom –
>
> (i) the three persons with the most votes in that election qualify automatically to be members of the council
>
> (ii) three further persons shall be designated by the Minister;
>
> (c) one representative of each para-veterinary profession elected as contemplated in subsection (1)(a)(ii);
>
> (d) one person from the persons referred to in subsection (1)(c)(i), designated by the Minister;

(e) five persons designated by the Minister from the persons referred to in subsection (1)(c)(ii) and (iii), of whom at least one shall be a non-veterinarian;

(f) one person from each of the universities in the Republic that has a faculty of veterinary science, designated by the Minister from the nominations referred to in subsection (1)(d); and

(g) one representative designated by the South African Veterinary Association from its members.

[15] A 'para-veterinary profession' is defined in s 1 of the Act as '*a profession referred to in a notice under section 21*'.

[16] In terms of s 20(1), the Minister may –

(a) … from time to time on the recommendation of the council prescribe the degrees, diplomas and certificates, granted after examination by a university or other educational institution, which shall entitle the holders thereof to registration in terms of this Act to practise veterinary professions or para-veterinary professions

(b) Different degrees, diplomas or certificates may be so prescribed in respect of different veterinary professions or para-veterinary professions.

[17] Section 21(1) provides:

The Minister may on the recommendation of the council by notice in the *Gazette* declare the provisions of this Act applicable to any profession which has as its object the rendering of services supplementing the services which in terms of the rules are deemed to pertain specially to a veterinary profession.

[18] Section 29(1) provides:

The Minister may prescribe the designations which are reserved for allocation to persons registered or deemed to be registered in terms of this Act to practise veterinary professions or para-veterinary professions

[19] The essence of the allegations in the particulars of claim in support of the claim against the Veterinary Council is that the Council has, through its registrar, made recommendations to the Minister in terms of s 43(1)[5] read with s 21(1) of the Act regarding the declaration of a para-veterinary profession of 'veterinary physiotherapy', and to enable the Minister to prescribe degrees, diplomas and certificates granted after examination by a university or educational institution. If

[5] I surmise that this was an intended reference to s 20(1) of the Act. Section 43(1) of the Act invests the Minister with the power to make regulations in respect of various aspects of the administration of the Act, including the degrees, diplomas and certificates that must have been obtained as a prerequisite for the registration of the holders thereof in terms of the Act.

these recommendations are accepted, it will enable the holders of the prescribed qualifications to obtain registration in terms of the Act to practise as veterinary physiotherapists using the designation 'physiotherapist' or 'physical therapist'.

[20] The tenor of the Council's recommendations is not alleged in the pleading, other than in the general terms that I have described. It is alleged that upon a proper interpretation of the recommendations, '*the effect of the recommended declaration of a para-veterinary profession known as "veterinary physiotherapy" will be to –*

1. *debase the name and distinctive titles "physiotherapist", "physical therapist", Physiotherapy" and "physical therapy"*
2. *authorise the first defendant and others to infringe upon the the goodwill, name and distinctive titles "physiotherapist", "physical therapist", Physiotherapy" and "physical therapy" and hold themselves out as physiotherapists or physical therapists whereas in law and in fact they are not physiotherapists or physical therapists;*
3. *... legalise an unlawful act*
4. *mislead the public into believing that:*
   - *4.1 the services of the first defendant and its 'graduates' are those of physiotherapists and/or physical therapists; and/or*
   - 4.2 *associated with the services of the plaintiff and its members.*'

[21] The essence of the first defendant's exception is that the relief sought by the plaintiff in terms of prayers 4 to 6 is incompetent, in that it would entail prohibiting the Veterinary Council and the Minister from carrying out and exercising the very functions and powers that the Act provides for them. The Veterinary Council's exception, which is limited to the relief sought in terms of prayer 4 - being the only head of relief sought against it - is predicated on the same contention. The Minister's exception, which was drafted more in the style of a notice of objection than an exception because it lacked any prayer for the upholding of the exception and the dismissal of any of the claims, is also brought on the basis that the relief sought by the plaintiff is 'impermissible in law' because it would prevent him from exercising his statutory powers.

[22] In my judgment the exceptions are well taken.

[23] The plaintiff has no right to inhibit the formulation by the Veterinary Committee of any recommendations it may wish to make to the Minister in terms of the Act. Any recommendations that it makes have no direct effect on the plaintiff. The recommendations can only have an external effect if and when they are accepted by the Minister. It is not the function of the courts to determine whether the recommendations made by the Veterinary Council are well-founded or not; that is the Minister's function in terms of the statute. Assuming that the plaintiff's rights might be adversely affected, as alleged, if the Minister were to accept the Council's recommendations, the principles of administrative justice, enshrined in s 33 of the Constitution and legislatively provided for in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), would require the Minister to afford the plaintiff the opportunity to make representations before he made a decision. Absent special circumstances, such as the existence of demonstrable mala fides on the part of the Minister (which has not been alleged), an interdict is not available to pre-empt the administrative process.

[24] It was well-established, even in the pre-constitutional era, that courts do not accept a supererogatory function in respect of decision-making allocated by statute to government or regulatory bodies; see for example *Molteno Bros. & Others v South African Railways and Harbours* 1936 AD 321 and *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C). In *Molteno*, the Appellate Division held that it was not for the court to prescribe to a statutory body how to exercise its function and, that in the absence of any indication of mala fides by the body in the exercise of its discretion, the court had no power to intervene in its functioning. In the modern era it is recognised that the Constitution provides for a separation of powers between the executive, legislative and judicial branches of government, and the courts have pronounced in judgments of the highest authority that the judiciary must not trench inappropriately on the domains of the other branches of government; see for example *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) at para 37[6] and *International Trade Administration*

[6] Where the Court (per Ngcobo J) held, amongst other things, that '*Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution*'. Interference in the context posited by the allegations in the plaintiff's particulars of claim is constitutionally mandated by way of judicial review in terms of PAJA.

Commission v SCAW South Africa (Pty) Ltd [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 at paras. 90-110. I think it is clear that for a court to grant interdictory relief against the Veterinary Council and/or the Minister of the nature sought by the plaintiff would be to do just that. It would entail impermissibly prescribing to the second and third defendants how to carry out their statutory functions.

[25] Moreover, any decision by the Minister in terms of the pertinent provisions of the statute will qualify as administrative action within the meaning of PAJA. Were the Minister to accept recommendations that would bring about a result that was not permissible in law, he would be acting beyond his powers, and it would be open to any adversely affected party to impugn his decision by applying for judicial review in terms of PAJA. The principle of subsidiarity dictates that challenges to administrative action must be brought under the auspices of PAJA. The particulars of claim do not contain any allegations that would justify an exception to the limiting effect of the principle on the manner in which a litigant may seek remedial relief. They also do not contain any allegations why, should the Minister actually exceed his powers, relief sought by way of the ordinary remedy of judicial review (coupled, if appropriate, by interim interdictory relief pending such review) would not afford the plaintiff adequate protection. It has been settled for more than a century now that proof of the absence of an adequate alternative remedy is one of the requirements for final interdictory relief; see *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[26] The word physiotherapist is in ordinary English usage (as are most other professional appellations). In South Africa the right to call oneself or practise as a physiotherapist is regulated in terms of the Health Professions Act, and any exclusiveness in the appellation is derived from that Act. The allegation that only members of the profession registered under the designation ‘physiotherapy’ in terms of the Health Professions Act may legally practise using the titles ‘physiotherapist’ or ‘physical therapist’ to the exclusion of any power by the Minister to designate a para-veterinary profession to be called ‘veterinary physiotherapy’ is unsupported by any reliance on a statutory provision having that effect. Indeed, as mentioned above, the Act under which the profession practised by the plaintiff’s members is registered expressly acknowledges that any exclusivity afforded by registration in terms of the Health Professions Act is subject to legislatively provided exceptions created by other

legislation regulating health care providers. The dictionary definition of 'veterinary surgeon' which is apparently the British English equivalent of what the Oxford Dictionary describes as the American English word 'veterinarian' is 'a person qualified to treat diseased or injured animals', in other words a health care provider for animals. It appears to me therefore that the Act qualifies as a statute that could support an exception to the exclusivity afforded to professions registered under the Health Professions Act.

[27] If the effect of the promulgation under the Veterinary and Para-Veterinary Professions Act of a para-veterinary profession to be called 'veterinary physiotherapy' would prejudice the professional status or reputation of the profession regulated under the Health Professions Act, as the plaintiff alleges, that is a matter to be resolved in the first instance between the respective members of the Cabinet responsible for the administration of those Acts, and the engagement of the courts in such matters is something that the Constitution (s 41) and the Intergovernmental Relations Framework Act 13 of 2005 provide should be a last resort. This is but a further reason why the plaintiff's claims in terms of prayers 4 to 6 are not cognisable.

[28] In the result the following order is made:

(a) The exceptions of the first, second and third defendants to the claims advanced in prayers 4, 5 and 6 of the plaintiff's particulars of claim are upheld with costs.

(b) Paragraphs 39 to 48 of the plaintiff's particulars of claim are struck out.

(c) The plaintiff is afforded a period of 15 days from the date of this order to amend its particulars of claim, in default of which the action against the second and third defendants will be deemed to have been dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court