THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 116/2012
Reportable

In the matter between:

EMERGENCY MEDICAL SUPPLIES AND TRAINING CC (Trading as EMS) **APPELLANT**

and

HEALTH PROFESSIONS COUNCIL OF SOUTH ARICA **FIRST RESPONDENT**

PROFESSIONAL BOARD FOR EMERGENCY CARE PRACTITIONERS **SECOND RESPONDENT**

Neutral citation: *EMS v Health Professions Council of SA* (116/2012) [2013] ZASCA 87 (31 May 2013)

Coram: Mthiyane DP, Maya and Shongwe JJA and Erasmus and Mbha AJJA

Heard: **9 May 2013**
Delivered: **31 May 2013**

Summary: The nature of the appeal created by s 20 of the Health Professions Act 56 of 1974 – whether it is a wide appeal or a restricted appeal, ie an appeal in the ordinary sense.

ORDER

On appeal from: Western Cape High Court, Cape Town (Hlophe JP and Zondi J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

MTHIYANE DP (MAYA, SHONGWE JJA, ERASMUS AND MBHA AJJA CONCURRING):

[1] This appeal is against a judgment and order of the Western Cape High Court (Hlophe JP and Zondi J) dismissing the appellant's appeal in terms of s 20 of the Health Professions Act 56 of 1974 (the Act) against the decision of the second respondent, the Professional Board for Emergency Care Practitioners (the Board), to withdraw the appellant's accreditation. With the leave of the high court the appellant appeals to this court.

[2] The appeal follows an earlier appeal to this court by the respondents against the judgment and order of the Western Cape High Court, in which Motala J and Manca AJ had held that an appeal under s 20 of the Act is a wide appeal which is not confined to the record which served before the Board. The appeal was struck from the roll on the basis that the matter was not properly before the court. Leave had been granted on the question whether the s 20 appeal was a wide appeal or a narrow appeal. In granting leave to appeal the learned judges had left out of

account issues such as the ‘the merits of the appeal itself, the striking out application, and the contentions as to the record’. The case is reported as *Health Professions Council of South Africa & another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA). For convenience I shall refer to the appeal to this court against the decision of Motala J and Manca AJ, as ‘the earlier appeal’.

[3] There are two questions that require consideration by the court in the present appeal. The first is whether this appeal is properly before the court, given that the earlier appeal on the same issue was struck from the roll. The second question is whether the appeal created by s 20 of the Act is a wide appeal or a narrow appeal. If this court concludes that s 20 creates a wide appeal then in that event it should have regard not only to the merits of the case but to the review grounds relied on by the appellant, such as bias and conflict of interest on the part of the Board members when the decision to withdraw its accreditation was made, as well as other review grounds raised by the appellant. But if on the other hand a conclusion is reached that s 20 of the Act creates a narrow appeal, ie an appeal in the ordinary sense, the consideration of the appeal by this court will be confined to the merits of the appeal. However, it will be limited to the evidence or information on which the Board’s decision was based. The only determination will then be whether that decision was right or wrong.

Factual background

[4] In 1999 the appellant applied to the Board for approval to conduct training of emergency care practitioners ─ the so called paramedics ─ in four basic ambulance assistance (BAA) courses, three ambulance emergency assistance (AEA) courses and subsequently between

November 2002 and February 2003, one critical care assistance (CCA) course. The appellant's applications for accreditation were granted. By the end of 2004 the Board discovered that the appellant conducted training well beyond its original accreditation. The appellant was now offering training in 11 BAA courses, five AEA courses and two CCA courses without having obtained approval from the Board to extend the scope of its accreditation. The Board conducted an investigation into the matter and also discovered that the facilities, the equipment and the standard of the offered training were well below par. In November 2006 the Board conducted an examination of the appellant's students in the CCA discipline. The students performed poorly. In the same month the appellant's accreditation was withdrawn by the Board. This led to an appeal to the high court in terms of s 20 of the Act which was then considered by Motala J and Manca AJ.

Is the appeal properly before this court?

[5] Against the above background I turn to a discussion of the issue whether the present appeal is properly before this court. Counsel for the appellant submitted that it is not competent for this court to adjudicate on the question whether the s 20 appeal is a wide appeal or a narrow appeal as this issue was disposed of in the earlier appeal. This argument is clearly without merit. On a proper reading of the judgment it is clear that the court in the earlier appeal refused to hear the appeal piecemeal, given that there were outstanding issues which also formed part of the s 20 appeal and which could still come before this court on appeal. Leave to appeal had been granted by Motala J and Manca AJ only on the question whether the s 20 appeal is a wide appeal or a narrow appeal. The matter was struck off the roll and there was therefore no final determination of the issue which would have entitled the appellant to raise a plea of res

judicata. I conclude therefore that the question is still open for adjudication and that it is competent for this court to deal with it.

Section 20 appeal: wide or narrow appeal?

[6] I turn now to the question whether the appeal created by s 20 of the Act is a wide appeal or a narrow appeal, ie an appeal in the ordinary sense. Before doing so it is necessary to briefly discuss how the two courts below approached the matter. Motala J and Manca AJ adopted the view that the appeal under s 20 was a wide appeal and that the court was therefore not restricted to the information that was before the Board when it made its decision. Having come to this conclusion the learned judges concluded that they were entitled to have regard to the review grounds relied on by the appellant. Hlophe JP and Zondi J aligned themselves with the view that the s 20 appeal was indeed a wide appeal but refused to hold that it was wide enough to include consideration by the court of the review grounds contended for by the appellant. The learned judges expressed themselves as follows:

'In our view when Motala, J and Manca, AJ held that an appeal under section 20 is a wide appeal, they could not have meant an appeal of the nature contended for by the appellant.'

The judges went on to state that this ─ meaning this case ─ was not a review but an appeal and therefore the court could only concern itself with the merits of the matter. They aligned themselves with the remarks of Cameron JA in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) where the judge of appeal remarked (para 32) that the merits may sometimes intrude in review proceedings but that this did not obliterate the distinction between an appeal and a review. In my view the judges in the court below were no doubt correct in their finding that there is a clear

distinction between an appeal and a review and therefore cannot be faultered in that regard. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 45. Notwithstanding that stance, however, they proceeded to deal in detail with the review grounds advanced by the appellant in its appeal under s 20 of the Act, namely, appellant's contentions that an incorrect body took a decision to withdraw its accreditation; that the Board was biased in that it prejudged the issue; and that there was a material conflict on the part of the members of the Board. It seems to me that the court below having found that the appeal under s 20 was limited to the merits, the need to consider the review grounds raised by the appellant fell away.

[7] Section 20 affords a person aggrieved a right of appeal and provides as follows:

'**20 Right to a 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.'

[8] In *Health Professions Council of SA v De Bruin* [2004] 4 All SA 392 (SCA) para 23, this court authoritatively decided that an appeal to the high court created by s 20 of the Act was an appeal in the ordinary sense, ie '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 the decision was right or wrong'. *De Bruin* was followed and applied by this court in *De Beer v Raad vir Gesondheidsberoepe van Suid-Afrika* 2007 (2) SA 502 (SCA). In *De Beer*

the argument that the appeal in s 20 of the Act was a review was rejected as being clearly wrong (see paras 25-26).

[9] Motala J and Manca AJ refused to follow and apply *De Bruin*. They adopted the view that *De Bruin* was distinguishable on the facts from this case and advanced two reasons for that conclusion. The first was that the decision in *De Bruin* and the cases referred to therein dealt with an appellant who had sought to appeal against a decision which had been taken consequent upon a disciplinary hearing. In each case, said the learned judges, the disciplinary proceedings had been recorded and there was difficulty in determining what constituted the record of the proceedings. The second reason was that the decision was taken in the absence of the interested person. This line of reasoning found favour with Hlophe JP and Zondi J who said in their judgment, that there was no reason why they should deviate from the judgment of Motala J and Manca AJ in regard to the nature of the appeal.

[10] In my view the reasons advanced by Motala J and Manca AJ that this case is distinguishable from *De Bruin* do not withstand scrutiny. In the present matter there was a record which served before the learned judges when they considered the s 20 appeal. There was, for example Form 169 on which the appellant applied for accreditation. There was also correspondence and other documentation relevant to the appellant's application. There were furthermore affidavits before the judges explaining the context in which the documentation had been submitted. I therefore do not agree that there was no record in this matter on which the appeal could have been considered on the merits. As to the second ground relating to the absence of an interested person, it with respect, appears to be a bit of a red herring. There was no necessity for the parties to appear

in person in the present matter. The appeal was conducted through their representatives and the documentation filed by the respective parties. In any event none of the parties in this matter would have been capable of appearing in person. In my view *De Beer* and *De Bruin* were correctly decided and this court is bound by them. It has not been shown that the two cases were wrongly decided.

[11] In the view which I take of the matter, namely that an appeal created by s 20 is a narrow appeal, ie an appeal in the ordinary sense, it is necessary to consider the grounds advanced by the appellant on the merits.

The merits

[12] In this regard two main issues require consideration. The first concerns the correctness or otherwise of the decision of the Board to cancel the appellant's accreditation. The second concerns the decision relating to the November 2006 examination. Regarding the first issue the essence of the complaint against the appellant was that it offered training beyond its originally approved accreditation. When the appellant applied for accreditation in 1999 it indicated on Form 169 that it intended to conduct training in four BAA courses. On 29 July 1999 the Board caused the appellant's premises to be inspected and a pre-accreditation report was compiled. These were considered by the Board on 27 October 1999 and the appellant was informed by a letter dated 8 November 1999 that its application for accreditation had been granted.

[13] On 10 November 1999 the appellant applied again for accreditation for three AEA courses. On 12 and 13 July 2000 the Board's representatives inspected the appellant's premises and thereafter compiled

a pre-accreditation report. After considering the matter, the Board approved the application for accreditation and conveyed its decision to the appellant by way of a letter dated 30 October 2000.

[14] Between November 2002 and February 2003 the appellant applied again on the prescribed Form 169 for accreditation to conduct training in one CCA course. During May 2003 the premises of the appellant were inspected and a pre-accreditation report was compiled and handed to the Board. The appellant was subsequently informed by way of a letter that its accreditation had been granted, subject to its CCA examinations being moderated by the Board's education committee member, Mr Dhai. The appellant's accreditation was confirmed on 17 November 2003 at a meeting of the Board.

[15] By the end of 2004 the appellant was, contrary to its original accreditation, conducting training in 11 BAA courses, five AEA courses and two CCA courses. The Board's complaint was that the appellant deviated from its original accreditation of four BAA courses, three AEA courses and one CCA course. This was what the appellant originally had applied and had been granted accreditation for.

[16] The matter became a subject of various correspondences between the Board and the appellant from 2005 to 2006 and culminated in the Board revoking the appellant's accreditation in all the courses in which it conducted training. The Board has maintained throughout that the appellant was conducting training beyond its accreditation and that despite bringing this to the attention of the appellant, the latter simply ignored this fact and proceeded with training beyond its accreditation.

[17] In argument on appeal before this court counsel for the appellant did not dispute that the appellant offered more courses than those for which it had been granted accreditation. The submission advanced on the appellant's behalf was that the letters from the Board granting the appellant accreditation did not limit the number of courses the appellant could offer in any of the three disciplines, namely BAA, AEA and CCA. In my view the submission is without merit. The appellant applied for accreditation to offer training in a specified number of courses and there is no reason to think that when accreditation was granted it entitled the appellant to offer more courses than those applied for. The appellant's conduct in conducting training in more courses than those applied for was contrary to the provisions of s 16(1) of the Act, which reads as follows:

'(1) Notwithstanding anything to the contrary in any other law contained but subject to the provisions of the Nursing Act, 1978 (Act 50 of 1978), no person or educational institution, excluding a university or a technikon, may offer or provide any training having as its object to qualify any person for the practising of any profession to which the provisions of this Act apply or for the carrying on of any other activity directed to the mental or physical examining of any person or to the diagnosis, treatment or prevention of any mental or physical defect, illness or deficiency in man, unless such training has been approved by the professional board concerned.'

[18] There were other reasons why the Board decided to withdraw the appellant's accreditation, such as insufficient equipment, failure to keep logbooks and the general poor quality of training. I do not intend to deal with these reasons, because of the finding in the preceding paragraph that the appellant's conduct fell foul of the provisions of s 16(1) of the Act.

[19] This brings me to the November 2006 examination as one of the reasons which led to a decision to revoke the appellant's accreditation. I have already indicated that the Board alleged that the quality of training

offered by the appellant was unacceptable to the Board. In support of this allegation the Board relied on a number of reports including that of a Board member Mr James Bowen. His November 2006 report noted that the students who sat for the November 2006 examinations, which was set by the Board, lacked a deep understanding of theoretical knowledge and described the grasp of the subjects by the students as superficial. On 7 November 2006 the Executive Committee passed a resolution authorising the Chairperson of the Education Committee to appoint examiners to conduct the examinations of the appellant as and when there was completion of a particular course which required examination. Ms D Muhlbauer was appointed as the chief examiner to conduct the appellant's CCA final examination. Mr Bowen was appointed as the moderator.

[20] On 15 November 2006 Ms Muhlbauer obtained the Objective Structure Clinical Examination (OSCE) sheets intended for use in the CCA examinations from Dr TH Stevens, the appellant's medical director and CCA co-ordinator. Upon perusal thereof, she noted that the OSCE sheets did not cater for all the examinable skills, with no less than 14 skills missing. When she took this matter up with Dr Stevens, she was advised that the OSCE sheets forwarded to her were in respect of the skills that the appellant had decided to examine the students on and the skills that the students had practised for their finals. Dr Stevens also indicated that the students had been taught four of the 14 skills that Ms Muhlbauer considered to be missing from the OSCE sheets, with the rest of the skills having been taught to the students in their hospital phase and therefore not examined during the OSCE.

[21] From the above it was clear to the Board that the students were not taught by the appellant in all the skills that they were required to be

proficient. The upshot of this was that none of the students passed the long question paper, where the highest mark was 41 per cent and the lowest mark was 22 per cent. Again in the OSCE assessments none of the students passed the examinations, the pass mark being 75 per cent. However four students passed the short question paper, four failed the oral evaluations and only two students were found to be competent in the simulations. A conclusion was reached that it would be futile to allow any of these students a reassessment without proper remedial action. Mr Bowen in his moderation report repeated much of what Ms Muhlbauer stated in her report. As already indicated above, he concluded that the students appeared to lack a deep understanding of the theoretical knowledge and that there was a superficial grasp of the subjects by the students but insufficient to deeply explore a subject. He also stated that there appeared to have been an obvious lack in the teaching of the program in question, as students were unable to demonstrate a detailed understanding of certain procedures. Finally, he could not recommend that any of the students be permitted to be registered with the HPCSA.

[22] In argument before us, counsel for the appellant submitted that the November 2006 examination was so difficult that even medical specialists could not have been expected to answer at least one of the questions in the detail required. Counsel relies for this submission on the report of Dr Cooke who was invited as an expert on the appellant's behalf to consider, assess and evaluate the November 2006 examination papers. Dr Cooke's report has been placed before us. That is unfortunately not how I read the report as set out in his letter of 10 May 2007. Dr Cooke said that the questions were medically correct but pointed out that there were minor issues with regards to long questions and short questions. He then went on to say that the questions could be easily understood and

were very clear in their content of case scenario, exact requirements of answers and subsections. As to the long questions he stated that they were not misleading. There was, he continued, some minor sense of ambiguity or ‘trick questions’ in the multiple choice section. He then went on to offer comment on the mark allocation and acknowledged that the mark allocation in the long questions is an area which will always carry some minor degree of subjectivity. His further comments on the paper do not, in my view, detract from the fairness of the examination and do not provide support for the contention that the November 2006 examination paper was unfair and aimed at failing the appellant’s students. In my view the submissions by counsel regarding the November 2006 examination paper are without merit.

[23] It bears mention that the first respondent, the Health Professions Council of South Africa is the statutory *custos morum* of the medical profession and that being mainly composed of members of the profession who know and appreciate the standards demanded of the profession, it has considerable advantages over a court in the consideration and evaluation of standards sought to be maintained (*De Bruin* para 23). There can therefore be no question that the Board’s assessment of the November 2006 examination must carry the day.

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

The appeal is dismissed with costs including the costs of two counsel.

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K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

For Appellant:	PJ Tredoux (with him C Cutler) Instructed by: Gillan & Veldhuizen Inc, Cape Town Matsepes Inc, Bloemfontein
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