



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 35280/2009

DATE: 04 JUNE 2010

IN THE MATTER BETWEEN

EMERGENCY CARE TRAINING ASSOCIATION

APPLICANT

AND

MINISTER OF HEALTH

1ST RESPONDENT

MEC FOR HEALTH, GAUTENG

2ND RESPONDENT

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

3RD RESPONDENT

PROFESSIONAL BOARD FOR EMERGENCY CARE
PRACTITIONERS

4TH RESPONDENT

CHAIRPERSON: PROFESSIONAL BOARD FOR EMERGENCY
CARE PRACTITIONERS

5TH RESPONDENT

SOUTH AFRICAN QUALIFICATIONS AUTHORITY

6TH RESPONDENT

JUDGMENT

KOLLAPEN, AJ

Background and legal context

[1] Emergency care practitioners who often are the first point of contact for critically ill or injured patients require appropriate training, skills and expertise to enable them to effectively discharge their duties.

[2] While there are different qualifications that can be obtained in the emergency care industry, for the purposes of this application the following qualifications are relevant:

2.1 Basic Ambulance Assistant (BAA);

2.2 Critical Care Assistant (CCA);

2.3 Ambulance Emergency Assistant (AEA).

These qualifications are usually obtained by way of short courses and are provided by private colleges who are accredited with the 5th respondent.

[3] The 4th respondent, the Professional Board for Emergency Care Practitioners, has in terms of section 16(1) of the Health Professions Act No 56 of 1974 the authority to exercise control over education and training of emergency care

practitioners as well as the power to approve training that any educational or training institution wishes to offer in pursuance of the qualifications referred to.

- [4] In terms of section 17 of the Act provision is made for the registration of any registrable health profession while section 18 provides for the keeping of registers in respect of persons so registered.
- [5] It is common cause that a process to review and upgrade the qualifications required for BAA, CCA and AEA was initiated by the 4th respondent in or about 2004 and various meetings with affected stakeholders were convened towards this objective. The applicant was one such stakeholder.
- [6] The process would have ultimately contemplated the phasing out of the existing short course training as well as the "closure" of the registers referred to in section 18.
- [7] It is also common cause that in terms of section 24 of the Act only the Minister (on the recommendation of the third respondent) has the power to prescribe the qualifications required as well as to phase out existing short course qualifications from the list of approved qualifications. In addition the "closure" of any register can only be effected by the Minister by the promulgation of regulations removing any such profession from the list of registrable professional categories.

[8] On 17 December 2008 the 3rd and 4th respondents wrote to the applicant's attorneys advising that the 3rd respondent had resolved as follows:

"...wish to advise that the Board (4th Respondent) resolved that ECTA (the applicant) be advised as follows :-

The BAA and CAA register will close on the 1 December 2010 and the tentative date for the closure of the AEA is 1 December 2014. However the closure date for this register will be reviewed during 2012. BAA and CCA qualifications will not be recognized for registration with effect from 1 December 2010. It is important to note that persons who are registered as BAA's and CCA's on 1 December 2010 will retain their registrations and will continue to practice, however the closure of the registers means that no new names will be added to these registers after this date . Regulations relating to the closing of the registers will be published by the Minister of Health in the Government Gazette for public comment before promulgation ; “

[9] On 23 January 2009 the 3rd and 4th respondent wrote to all accredited training institutions advising them in substantially the same terms as set out above.

Issues in dispute

[10] The applicant seeks to review and set aside this ‘decision’ of the 3rd and 4th respondent as articulated in the letters of 17 December and 23 January and argue in the main that:

- (i) The decision is *ultra vires* in that neither the 3rd nor the 4th respondent has any power to phase out training or close a register. That power is vested in the Minister only.
- (ii) The decision was arbitrary and in conflict with the legitimate expectations created by the various meetings between the 3rd and 4th respondent and stakeholders in the emergency care industry including the applicant, namely that the phasing out of the short courses and the closure of the registers would only commence after 2014.

[11] The 3rd, 4th and 5th respondents oppose the relief sought and in their opposition:

- (i) challenge the *locus standi* of the applicant to bring these proceedings;
- (ii) contend that the "decision" that was taken by the 3rd and 4th respondent and evidenced in the letters of 17 December and 23 January was no more than a proposal to submit draft regulations to the Minister for consideration;
- (iii) contend that in the absence of any regulations promulgated by the Minister the "decision" is incapable of being reviewed; and
- (iv) contend accordingly that the bringing of the application by the applicants was premature and falls to be dismissed.

Discussion

Locus standi

[12] The respondents' challenge to the applicant's *locus standi* is confined to whether the applicant has the legal capacity to bring these proceedings as opposed to it having an interest in the matter. While the respondents concede the substance of the applicant's interest in the proceedings, it argues that it has not proved that it has the capacity to bring the application. In particular the failure by the applicant to attach a copy of its constitution which would empower it to bring this action or advance allegations sufficient to establish its *locus standi* is seen as being fatal to its claim to *locus standi*.

[13] The applicant is described in the Founding Affidavit as "a voluntary association providing training in emergency care". There is a further description of it as being 'a representative body of all these training colleges'. It annexes a list of its members in the papers and further contends that the 3rd respondent has recognised it as a stakeholder and invited it to various stakeholder meetings. It further argues that by virtue of the provisions of rule 14(2) of the Uniform Rules of the Supreme Court it has the necessary *locus standi*.

[14] It is clear that the provisions of rule 14(2) are procedural and not substantive in nature and cannot serve to confer *locus standi* on any entity that otherwise would lack the capacity to bring proceedings. See *Bantu Callies Football Club(also known as Pretoria Callies Football Club vs Mothlamme and other 1978(4) SA 486 (T)* .

- [15] Leaving aside the issue of rule 14(2) in these proceedings it was argued for the applicant that our new constitutional dispensation has significantly changed the approach to *locus standi* of voluntary associations and that there has been a significant departure from the common law position that was confirmed in *Interim Award Council v The Premier of the Western Cape* 1998(3) SA 1056 (C) where it was held inter alia that the primary aids in the determination of *locus standi* of a voluntary association included in the first instance a reference to its constitution to determine whether it was a *universitas*. In the event that the express or implied terms of the constitution were not helpful regard would then be had to the nature of and the objects of the association.

Applicant sought to rely on the decision in *Highveldridge Residents Concerned Party vs Highveldridge TLC* 2002(2) SA 66 (TPD) where the court had to consider the challenge to the applicant's *locus standi* under circumstances where from the constitution of the applicant it did not appear that the applicant possessed legal personality or that the applicant was authorised by its constitution to institute action in its own name and further where it did not appear that there was a resolution authorising the deponent to act on behalf of the applicant in the proceedings brought.

- [17] In that matter the court, moving from the premise that the right regarding standing must be interpreted generously and extensively and having regard to the fact that the attack on the alleged lack of *locus standi* focused primarily on its capacity as a

voluntary association as opposed to its interest in the proceedings, found that the applicant did not comply with the requirements of the common law in so far as they pertain to the *locus standi* of a voluntary association.

[18] However, the court went on to find that the restrictions imposed by the common law should not apply without qualification to voluntary associations seeking to invoke section 38 of the Bill of Rights to seek redress as to do so would disregard the interest of "the poorest in our society who often are not in a position where legal advice is readily accessible and who are more often than not dependent upon action taken by informally structured associations of civil society so that legitimate issues may be addressed on their behalf".

[19] Finding that the common law restrictions would constitute an "impenetrable obstacle" contrary to the constitutional context, the court dismissed the challenge to the applicant's *locus standi*.

[20] In *Rail Commuter Action Group vs Transnet Ltd and Others* 2003(5) S A 518 CPD the court found that a "voluntary association formed to protect the rights of a vulnerable constituency and with the object of holding a public body accountable to the public, should, it seems not be subjected to unnecessary restrictions before being heard by our courts".

[21] In both these matters, *Highveldridge* and the *Rail Commuter Action Group* , the courts justifiably departed from the common law requirements regarding *locus standi* under circumstances where the applicants were seen as part of a marginalised and vulnerable community, with limited access to means, legal representation and who were advancing an issue of great significance to their lives and livelihoods. In the former instance the provision of water and in the latter instance the personal safety of commuters on public trains.

[22] The approach to standing evidenced in the above matters accords with the sentiments of the Constitutional Court articulated in the matter of *Ferreira vs Levin NO 1996(1) 984 SA (CC)* . Chaskalson P (as he then was) said:

‘it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

There can hardly be opposition to the proposition that in constitutional matters a broad approach to standing , both in relation to interest as well as to capacity , is not only justifiable but is also necessary to give full effect to the spirit of the Constitution.

A question critical to and central in the determination of these proceedings is whether the broad and expansive approach to standing with which I associate

myself, is authority for the proposition that in Constitutional matters the common law requirements of standing in so far as they pertain to voluntary associations have been rendered obsolete or indeed that the departure from then is justifiable under any or all circumstances. I do not interpret and understand that to be the case. An analysis of the dicta in both the *Highveldridge* and *Rail Commuter Action Group* matters suggest that the facts and circumstances of each matter weighed heavily in the decision as to whether a departure from the common law requirements was justified.

In *Highveldridge* the court expressly pointed out that the restrictions of the common law should not apply "without qualification" and it does appear that the departure was justified by the particular circumstances of the matter on hand. The words "without qualification" would certainly suggest that the approach that should be taken should be dependent upon the facts and circumstances of each particular matter. It can hardly be argued that when a voluntary association seeks to invoke section 38 or indeed seeks to advance the protection of any right in the Bill of Rights the issue of *locus standi* simply becomes moot. There is in my view a marked difference between adopting a broad and expansive approach to standing as opposed to a view that suggests that standing has become largely irrelevant in constitutional matters. Issues of interest and capacity in the context of locus standi remain relevant, even in constitutional matters, albeit that the threshold in satisfying those requirements has been considerably reduced in the interests of a functioning and effective constitutional democracy.

[23] Having regard to the matter on hand it is not in dispute that the applicant did not support its claim to *locus standi* by attaching a copy of its Constitution to its papers. It is not clear from the papers whether in fact the applicant has a Constitution. While a list of members of the applicant is attached, there is no resolution nor is there any description of what the aims and objectives of the applicant are apart from being stated that it is a "voluntary association providing training in emergency care".

[24] However, it is common cause that the applicant has been recognised by the 3rd respondent as a stakeholder in the emergency care industry and that there have been ongoing discussions between the 3rd and 4th respondents and the applicant. The respondent has conceded that the applicant does indeed have an interest in these proceedings. What it challenges is whether the applicant has the capacity to bring these proceedings. For the sake of completeness it appears this challenge to the capacity of the applicant has some history and was not simply opportunistic in respect of these proceedings. In its Answering Affidavit the Respondents point out that ...”During the consultative process relating to short course qualification the Board (4th Respondent) repeatedly asked the applicant to provide it with a copy of its constitution so that the Board could know the basis upon which the applicant purported to represent its members in the consultative . Despite these requests, the applicant has, to date, and even in this application, failed to furnish a copy of its constitution.” These assertions stand unchallenged.

- [25] Mr Fourie for the applicant urged the court to follow the *Highveld Ridge* and *Rail Commuter* decisions and to depart from the common law requirements required to establish *locus standi*. It must be evident that such a departure as is argued for must be justified in the circumstances and the context of each particular matter.
- [26] There are various features that distinguish the applicant in the present matter from the applicants in the *Highveld Ridge* and *Rail Commuter* matters. In addition there are various features that distinguish the facts in this matter from those that were placed before the court in those matters.
- [27] In the *Highveld Ridge* matter the court having regard to the Constitution of the applicant described it as being in the spirit of a popular movement rather than characteristic of an orthodox voluntary association. In that matter the constitution of the applicant was indeed placed before the court and while it was rudimentary it purported to set out the objectives of the applicant and attempted to describe its structure and office bearers.
- [28] In the *Rail Commuter* matter the applicant was constituted at a public meeting called to give expression and demand action about the grave dangers of travelling by train. At that public meeting a committee was formed and from the minutes of that public meeting it appears that a specific motion was passed authorising it to bring these proceedings.

[29] The applicant in the present matter has been in existence for some time now it appears. It is described as a training organisation as well as a representative body of emergency care training colleges. The absence of the Constitution makes it difficult to ascertain what its aims and objectives are precisely but a cursory glance at a list of some of its members include what may be regarded as commercial entities (Netcare, ER24) and certainly does not come across as an organisation that could be described as a community organization . It has access to legal representation and appears to have engaged with the Respondents in a competent and comprehensive manner.

[30] In the present matter apart from failing to attach its Constitution to its founding papers the applicant offers no explanation for its failure to do so or indeed fails to set out any facts from which the court could possibly conclude that it has the necessary capacity to bring these proceedings. One cannot fathom why it chose the stance. It appears to have relied on the provisions of rule 14(2). It was accepted by both counsel that rule 14(2) was procedural in nature and could not endow a voluntary association that lacked capacity with *locus standi*.

[31] In my view the position of the applicant as well as the nature of the relief it seeks (a matter I will deal with shortly) distinguish it from the instances where the courts have regarded departures from the common law requirements justifiable and consistent with the spirit of the constitution. Accordingly I am not convinced

that the applicant has made out a case why on the facts of the present matter such a departure is warranted.

It was never contended for the applicant that the common law requirements were restrictive, created an insurmountable obstacle or were difficult to comply with . On the papers the position of the applicant was simply that the provisions of Rule 14(2) endowed it with locus standi. This was a misconceived understanding of the law as Rule 14(2) is procedural and not substantive in nature. Even in arguing for a departure from the common law the applicant has not placed anything before the Court why such departure should be warranted. As I understand it, it's position is that since this is a constitutional matter it needs aver no more than that it is a voluntary association. As stated this is not my understanding of what a broad and expansive approach to standing means and the applicant who fails to at the very least to place facts before the Court in support of it's claim to locus standi , even when invited to do so , must then accept the risk that such a stance carries .

[32] I am alive to the often expressed concern that a successful challenge to *locus standi* may have the consequence that a litigant who otherwise would have a good case and be entitled to relief is barred from doing so. Certainly that was a consideration which also applied in the *Highveld Ridge* and *Rail Commuter* matters. The situation is somewhat different in this instance.

[33] The legal issue is common cause between the parties in that both accept that the power to close registers and to phase out training is vested in the Minister only.

The 3rd and 4th respondents have under oath confirmed that in the absence of regulations promulgated by the Minister they:

- (i) will not withdraw any consents granted;
- (ii) will not reject any applications for training;
- (iii) will not phase out any training courses; and
- (iv) will not close any registers.

[34] While I am not convinced that such was always the stance of the 3rd and 4th respondent its undertaking given in respect of its answering affidavit must be accepted on the face of it and under those circumstances there can be no apprehension on the part of the applicant that the 3rd and 4th respondent will act to phase out training courses or close registers until such time as regulations had been promulgated by the Minister.

[35] That being the case it can hardly be said that circumstances relative to the relief being claimed is such that it may be a factor in supporting the contention that the applicant is entitled to claim a departure from the common law requirements of *locus standi*.

[36] For the reasons above the applicant has failed to prove its *locus standi* in these proceedings and accordingly there is no need to deliberate on the merits of the matter save for what is set out above.

Costs

[37] While ordinarily costs should follow the result in this matter the applicant was seeking to advance a constitutional issue and an order that each party should pay its own costs would be appropriate. I accordingly make the following order:

- (i) **The challenge to the *locus standi* of the applicant is upheld and the application is dismissed.**
- (ii) **Each party is to pay its own costs.**

N. KOLLAPEN
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

35280-09

HEARD ON: **26 APRIL 2010**

FOR THE APPLICANT: **ADV. D.S. FOURIE SC**

INSTRUCTED BY: **HURTER SPIES INC**

FOR THE RESPONDENTS: **ADV. M. CHASKALSON SC AND
ADV. N. JELE**

INSTRUCTED BY: **GILDENHUYS LESSING MALATJI INC**