

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 79/2001
REPORTABLE

In the matter between:

SOUTH AFRICAN VETERINARY COUNCIL

First Appellant

REGISTRAR, SOUTH AFRICAN VETERINARY COUNCIL

Second Appellant

and

GREG SZYMANSKI

Respondent

Before: Howie P, Olivier, Streicher, Cameron and Lewis JJA

Heard: Tuesday 25 February 2003

Judgment: Friday 14 March 2003

Legitimate expectation – minimum requirements for invoking – must be a representation – and reliance upon it must be reasonable – Motion court proceedings – dispute of fact – basic position restated

JUDGMENT

CAMERON JA:

[1] This is an appeal against an order of the Pretoria High Court which set aside an examination pass mark decision of the first appellant, the South African Veterinary Council ('the Council') (whose Registrar is the second appellant), and which ordered the Council to register the respondent, Dr Szymanski, as a veterinary surgeon. The Court of first instance (Motata J) refused leave to appeal, but this Court later granted the necessary leave.

[2] The dispute arose from a special examination the Council conducted in September 1998 to enable South African citizens or permanent residents with foreign veterinary qualifications to qualify for registration under the South African legislation.¹ Dr Szymanski obtained a veterinary degree in Poland in 1978. He immigrated to South Africa in 1989, becoming a citizen by naturalisation in 1994. He sat the special examination in 1998. After moderation he was awarded a combined mark of 45,25% for the two component parts (written and oral). This the Council considered a failure, and refused to register him. In September 2000 he launched proceedings in the Pretoria High Court. The relief he sought was an order setting aside the Council's decision

¹ Veterinary and Para-Veterinary Professions Act 19 of 1982 ('the 1982 Act').

that the pass mark was 50%, and requiring it to register him as a veterinary surgeon.

[3] The case Dr Szymanski made in his founding affidavit was that he had a legitimate expectation that the requirement for passing the special examination was 40% for each of the oral and written parts (and not 50% for either or both combined). He claimed the expectation arose from (a) pre-examination letters the Council sent; and (b) conversations he had in August 1998 with one of its members, Professor Rautenbach, who was conducting a preparatory course on behalf of the Council for special examination entrants. To see whether Dr Szymanski made out a case at all, and whether he was entitled to the relief he obtained, it is necessary to set out the details of both aspects of the claimed expectation.

[4] The Council wrote to Dr Szymanski on 13 June 1997 informing him of the special examination. Attached were two documents – the first headed ‘Special Examination Curriculum’ and the second ‘Special Examination for Registration as a Veterinarian – General Information’. The ‘Curriculum’ makes it clear that the special examination consists of two parts – a three-hour written

examination (consisting of three sections, whose subject-matter is specified); and a practical/oral examination. At its foot the document states:

‘Candidates must obtain a sub-minimum of 40% in both sections of the evaluation procedure and registration will follow on ratification of results by SA Veterinary Council.’

The ‘General Information’ gives details such as application procedures, venue, enrolment dates and examination fee. Its concluding section is ‘Special examination information’:

‘7.1 The examination consists of two parts namely:
 a three hour written examination and a practical/oral examination
 as set out in the Curriculum.
 7.2 A minimum mark of 40% must be obtained in both the written and
 practical/oral examination.
 ...’

[5] Dr Szymanski then applied to write the special examination and paid a registration fee. He states in his founding affidavit that he believed on the basis of these letters that he ‘needed a minimum of 40% in the written and practical/oral examination in order to be registered’.

[6] In August 1998 he attended the Council’s preparatory course. There he saw a letter of 31 July 1998 the Council had sent to a colleague on the course (he says he received his own copy only later). The letter enclosed the ‘venues, dates, times, template,

rules and list of procedures' for the upcoming examination. It urged candidates to contact the Council should they require any further information. The attachments included a document entitled 'SAVC Registration Examination: Administrative Rules'.

This stated:

'3.13 A subminimum of 40% is required for each section and the practical/oral examination as well as a final combined mark of at least 50% in order to pass the Examination for registration with the Council.

3.14 Council does not accept responsibility for incorrect information obtained from unauthorised persons on examinations arrangements/or results. All enquiries must be made to the Secretariat.'

[7] Dr Szymanski states that he was 'immediately concerned' to read this document – but considered that it 'must be a standard form attached to all such notices and aimed at the usual registration examination and not the special examination'. To put his mind at ease, however, he approached Rautenbach and asked him for 'clarification as to the correct position with specific reference to what the pass requirement was, ie either an average of 50% on the specially combined mark or 40% on the oral/practical and 40% on the written exam'. He states that Rautenbach undertook to approach the Council. The next day Rautenbach reported back that he had discussed the matter with its president, Professor Terblanche, who had informed him that candidates writing the

special examination could ignore the 'Administrative Rules', since these had been sent in error to special entrants. Dr Szymanski says he was now convinced that to pass he needed only 40% in each of the oral/practical and written examinations.

[8] The Council also sent out a letter dated 14 August advising candidates that, having been told in June 1997 that a sub-minimum of 40% was required in only the written and oral examinations (as a whole), they should ignore the further suggestion in the July 1998 letter that a sub-minimum was required *in each section* of each examination (even though the latter was in accordance with Council policy). Dr Szymanski claimed to have received this letter only after the examination (which the Council disputes). He says it took him 'completely by surprise' and that he could not believe that the Council could 'send such a notification' after the examination, which he had sat with the aim of obtaining only 40%.

[9] The Council in its opposing depositions strongly denied that, properly interpreted, its letters could mean that the pass mark was only 40%. Even more emphatically, the Council disputed in detail that in August Rautenbach ever discussed the overall pass mark

with special examination entrants. On its version, the only question Rautenbach discussed with them, and the only issue he raised with Terblanche, was the apparent stipulation (suggested in the 'Administrative Rules') that the sub-minimum requirement applied not only to the written paper as a whole, but to each section of it. It was on this issue that Rautenbach, after consulting with Terblanche and the Council's assistant registrar, Ms Havinga (who faxed a contemporaneous query to the Council's examination officer, Professor Veary), gave the assurance that the sub-minimum did not apply to each section.

[10] The Council's president, Terblanche, Rautenbach himself and Havinga, attested to these averments. Havinga attached her memo to Veary. It deals with the confusion about the application of the sub-minimum requirement to each section of the written examination – but makes no reference to the overall pass mark.

[11] These affidavits confronted the Court below with two connected issues. The first was a preliminary question – did Dr Szymanski's founding papers make out a case that his belief that the pass mark was 40% was reasonable? Unless on his own account (leaving aside for the moment the Council's affidavits), he made

out such a case, there could be no question of his relying on a 'legitimate expectation'. But even if he passed this hurdle, the second question was whether, given the Council's denial that the overall pass mark was ever discussed, he was entitled to relief on the papers as a whole.

[12] In answering both questions the starting point is of course that the Council is a statutory body² to which the constitutional requirements of just administrative action applied. These entitled Dr Szymanski to action from the Council that was 'lawful, reasonable and procedurally fair'.³

[13] The first question concerns the bare case an applicant must make out to be able to invoke the legitimate expectation doctrine. The second question raises elementary issues about the conduct of motion proceedings. In my view both questions cannot but be answered against Dr Szymanski, and in granting him relief the Court below strayed far from a proper approach.

(a) Basic requirements for a legitimate expectation

² Established under s 2 of the 1982 Act.

³ 1996 Constitution s 33. The Promotion of Administrative Justice Act 3 of 2000 (s 3(1) of which explicitly refers to 'legitimate expectations') came into force on 30 November 2000, after the events in issue.

[14] The order the Court below granted went very far indeed. It did not merely set aside the Council's decision about the pass mark. Nor did it remit the matter to the Council to reconsider its decision that Dr Szymanski had failed. There was no finding – and no basis for a finding – that the Council had acted in bad faith or was unable, unwilling or unfit to perform its duties. The order granted nevertheless by-passed the Council and conferred on Dr Szymanski a statutory benefit (registration as a veterinary surgeon) in respect of which the legislature entrusted the Council itself with heavy responsibilities.⁴

[15] The propriety of the order given in this form was open to serious question, not least because it is by no means clear that a legitimate expectation can found an extra-procedural entitlement such as the substantive benefit claimed here. Though this Court has recently cautioned against an over-hasty answer to this 'difficult and complex' issue, and has suggested that the substantive legitimate expectation doctrine may have been developed to deal with problems of English law that do not exist in

⁴ 1982 Act sections 20 and 22 to 28.

our law,⁵ this case does not require us to resolve the issue. This is because Dr Szymanski's case was deficient in its most basic essentials.

[16] His case was that the Council had created an expectation, in the first instance in its correspondence, that the pass mark for the special examination was 40%. But this is not so. Neither the 1997 nor the 1998 documents, nor those documents taken together, represent that the pass mark is 40%. The 'Curriculum' of June 1997 refers explicitly to the 'sub-minimum' of 40% that candidates must obtain in both the written and oral examinations. A 'minimum' means the least permissible or possible. A 'sub-minimum' therefore suggests an additional requirement below the minimum, and in argument counsel for Dr Szymanski rightly conceded that 'sub-minimum' entailed that there must be an additional applicable minimum. This by unavoidable inference had to be one above the sub-minimum.

[17] That is exactly what the Council conveyed when it said in June 1997 that candidates must obtain a 'sub-minimum' of 40% in both the oral and written examinations. The other minimum

⁵*Meyer v Iscor Pension Fund*, 391/2001, decision of 28 November 2002, para 27 (Brand JA,

contemplated was the overall pass rate, which the 'Curriculum' does not mention, but which by implication was clearly not 40%.

[18] It is true that the 'General Information' of June 1997 does not refer to a 'sub-minimum', but merely to a 'minimum' of 40%. But, equally, it does not state that the *pass mark* is 40%. No Council document contains such a representation. At best for Dr Szymanski (and at worst for the Council) the varying statements about minima and sub-minima created confusion. Counsel for Dr Szymanski was driven to charge the Council with responsibility for 'too many mistakes and misperceptions'. But subjective confusion by itself is no basis for a legitimate expectation. Still less can misinterpreting the words or actions of an authority give rise to a legitimate expectation.⁶

[19] The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J in *National Director of Public Prosecutions v Phillips and Others*.⁷ He said:

Harms JA, Cameron JA, Navsa JA and Jones AJA concurring).

⁶ De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5 ed 1995 by Woolf and Jowell) para 8-055, citing immigration appeal cases not available in the Court's Library or on-line.

⁷ 2002 (4) SA 60 (W) 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 ed] 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 expectations. 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 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: De Smith, 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 350h - 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 59E - G.”

[20] Adopting and applying this exposition, which is supported also by the decision of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,⁸ it is plain that Dr Szymanski's case was defective from the outset. He may subjectively have had an expectation. But his expectation fails to meet criteria (i) and (ii) (making it unnecessary to consider any further requisites). There was no representation that the pass mark was 40% – let alone a

⁸ 2000 (1) SA 1 (CC) para 216, referring to the reasonableness requirement, and stating that the

clear, unambiguous and unqualified representation. Nor was Dr Szymanski's expectation to that effect reasonable.

[21] It is worth emphasising that the reasonableness of the expectation operates as a pre-condition to its legitimacy.⁹ 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. In the present case, it was not in my view reasonable for Dr Szymanski to conclude on the basis of the June 1997 letters from the Council, however ambiguous or confusing they may have been, that the pass mark was 40%. No legitimate expectation could therefore have been created.

[22] Certainly the 'Administrative Rules' the Council sent out in July 1998 removed any doubt there may have been. These stated that the sub-minimum was required in each of the oral and written parts in addition to a combined mark of at least 50%. Dr

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'.

⁹ See Lord Diplock's speech in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 949*h-j*.

Szymanski on his own account saw this document before taking the examination, and realised that it was at odds with the impression he said he gained from the previous correspondence. He claimed however to have concluded that the 'Rules' were inapplicable, and to have received confirmation of his impression from a conversation with Rautenbach. This entails consideration of the second aspect of the case, namely the extensive disputes of fact that appear from the affidavits.

(b) Disputes of fact in motion court proceedings

[23] It is an elementary rule of motion proceedings that an applicant cannot succeed in the face of a genuine dispute of fact that is material to the relief sought. Conflicting averments under oath cannot be tested on affidavit but only by oral evidence. Nearly 80 years ago Innes CJ explained that

'The reason is clear; it is undesirable in such cases to endeavour to settle the dispute of fact upon affidavit. It is more satisfactory that evidence should be led and that the Court should have an opportunity of seeing and hearing the witnesses before coming to a conclusion.'¹⁰

[24] Innes CJ added a significant qualification: 'where the facts are not really in dispute ... there can be no objection, but on the

contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion'.¹¹ This qualification, endorsed in the subsequent classic expositions on the subject,¹² led to a gradual but not inconsiderable relaxation of the criteria for determining whether despite a factual dispute relief can be granted in affidavit proceedings. Most notably, Corbett CJ in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd*¹³ amplified the ambit of uncreditworthy denials that would not impede the grant of relief. He extended them beyond those not raising a real, genuine or bona fide dispute of fact, to allegations or denials that are 'so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers'.¹⁴

[25] This much is elementary, but necessary in view of the course the proceedings took in the Court below. The case involved review of a decision of a statutory body. The applicant therefore had no choice but to proceed by way of notice of motion.¹⁵ But once the Council had raised a genuine dispute about Dr

¹⁰ *Frank v Ohlsson's Cape Breweries Ltd* 1924 AD 289 at 294.

¹¹ pp 294-295.

¹² *Peterson v Cuthbert & Co Ltd* 1945 AD 420 428; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

¹³ 1984 (3) SA 623 (A) at 634-635.

¹⁴ Drawing on the minority judgment of Botha AJA in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 924A.

Szymanski's factual exposition, one that was material to the relief he sought, it was not proper for the Court to grant him relief on the papers. The disputed issues should have been referred for the hearing of oral evidence, or for trial.¹⁶

[26] Provincial division practice may sometimes be robust (in my view often rightly so) in applying Corbett CJ's category of 'far-fetched or clearly untenable' denials. But the approach in the present case went far beyond robust. Relief was granted despite the Council's comprehensive and detailed denials, supported by contemporaneous notes and correspondence. The judge below considered that the matter could be approached on a 'balance of probability', and concluded that it was 'improbable' that any dispute existed with regard to the application of the minimum requirement (as opposed to the pass mark). In this he erred appreciably, and to the detriment of all the parties, including Dr Szymanski, who has been put to the expense of defending a judgment on appeal in circumstances where it was extremely difficult to do so.

¹⁵ Rule of Court 53.

¹⁶ Rule of Court 6(5)(g).

[27] As pointed out earlier, the Council denied that the pass mark had ever been discussed with special examination entrants. This much Dr Szymanski's counsel accepted. But he contended that Terblanche and Rautenbach failed to deny explicitly that Terblanche informed Rautenbach that July 1998 'Administrative Rules' had gone out in error. He also sought to demonstrate through detailed analysis that the document pertained to the Council's ordinary examinations, and not the special examination at issue here. Hence he contended that Dr Szymanski was entitled to conclude that the 'Rules' had been sent in error, and it was likely that Rautenbach had told him so.

[28] These submissions are incorrect. First, Terblanche and Rautenbach specifically deny that examination entrants were ever told that the 'Administrative Rules' could be ignored or were sent out in error. Terblanche (the main deponent authorised by the Council) denies 'each and every allegation' in the relevant portion of Dr Szymanski's account. He also denies 'particularly' that he indicated to Rautenbach, *or that the latter communicated to the students*, that the rules had been sent in administrative error, or that any of the rules could be ignored. Rautenbach's subsidiary

deposition confirms that of Terblanche. Rautenbach adds 'more particularly' that the only discussion he ever had with Dr Szymanski concerned the application of the sub-minimum to the different sections of the written examination, and that it was never indicated to him that Dr Szymanski was under the impression that the 50% pass mark did not apply. Hence it was never discussed.

[29] Second, as I have shown, the Council's explicit and detailed denials rendered the matter incapable of decision by affidavit on the probabilities. At best for Dr Szymanski, the apparent discordance between the examination format the 'Administrative Rules' envisaged and the special examination format gave rise to confusion. This of course is why he approached Rautenbach, with an upshot that brings us back to the irresolvable conflict between the depositions.

[30] The reasons set out earlier also entail that Dr Szymanski's attempt to invoke what he called a 'statutory contract' between him and the Council regarding a 40% pass mark must fail. The Council made no offer and there was thus none to accept. For similar reasons there can be no question of an estoppel.

[31] In these circumstances the relief should plainly not have been granted. There was some difference before us as to whether either party asked the Court below to refer the matter for evidence. In his written argument counsel for Dr Szymanski stated that he invited the Court below during argument to refer the matter for the hearing of evidence 'should it have deemed it necessary'. But in argument he correctly did not persist with this.

[32] To summarise: on Dr Szymanski's own averments his correspondence with the Council did not establish that it represented to him that the pass mark was 40%. And his belief that this was so was not reasonable. No question of a legitimate expectation could therefore arise. In addition, the Council's detailed denial of his allegation that one of its members told him to ignore the document making it clear that the overall pass mark was 50% raised a real and substantial dispute of fact that could not properly be decided on the papers. The application therefore had to fail.

[33] The appeal succeeds with costs. The order of the Court below is set aside. In its place there is substituted:

‘The application is dismissed with costs.’

**E CAMERON
JUDGE OF APPEAL**

CONCUR:

**HOWIE P
OLIVIER JA
STREICHER JA
LEWIS JA**