IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **93357/2016**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. ☑

.....
SIGNATURE

...28/04/2017...
DATE

28/4/2017

DE VRIES AMBULANCE ACADEMY (PTY) LTD **APPLICANT**

AND

THE PROFESSIONAL BOARD FOR EMERGENCY CARE **FIRST RESPONDENT**

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **SECOND RESPONDENT**

JUDGMENT

THOBANE AJ,

Introduction

[1] On 30 March 2017 Tolmay J gave an order in the following terms;

> 1. *It is declared that the application is urgent and the applicant's failure to comply with the Rules of Court is condoned;*
> 2. *The resolution by the first respondent dated 10 March 2017 to withdraw the accreditation of the applicant with the second respondent to offer education and training to Basic Ambulance Assistants is stayed pending:*
>
> *(a) the finalization of the review application under case no 93357/2016 and*
>
> *(b) the finalization of a further review application to be issued by the applicant pertaining to the resolution of 10 March 2017 taken by the respondents within 20 days following this order,*
>
> *(c) after the review application referred to in par 2 supra has been instituted provisions of Rule 33 will be complied with by the applicant and respondent,*
>
> *(d) should the applicant not comply with the order as set out in par 2 hereof the interim order will lapse,*
>
> *(e) the second respondent shall pending the finalization of the review application referred to in par 2 above continue to register students who completed the necessary basic*

ambulance assistance courses with the applicant but subject to the provisions of section 17 of the Health Profession Act 5 of 1974,

(f) the first and second respondent are ordered to jointly and severally the one paying the other to be absolved to pay the costs of this application.

[2] After the above order was granted, the respondents launched an application for leave to appeal same. The current application is for an order that pending the application for leave to appeal, or an appeal, the order of Tolmay J remain effective. This application therefore is in terms of the provisions of sections 18(1) and (3) of the Superior Courts Act, 10 of 2013.

Parties

[3] The applicant is a private company duly registered in terms of the company laws of the Republic of South Africa and conducts amongst others, education and training of emergency service personnel. The applicant has been providing such education and training for over 22 years.

[4] The first respondent is the Professional Board for Emergency Care established in terms of the Health Professions Act, no 56 of 1974, one of its functions, amongst others, is to give accreditation to centers that offer training of Basic Ambulance Assistants. Applicant offers such training.

[5] The second respondent is the Health Professions Council of South Africa, a statutory body established in terms of section 2 of the Health Professions Act. No remedy is sought against the second respondent. The second respondent therefore is cited for the interest it may have in the outcome of the application.

Background

[6] There is a long history to the matter, which history is punctuated by amongst others, engagements, evaluations and negotiations between the parties as well as exchange of correspondence. The following summary places the matter into better perspective;

6.1. For over 22 years the applicant had been providing training of Basic Ambulance Assistants. The first respondent contends that the applicant's training of emergency personnel does not meet certain minimum requirements or that the lecturing staff do not have requisite qualifications ;

6.2. The first respondent, as a result, took certain resolutions which the applicant was aggrieved at;

6.3. The applicant launched an application to review the decisions taken by the first respondent. Those review proceedings are pending in this court;

6.4. While the review application was pending, on 10 March 2017, the first respondent took a decision to withdraw accreditation of the

applicant with the second respondent. The withdrawal meant that the applicant could not train Basic Ambulance Assistants;

6.5. The applicant subsequent to the withdrawal of the accreditation, launched an urgent application which culminated in the order of Tolmay J, mentioned above;

6.6. The first respondent on 3 April 2017 filed an application for leave to appeal the order of Tolmay J;

6.7. The applicant is now before this court on an urgent basis seeking an order that the order of Tolmay J not be suspended.

Urgency

[7] The thrust of applicant's counsel on urgency is that since Tolmay J found that the matter was urgent, and in light of the history of the matter as well as she the reasons advanced by the first respondent disputing urgency, namely, that urgency is self created and given the fact that such advanced reasons having been rejected by Tolmay J, it follows, he submitted, that urgency still prevails.

[8] The first respondent disputes urgency and contends that since the reasons, which have been since requested, why the matter was found to be urgent by Tolmay J are not known, no reliance can be placed on her finding that the matter is urgent. He contends that urgency of this matter is a stand alone and should be evaluated as such. It is further disputed that on the

common cause facts urgency can be inferred. Counsel further argues that the closing down of the applicant thus prejudicing prospective students, will not eventuate in that the applicant can still employ suitably qualified staff, re-qualify or retrain the current contingent and also that applicant has other sources of revenue.

[9] Before delving into merits, urgency ought to be settled first. Urgency is regulated by rule 6(12) of the Uniform Rules of Court. Particularly Rule 6(12) (b) which provides as follows,

> *"(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

The applicant therefore, in light of the aforementioned provisions, must do two things. Firstly, applicant must disclose circumstances which in its view, render the matter urgent and secondly, advance reasons why applicant contends it will not be afforded substantial redress at a hearing in due course.

[10] The order of Tolmay J in the circumstances of this case is instructive, for it says that the resolution of 10 March 2017, which resolution seeks to withdraw applicant's accreditation, is stayed on certain conditions. The order states in para 2 as follows;

"2. The resolution by the first respondent dated 10 March 2017 to withdraw the accreditation of the applicant with the second respondent to offer education and training to Basic Ambulance Assistants is stayed pending:

(a).....

(b).....

(c).....

(d).....

(e) The second respondent shall pending the finalization of the review application referred to in par 2 above continue to register students who completed the necessary basic ambulance assistance courses with the applicant but subject to the provisions of section17 of the Health Professions Act 56 of 1974."

From the aforegoing it is self evident that the main purpose of the order was to keep operations of the applicant going while the review application was being considered. To the extent that the applicant must state factors which render the matter urgent, I am satisfied that this requirement is met.

[11] On substantial redress Notshe AJ in ***East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others [2012] JOL 28244 (GSJ)*** para 7 said the following;

"It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case."

Since the order of Tolmay J arrests the shutting of the applicant's doors, it seems to me easy to conclude that whereas there might be redress in due course, in the form of employing new teachers or re-qualifying the current ones, as argued by counsel for the first respondent, in my view such redress will not be substantial as contemplated in the rule in that it is devoid of any immediacy.

[12] I am therefore of the view that the matter is sufficiently urgent to be enrolled and heard as such.

The Superior Courts Act, 10 of 2013

[13] This application is brought in terms of section 18 of the aforementioned Act. The section provides as follows;

*"**18**. (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an*

application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[14] In light of what the law provides, the applicant is enjoined to establish that there are exceptional circumstances and in addition show that it will suffer irreparable harm if the relief sought is not granted on one hand and that the respondents, on the other hand, will not suffer irreparable harm.

[15] What the applicant contends are exceptional circumstances can be summarized as follows;

15.1. Its period of existence namely 22 years, during which training had always been offered;

15.2. That in the event the order is not made effective, it will be forced to close shop and that job losses will follow;

15.3. That current and prospective students will be prejudiced;

15.4 That constitutional rights of not only the applicant but also its employees and students will be harmed.

15.5. That the order of Tolmay J would be rendered nugatory if the suspension is not directed.

Applicant relied inter alia on excerpts from ***Incubeta Holdings and Another v Ellis and Another 2014 (3) SA 189 (GSJ)***, in arguing that the merits of the matter are at this stage of the proceedings not pertinent and also that the plight of the victor is all that is required (*paragraph 28 of the judgment*). Such an approach is correct because every application is to be dealt with on its own facts and is therefore case specific.

[16] Counsel for the first respondent was of the view that the exercise of showing the existence of exceptional circumstances required examination of the facts. In saying so he also relied on ***Incubeta Holdings and Another v Ellis and Another*** (supra). I pause to indicate that counsel for the applicant relied on paragraph 26 of the same judgment in making the point that the merits should not come into reckoning. Paragraph 26 reads as follows;

"[26] I have made no reference to the 'merits' of the case which resulted in the interdict. In my view they are not pertinent to this kind of enquiry. The considerations that are valuable pre-suppose a bona fide application for leave to appeal or an actual appeal. No second guessing about the judgment per se comes into reckoning."

He argued with reference to the facts of this case, that the applicant has proven none and that even if the withdrawal of accreditation were to result in the closure of the applicant, it did not get elevated to being exceptional circumstances in that the applicant through its conduct caused the withdrawal of accreditation.

[17] For purposes of obtaining an order that the order of Tolmay J remain in place, the applicant must show that it will suffer harm and that the respondents will suffer none. Counsel for the first respondent states that the respondents exercise a regulatory function and that if the order of Tolmay J is made operational, its regulatory function would be impaired. In the result the rule of law would be negatively impacted on and there would be encroachment on another sphere of government, something which the courts have warned should be avoided. Counsel in support of the above contentions relied on ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC);*** particularly the following paragraphs;

"[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

[18] On the facts of this case, the practical effect of the order of Tolmay J is

to keep the operations of the applicant going while an outcome of the review application is awaited. The launching of an application for leave to appeal defeats the effect of the said order. I agree with the contention of the applicant's counsel that the application for leave to appeal renders the order nugatory. The solution advanced on behalf of the first respondent to show that permanent closure of the applicant need not eventuate namely; that the applicant can retrain its staff, temporarily employ suitably qualified staff and focus on other areas of training it offers and not only the training of Basic Ambulance Assistants, does not, in my view, obviate the practical effect of the order. The question therefore is whether exceptional circumstances have been shown to exist and also whether there is absence of irreparable harm to the respondents on one hand and the presence of irreparable harm to the applicant, on the other.

[19] The concept of exceptional circumstances has been a subject of our courts for a considerable period of time. Mpati P in ***Avnit v First Rand Bank Ltd (20233/14) [2014] ZASCA 132 (23 September 2014)*** and in an endeavour to trace the the origins of the concept had the following to say with regards thereto;

> *"[4] The term 'exceptional circumstances' is one that has been used in various different statutory provisions in varying contexts over many years. It was first considered by this Court in the context of its power in exceptional circumstances to direct that a hearing be*

held other than in Bloemfontein. The question arose in ***Norwich Union Life Insurance Society v Dobbs 1912 AD 395****, where Innes ACJ said at 399:*

> *'The question at once arises, what are "exceptional circumstances"? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.'*

[5] Later cases have likewise declined any invitation to define 'exceptional circumstances' for the sound reason that the enquiry is a factual one.2 A helpful summary of the approach to the question in any given case was provided by Thring J in ***MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and another 2002 (6) SA 150 (C)*** *where he said:*

'1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different: 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best

be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'"

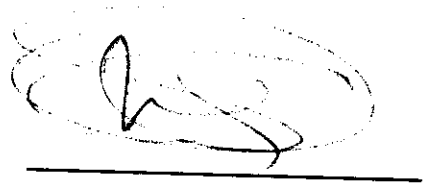
[20] In *casu*, the presence or absence of exceptional circumstances is contested terrain. The predicament that the applicant finds itself, in the event the order of Tolmay J is not made effective, is that it will be forced to shut down the training of Basic Ambulance Assistants or as the first respondent argued, not be operational for a period of about nine months while it rearranges its operations, which will include the retraining of staff. That the applicant would have to do that after 22 years of uninterrupted service, is out of the ordinary. Moreover, the parties are awaiting a date of hearing of the application for leave to appeal. As at the hearing of this urgent application, the date of hearing of the application for leave to appeal had not been set, and Tolmay J had not advanced any reasons for her order. It is cold comfort therefore that the first respondent suggests that the risk that the applicant stands to run is the retraining of its staff which may take approximately nine months, while the said nine months is not even guaranteed. Inherent in the first respondent's reply to the contention that the applicant will have to contemplate closing down, is an unintended acknowledgement that the applicant stands to suffer harm and that such harm, from the first respondents' point of view, can be mitigated.

[21] The first respondent exercises regulatory functions and one must ask if this matter is one of those rarest of cases where the court deviates from what is the norm, thus keeping the order of Tolmay J effective. The fact that in the event the order is not made operational applicant's operations will be affected, is a singular most convincing factor for this court to get involved. For it is precisely what the order of Tolmay J sought to prevent. I am mindful of the fact that the court should intervene only in the most rarest of cases and that whenever it does so, it is after a period of thorough reflection and caution. I am not dismissive of the statutorily conferred powers of the first respondent to regulate the applicant. However, the fact that the first respondent for over a period of six years did not exercise the regulatory function it always could have, during which time the applicant conducted its operations, suggests that harm, on the part of the respondents, from a regulatory point of view is absent. On the flip side, if the order is not suspended, applicant will need to deploy financial and other resources to capacitance its staff. That this will need to happen and that it has financial implications is not in dispute. This in my view is sufficient to make a finding that exceptional circumstances, on the facts of this case are present.

[22] I am accordingly of the view that the application must succeed.

[23] I therefore make the following order:

1. That pending the respondents' application for leave to appeal, or an appeal (in the event leave to appeal is granted), the order of Tolmay J, dated 30 March 2017, shall remain effective;
2. That the respondents are directed to pay the costs of the application jointly and severally, which costs are to include costs consequent upon the employment of two counsel.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Heard	:	25 April 2017
Delivered	:	28 April 2017
Counsel for Applicant	:	Adv. AC Ferreira SC,
		Adv. SG Gouws
Counsel for 1st Respondent	:	Adv. D Berger SC,
		Adv. T Manchu