

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

23/9/16

CASE NUMBER: 37129/16

In the matter between:

INSCAPE EDUCATION GROUP (PTY) LTD

FIRST APPLICANT

MICHAEL VAN NIEKERK


(1) REPORTABLE: YES/NO.

SECOND APPLICANT

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

and

DELETE WHENEVER IS NOT APPLICABLE	
<p>(1) REPORTABLE: YES/NO.</p> <p>(2) OF INTEREST TO OTHER JUDGES: YES/NO.</p> <p>(3) REVISED.</p>	<p style="text-align: right;">SECOND APPLICANT</p>
<p style="font-size: large;">23/9/16</p> <p style="font-size: x-small;">DATE</p>	 <p style="font-size: x-small;">SIGNATURE</p>

THE SOUTH AFRICAN COUNCIL FOR THE  
ARCHITECTURAL PROFESSION

RESPONDENT

JUDGMENT

TLHAPI J

[1] This application was brought by way of urgency for the following relief:

“2. That a mandamus be issued as against the respondent in the following terms:

2.1 That the respondent's validation committee shall within 5 days of the

*granting of this order, finalize their report and recommendations in respect of the Validation visit in respect of the First Applicant;*

- 2.2 *That the Respondent's Board shall within 5 days, after the period defined in 2.1 above make a final decision in respect of the validation of the relevant courses presented by the First Applicant;*
3. *That the First Respondent shall register the Second Applicant onto their system as a candidate draughtsperson within 5 days of the granting of this order;*
4. *That the First Respondent shall register all of the First Applicant's successful graduates onto their system, in the appropriate field;*
5. *Costs of Suit, such costs to include the costs consequent upon the employment of two counsel;*

The application was served on the respondent and issued on 10 May 2016 and it was opposed.

[2] The founding affidavit was deposed to by Ms Helen Louise Buhrs "Ms Buhrs", the principal and managing director of the applicant. The applicant is duly registered with the Department of Higher Education and Training as a Private Higher Education Institution that offers educational programmes in the architectural and related professions. The respondent, is a regulatory body established in terms of the Architectural Profession Act 44 of 2000 ("the Act") and as appears in the preamble to the Act, is responsible 'for the registration of professionals, candidates and specified categories in the architectural profession; to provide for the regulation of the relationship between the South African Council for the Architectural

Profession and the Council for the Built Environment'. In terms of section 13 of the Act and subject to sections 5 and 7 of the Higher Education Act 101 of 1997 the Council of the respondent is responsible for 'conducting accreditation visits to any educational institution which has a department school or faculty of architecture'. The applicant is one such institution that requires validation from the respondent in the programme it offers, resulting in the Higher Certificate in Architectural Technology. The programme which is the subject of this application received full accreditation by the Council of Higher Education in a letter dated 17 September 2015.

[3] Ms Buhrs averred that the respondent's Validation Board had at the end of 2014 and on its validation visit recommended a conditional validation of the programme which is the subject of this application. The recommendation was not supported at a subsequent Council meeting and in early January 2015 such conditional validation was withdrawn and no reasons were given for this decision. During September 2015 the respondent was requested to conduct a validation visit as required by legislation. The respondent indicated in an email dated 8 October 2015 that the matter would be discussed at the Education Committee meeting on 30 October 2015. A request was made on 14 October 2015 on behalf of the applicant to be provided with an agenda for the meeting in an effort to determine and understand what needed to be discussed and decided upon at such meeting. On 17 November 2015 respondent wrote:

- "2. *The....."SACAP" has carefully considered the conditional validation which was granted by its Validation Panel on 3 December 2014 and decided that it was not appropriate to award conditional validation status.*
3. *To this end SACAP resolved to grant Inscape Education Group deferred validation pending a full validation visit.*
4. *SACAP hereby requests Inscape Education Group to propose three (3) suitable dates in early 2016 whereupon a full validation visit will be*

*conducted"*

[4] In a letter dated 20 November 2015 from the applicant's attorneys the following dates were suggested as dates for the Validation visit, 20<sup>th</sup>, 21<sup>st</sup>, 26<sup>th</sup> 27<sup>th</sup> and 28 January 2016. The dates were not convenient for the panel and the validation visit was moved to 22 and 23 February 2016. The validation visit would be conducted at the applicant's head office situated in Pretoria. Furthermore, in the same letter and also relevant to this application and, among other requests, the respondent was requested to confirm the following :

- "2.1 *That the current reference to the withdrawal of validation for Inscape on the SACAP website be removed and replaced with a validation status;*
- 2.2 *That any communication presented to the public including, but not limited to prospective students of INSCAPE, include reference to INSCAPE'S current deferred validation status.*
- 2.3 *That students who were enrolled at INSCAPE in the Higher Certificate in Architectural Technology in 2013, 2014 and 2015 will be considered for registration as candidate draughtsmen at SACAP in lieu of the inappropriate withdrawal of the prior validation status;*
- 2.4 *That permission be granted by SACAP to INSCAPE to communicate the deferred validation status to its current students and alumni from 2014 and 2013 respectively;"*

[5] In response to the above letter the respondent replied on 3 December 2015:

" 2. *Please note the following confirmations:*

- 2.1 *SACAP will publish the deferred status.*
- 2.2 *Same as above;*

- 2.3 *Registration for eligible students from the Pretoria Campus **ONLY** as it was the site that attained Conditional Validation;*

### **VALIDATION VISIT**

- 3.1 *In terms of Section 13 of the Architectural Act, 2000 we hereby request that you furnish SACAP with the valid CHE and SAQA certificates prior to the visit. SACAP undertakes a visit under the requirements of the Purple Book.”*

Ms Buhrs averred that this approach of dealing with only the Pretoria Campus was new as the validation visits for all its campuses were conducted at its Head Office in Pretoria. They nevertheless decided to get the validation process for the Pretoria campus determined. After conclusion of the Validation visit the respondent failed to comply with clauses 7.6 and 7.7 of the Purple Book, which required the completion of a draft report before departure and an agreement on the timescales for circulation and consideration of the draft and inputs on amendments to be effected. It was averred that there was an undertaking that the draft report for factual checking would be available within one month of the visit.

[6] On 17 March 2016 a letter on behalf of the applicant was addressed to the respondent raising various issues. In this letter the second applicant was mentioned as one of the graduates who had applied to be registered as a candidate architectural draughts-person and it was stated that his application was in process. It was further contended in that letter that ***‘the programme does not require the validation of SACAP in order for the programme to be offered or to be registered on the NQF. The institution however, intends to attain full validation from SACAP to benefit students who enrol in the programme.’***

[7] On 22 March 2016 a draft validation report was availed and the applicant did not agree with the content as it contained many inaccuracies. On 8 April 2016 another letter followed to the respondent which related to applicant's letter of the 17 March 2016 and in particular the failure by the respondent to address issues raised and to give undertakings as requested in paragraphs 9, 12 and 14 of that letter. Legal action was threatened if there was no response by close of business on 13 April 2016. A reply was received on 12 April 2016 which among others referred to the draft validation report conducted in respect of the Pretoria campus, which report it was contended addressed the issues raised in applicant's letter of 17 March 2016. The respondent further stated that *'the only route for registration at all professional levels or for upgrade thereto, is by acquisition of qualifications at a **recognised Architectural Learning Site.**'* It was further stated that the respondent's registration policy stipulated that: *"An applicant without any of the recognised qualifications, can apply for registration as a Candidate Architectural Draughtsperson, provided that the applicant has a least 2 years architectural experience obtained while registered under a Registered Professional".* (my underlining)

[8] On 14 April 2016 a letter was sent to the respondent drawing its attention to the input of the applicant to the draft validation report; the non-compliance with the timelines in the Purple Book and expressing its expectation that a revised report would be tabled before the Validation Committee. It was further stated:

*"With regards to the registration of our client's graduates we note the following. Apart from the fact that during the validation visit you have personally given the undertaking that our client's successful graduates may henceforth be registered with yourselves given the current awarded validation status, it is furthermore clearly states as follows in your 'Guidelines for the validation of courses at private architectural learning sites:*

*"Conditional validation implies that the course broadly meets minimum*

*standards, but that there are aspects that need to be rectified within a specified time span. **Persons with that qualification will be allowed to register***"

No response to this letter was provided.

[9] The applicant averred that the second applicant had completed his studies towards the Higher Certificate Architectural Technology and a transcript 'NA23', dated 28 April 2016 was annexed to the papers. The second applicant had received an email from the respondent on 11 April 2016 titled 'New Registration' which informed him that his application was being disqualified because the first applicant was not being recognized as an Architectural learning site, further that he did not have 'enough years experience in the Architectural field. He needed 2 to 3 years experience in the Architectural field. Ms Buhrs contended that the letter was contrary to the respondents own information on their website setting out how one can register. According to Matrix 2 it was stated that a person could register as a candidate Architectural Draughtsperson with only a grade 12 qualification. She contended further that there was no basis for the respondent's refusal to register the second applicant as it had registered five of its past students this year (2016).

[10] The answering affidavit was deposed to by Ms Marella O'Reilly ("Ms O'Reilly), registrar of the respondent. Ms O'Reilly averred that the validation or accreditation of an entity such as the first applicant is preceded by a validation visit which leads to a validation report which is considered by the respondent before a final decision is taken. She contended that in this instance it was not necessary to bring this application on an urgent basis. The validation report was finalised on 12 May 2016 and delivered to the first applicant the following day. She averred that the first applicant refused to accept the validation report by appending a signature on page 16 thereof. The report was returned to the respondent with the following note:

*"The signature hereto is as acknowledgement of receipt of the said document. I am advised not to sign the documents as I do not agree with the contents therein as expressed in response to SACAP previously."*

The respondent contended that if the first applicant did not agree with the content of the said report it could only mean that the first applicant had appraised itself with the content of the report before refusing to accept it. The respondent contended further that the relief sought in 2.1 of the Notice of Motion had been complied with.

The first applicant conceded in reply that the respondent had complied with the relief sought in 2.1 of the Notice of Motion. It contended that it would still seek a costs order associated with the relief contained in 2.1.

[11] The respondent contended that the relief sought in 2.2 would only be competent if there respondent had unreasonably delayed the decision contemplated in the report, that 'no case had been made out in that regard' and that such relief would only be competent as and when the validation report had been finalised. In reply the first applicant contended that the dilatory approach by the respondent and threats of legal action which caused the respondent to conduct its validation visit should be taken into account in considering delay.

[12] The respondent contended that the relief sought in 3 and 4 of the Notice of Motion depended on the first applicant being validated or accredited and that such process would be engaged and a decision made at the respondent's council meeting during June 2016. The first applicant disagreed as the non-validation adversely affected the registration of Candidate Draughtspersons and, in terms of the Respondent's own guidelines. Furthermore the programme was fully accredited with the Council of Higher Education and that its registration with SAQA was in order and was in the process of final registration.



There was further an undertaking by Ms O'Reilly that pending the finalization of its application the graduates would be registered and that this created a legitimate expectation in the circumstances that the applicants are expected to act upon.

[13] In as far as the status of the first applicant was concerned Ms O'Reilly averred that the first applicant started offering the curriculum in dispute at its Pretoria Campus and had never been fully validated or accredited. During August of 2013 a deferred validation was awarded as the entity had not yielded any graduates. The deferred status was to be reconsidered at a subsequent validation visit which was conducted on 25 March 2014. This visit resulted in the termination of the deferred validation and it was recommended that the qualification not be awarded validation status because the 'evidence provided in the form of students work falls below SACAP's benchmark standards.' The 2013 graduates were nevertheless allowed to register as candidates architectural draught persons 'in terms of the previous validation statement (August 2013). The first applicant appealed the 'Withdrawal of Validation' and the appeal was dismissed. Consequently the first applicant had no validation deferred or conditional effective 25 March 2014 and was not entitled to register students including the second applicant.

[14] The first applicant contended in reply that this background information was irrelevant for the purpose of this application and is meant to portray the first applicant in negative light. It contended that the 2013 graduates were allowed to register then and that presently the institution did not need to have an accredited qualification with a validation in order to be have second applicant registered as a candidate architectural draughtsperson. Furthermore, the first applicant was never given reasons for the withdrawal of its validation, and attempts to obtain same for purposes of instituting review proceeding as appear in a letter dated 21 September 2015 was met with no response. Since it was out of time to launch review proceedings it took the option to invite a new validation visit.

[15] In as far as the relief sought in 2.1 there is concession that the relief sought be abandoned since the report sought was delivered to the first applicant prior to the hearing on 13 May 2016. The first applicant however contends that it was entitled to costs for launching of the application. This in my view will rely on whether the application was urgent or not. This shall be dealt with below.

[16] As I understood the respondent the final report would still have to be placed before the Council and considered by them at a Council Meeting to be convened before the end of June 2016. The first applicant would have had to satisfy the Court that it was in a position to order the respondent to make a final decision in respect of the validation of the relevant courses presented by the first applicant. The first applicant would have to satisfy the Court that the respondent would be in a position to deal with its functions as envisaged in section 13 (b) of the Act in as far as it was duty bound to conditionally or unconditionally grant validation of the programme courses in question. The first applicant has not made out a case for such relief as envisaged in 2.2. If the first applicant is convinced that the court can grant such relief as envisaged 2.2 then, I ask the question as to what weight or status should the Court give the final report when it has not been accepted by the first applicant by appending a signature of acceptance or confirmation on page 16 of such report.

The first applicant does mention certain irregularities regarding the validation visit and the conduct of some of the SACAP's members during such visit. The first applicant further questions the competency of the visiting panel. In its commentary it states that the non-negotiable validation was inappropriate. As I see it, this suggests that the draft and final report were not of the quality where a final decision could be taken to validate the relevant courses presented by the first applicant. There is an alternative suggestion by the first applicant in its concluding commentary that another validation visit might be justified due to its dissatisfaction with the visiting panel of February 2016 but at the cost of the respondent. The failure to sign the final report and the dissatisfaction with the draft and final reports

makes me doubt whether such final report is competent to be considered by the Council for purposes of considering validation of the relevant courses. However, that decision is not for the Court to take as the respondent is the competent body vested with the expertise and power to evaluate the competencies of the first applicant. If it states that the final report will be presented to the Council then the first applicant should await the result and decide whether to review the decision.

[17] It is unfortunate in my view that the first applicant chose to move the case for the second applicant. I am of the view that not all the information pertaining to the second applicant's application to the respondent has been availed for the Court's scrutiny. Having regard to the Academic Transcript annexed to the papers it is not clear into which group the second applicant falls. The question is, does he fall under the 2013 group of graduates who were allowed to register in terms of the August 2013 validation report or does he fall under the 2014 or 2015 group. The transcript does not give a commencement and conclusion date of his studies for the Higher Certificate Architectural Technology. In the letter of 31 March 2016 at page 60 of the founding affidavit the second applicant is mentioned as having submitted an application which at the time was in process. It is not clear whether his application fell into the same category as the application of the four graduates whose applications as Candidate Architectural Draughtspersons had been approved by the respondent. No details have been provided.

[18] While the first applicant contends that it received full accreditation for its full programme for both contact and distance mode of delivery and site accreditation from the Council of Higher Education, it is not clear that accreditation contained in pages 49 and 50 of the founding affidavit under reference H/PR154/E003CAN related to accreditation as envisaged in the draft validation "NA19" and final report "AA1" validation report, that is the validation of relevant courses.

[19] The letter dated 11 April 2016 to the second applicant from the respondent should in my view be dealt with in two parts. Firstly it is mentioned that the first applicant is not recognized as an Architectural learning site. On page 51 to the Founding affidavit the Council on Higher Education stated:

***“The Institution is reminded that in order for it to enrol students as a private provider of higher education, the following three conditions must at all times be fulfilled:***

*. Registration of all qualifications with the South African Qualification Authority on the NQF;*

*. Accreditation of all higher education programmes by the HEQC*

When dealing with the applications of the graduates on page 60 of the Founding Affidavit as at paragraph 10 it was stated that the programme offered by the first applicant did not require validation by the respondent to be offered or to be registered on the NQF. This in my view is contrary to the mandate of the respondent clearly set out in the draft validation report and final report which clearly indicate that validation by the respondent was a precursor to registration on the NQF. Ms Buhr in reply also stated that its registration with SAQA was in the process of final registration. This can only mean that if this registration was not finalized when the application was launched the first applicant still had not met one of the pre-requisites to qualify for enrolment of students in the field in question.

[20] In giving her input on “NA19” Ms Buhrs was not opposed to submitting and developing a remedial plan although she objected to the ‘awarded status of Non-negotiable Conditional Validation. As I see it, the absence of comments marked in red against the relevant paragraphs on pages 99 to the founding affidavit could mean that there was acknowledgment by the first applicant that deficiencies were present which needed to be addressed. The first applicant was required to develop and submit a remedial plan no later

than 16 May 2016. In reply the first applicant points out to its remedial plan on pages 126 to 135 of "NA19". The first applicant contended that the final report was produced in haste in order to avoid the relief sought. In the reply examples are given in paragraphs 3.2, 3.3 and 3.4. In my view these inaccuracies do not address the content of the relief sought which is a decision on the validation of the relevant courses presented. I have read through some of the comments in red in the draft report. Unless the first applicant points out in detail how its input and remedial plan have not been considered or dealt with in the final report, it would be difficult for the Court without the assistance of appropriate input to evaluate and give an order such as is sought in 2.2. The respondent contends that the final report would be presented to the Council for a decision. In as far as the first respondent is not satisfied with such report I can only recommend that the two reports, that is the draft with first applicants comments and the final report be placed before the Council for decision. I have already expressed my view in paragraph 16 above.

[21] There were further no comments on mandate of the respondent as expressed in the preamble to 'NA19' and the Final Report AA1:

*"to determine whether graduates who apply for registration as candidates in any of the SACAP four professional categories who hold qualifications from the ALS being visited meet the minimum standards of competencies and skills associated with that category. A validated qualification enables graduates to register as Candidate Architectural Draughtspersons ..... after the required number of years in-service training and the passing of an examination in professional practice"(my underlining)*

Neither was there any comment or objection raised and under the heading:

*"VALIDATION PROCESS, AIM AND OBJECTIVES*

*Validation is an outcomes- based, peer-reviewed evaluation of courses in architecture.....*

*Accreditation as conducted by the Council for Higher Education (CHE), focuses on procedures and processes, and although SACAP may comment on issues of governance and administration, those are mainly the domain of the CHE. ....validation provides a benchmark of international standard as well as allowing mobility of students between the various programmes offered by validated ALSSs.*

*.....Specific objectives are to:*

*. recommend to the SACAP that the qualification concerned meets the prescribed national standard for registration purposes....*

*. communicate the results of an accreditation visit to the Higher Education Quality Committee for the purpose of approval of accreditation and registration of qualifications on the National Qualifications Framework(NQF) by the South African Qualifications Authority (SAQA)*

There was again no adverse comment regarding the Criteria for Evaluation. In as far the validation process was concerned the complaint was that no pre-meeting was held as prescribed in the Purple Book. The visiting board requested a change in schedule and a private meeting was held to enable the board to familiarize themselves with how the process was to unfold.

[22] My conclusion on this first aspect relating to the second applicant is that a case should have been made out on his behalf that during the period of his studies, the applicant's Pretoria Campus was a recognized architectural site in as far as it would have received validation for the courses it offered. The letters of the 20 November 2015 "NA9" and 3 December 2015 are informative in that they confirm that validation was withdrawn and was published on the respondent's website and that this affected students of 2013, 2014 and 2015. In as far as the candidate draughtspersons were concerned the respondent stated that it would consider registration for eligible students from the 'Pretoria Campus ONLY' as it

was the site that attained conditional validation'. In as far as the deferred validation status was concerned the respondent gave permission to the first applicant to communicate such status and the ability to register with the respondent only to the current 2015 students and alumni from 2013 and 2014 of the Pretoria Campus. According to the respondent deferred validation meant that *'recommendations for unconditional validation are deferred until the first applicant has complied with the requirements for unconditional validation'*. It contended that the second applicant trained at a time when the first applicant was *'not validated and cannot legitimately claim entitlement to the relief he seeks in the application.'*(my underlining)

[23] Secondly it was stated that the second applicant did not have enough years of experience in the Architectural field. It was argued on behalf of the second applicant that what was applicable to the second applicant was the registration matrix published on the respondent's website dated July 2011, being schedule 6, Matrix 2 which provides for registration of persons with experience. The entry level of Grade 12 was said to be applicable however the transcript annexed to the founding affidavit shows otherwise. The second applicant had passed courses in architecture offered by the first applicant. The explanatory notes to both matrix 1 and 2 stipulate supervision/ mentorship and experience. The second applicant's application form to the respondent could have shed light regarding the years of his experience. If there was no reason not to register the second applicant as argued on his behalf, no case has been made out as to why he had to be considered as being on equal footing with the students who had been registered as mentioned.

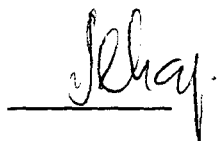
[24] No case has been made out for the relief sought in 4 of the Notice of Motion. The scope of the validation visit related to the architectural profession at the Pretoria Campus only and, this was made clear by the respondent. It is casting the net too wide by stating that all successful graduates be registered on the respondent's system 'in the appropriate field.'

## URGENCY AND COSTS

[25] In my view the validation and accreditation of the courses and qualifications offered by the respondent is key to successful registration and recognition of its graduates in the architectural profession. Section 13 of the Act is very clear as to what the functions of the respondent in this regard entail. In as far as the respondent contended that remedial action had not been dealt with as opposed to the first applicant's contention that it had complied, the first applicant failed in reply to deal with those aspects of its inputs as to remedial action, which were not dealt with in the final report. In as far as the Council of the respondent has not dealt with the final report, the first applicant cannot lay claim to urgency or a right to relief as appears the Notice of Motion, excluding 2.1. As soon as the final report was delivered the alleged urgency in respect of the relief sought in 2.1 came to an end. Furthermore the final report even though it was rejected by the first applicant had to be considered by the Council in June. It was not disputed that the first applicant has not had a deferred or conditional validation since 25 March 2014, and that the first applicant was not given unconditional validation. The relief therefore sought in the other prayers in the Notice of Motion were in my view not competent the validation process had not been finalised. It is therefore appropriate that the application be dismissed with costs.

[26] In the result the following order is given:

1. The application is dismissed with costs.



**TLHAPI VV**

**(JUDGE OF THE HIGH COURT)**



<b>MATTER HEARD ON</b>	<b>:</b>	<b>26 MAY 2016</b>
<b>JUDGMENT RESERVED ON</b>	<b>:</b>	<b>26 MAY 2016</b>
<b>ATTORNEYS FOR THE APPLICANTS</b>	<b>:</b>	<b>FOUCHE ATTORNEYS</b>
<b>ATTORNEYS FOR THE RESPONDENTS</b>	<b>:</b>	<b>GILDENHUYS MALATJI INC</b>