IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

Case Number: 86011/18

In the matter between:

THE SOUTH AFRICAN NURSING COUNCIL Applicant

and

THE HOSPITAL ASSOCIATION OF SOUTH AFRICA First Respondent

THE CHAIRPERSON OF THE APPEAL COMMITTEE Second Respondent

ADILA HASSSIM N.O. Third Respondent

ELIZABETH KAY-PETERSON N.O. Fourth Respondent

JUDGMENT

POTTERILL J

[1] The applicant, the South African Nursing Council [SANC] is seeking the review and setting aside of the decision of the second respondent, the Chairperson of the Appeal Committee's [the Appeal Committee] decision dated 31 August 2018. It is seeking the review in terms of s6(1) read with s8(1) of the Promotion of Administrative Justice Act 3 of 2000 [PAJA]. In essence the Appeal Committee upheld an appeal by first respondent, The Hospital Association of South Africa [HASA] overturning the 2017 decision of SANC not to allow foreign nurses to write the requisite SANC examinations in their country of origin. The Appeal Committee further directed that SANC must enter into a new Memorandum of Agreement [MOU] with HASA's members regarding the conduct of the SANC entrance examinations in foreign countries within a period of three months from the date of the decision of the Appeal Committee.

The issue to be decided

[2] The question to be answered is thus whether the Appeal Committee acted administratively unfair in upholding HASA's appeal and directing as it did.

The common cause facts as background

[3] In 2005 the Registrar of SANC, due to a critical shortage of registered nurses, gave permission for foreign recruits to write the SANC examinations in their countries of origin to facilitate the placement of skilled foreign recruits in South African hospitals to alleviate the pressure of understaffed institutions.

[4] After much negotiations SANC entered into an agreement [the 2009 MOU] with three members of HASA, Life, Mediclinic and Netcare formally facilitating the recruitment and registration of foreign nurses by members of HASA.

[5] The 2008 MOA included *inter alia* that all the costs and arrangements, support and communications for the requisite exams were to be covered by the recruiting company. At least 15 candidates must sit each examination and no more than 3 examinations would be held in a foreign country per annum.

[6] This MOU was set in motion and operated for 7 years. The 2009 MOU was replaced with the 2013 MOU on substantially the same terms.

[7] In 2016 SANC unilaterally revoked the 2013 MOU and introduced a requirement that all foreign nurses were to write their SANC entrance examinations in South Africa with no examinations to be conducted outside of South Africa. This transpired pursuant to the Education Committee [Edco] recommending that SANC do not renew the MOU with HASA. The rationale was that other entities in South Africa were following suit with similar requests. Edco found the MOU not to be in line with SANC's regulatory function. *"Indian nurses who employment in South Africa must follow same process like any other foreign nurses who applications are evaluated by*

foreign deck of Council an determination is made whether they qualify to sit for examinations as a requirement." [1]

[8] SANCO telephonically conferenced the recommendations of Edco and SANC then resolved that the Indian nurses to be employed in South Africa should follow the same process applied to all foreign nurses. The rationale is for SANC to refrain from entering into the MOU with any organisation but to focus on its regulatory function. SANC approved the Edco recommendation on 30-31 March 2016. During June 2016 this SANC policy was accepted.

[9] Various correspondence and meetings between HASA and SANC took place, but on 11 October 2017 HASA issued a letter of demand to SANC to reverse the 2016 decision, to disallow exams oversees, and requested discussion between the parties.

[10] On 5 December 2017 SANC issued a decision in which it upheld its decision not to allow the writing of the SANC exams of foreign nurses in their countries of origin and refused HASA permission to submit a business case as to why the decision was to be reversed.

[11] HASA then lodged an appeal to the Appeal Committee.

The appeal

[12] The grounds upon which HASA brought the review were that SANC had not followed due process. The decision was irrational and arbitrary in the face of the critical

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shortage of South African registered nurses and the decision was thus not rationally connected to the information before SANC. The decision did not serve the objects of the Nursing Act. The jurisdictional issue raised by SANC was so raised on appeal for the first time and did not form part of the ratio of SANC's decision.

[13] SANC submitted to the Appeal Committee that SANC had no jurisdiction to permit examinations to be written outside South Africa because the Act, Regulations and relevant policies only apply within the borders of South Africa. If SANC allowed such examinations it would be acting *ultra vires* its legislative powers. Furthermore the conclusion of a MOU threatened the regulatory function of SANC.

The review grounds

The appeal committee's decision is irrational because it disregarded the jurisdictional issue raised by SANC.

[14] The argument on behalf of SANC was that, despite the decision of SANC not being based on the fact that jurisdictionally they are limited to the borders of South Africa, this could be raised as a new issue at the appeal hearing because the Appeal Tribunal was not confined to the record of SANC, but had to determine the appeal as a wide appeal; a complete rehearing and redetermination on the merits of the case, including new information and additional evidence.

[15] The Appeal Tribunal found that on the jurisdictional issue; *"Neither the legal opinion nor the minutes referred to above cited the jurisdiction of the Council as a reason for reversing its decision to permit foreign examinations. Our courts have held that*

'[t]he duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly.' The attempt to justify the decision with different reasons than were at play when the decision was taken is not permissible- it amounts to "an ex post facto rationalization of a bad decision."[2] The Appeal Committee found as follows in par [21] of the decisions: *"Even if the question of jurisdiction had been the reason for the decision at the time of the relevant Council meetings it would not avail the Council. The legislative framework does not prohibit the conduct of examinations abroad, instead it confers a discretion on the Council to determine where examinations are to be conducted."*

[16] There is no irrationality in the decision of the Appeal Committee with regard to the jurisdictional issue. Even if the Appeal before the Appeal Committee is a wide appeal versus a narrow appeal, it does not allow for the original decision-maker to defend a decision on a ground that was not a ground for the decision at the time the decision was made.[3] This principle was confirmed in ***Zuma v Democratic Alliance and Others*** **2018 (1) SA 200 (SCA)** at para [24]: *"On 6 April 2009 Mr Mpshe announced publically that he had made the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for the decision. It is against those reasons and those reasons alone that the legality of Mr Mpshe's decision to terminate the prosecution is to be determined."*

[17] The jurisdictional issue is thus a non-starter and is dismissed. This argument was however fortified with the argument that a Court cannot allow SANC to act *ultra vires*

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[2] Paragraph 20 of decision; footnotes omitted

[3] *National Lotteries Board and Others v South African and Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27

its Act, Regulations and various policies and SANC must fulfil its obligations in terms of its regulatory obligations and functions. The prior 7 years of acting *"ultra vires"* in allowing this practise is not explained, in fact is evaded and seemingly blamed on the *"then Registrar."*[4] It is unexplained why for 7 years this *"unlawful"* practice was continued with further MOU's being signed. The reason is in fact straightforward; the writing of SANC exams in foreign countries is not *ultra vires* SANC's purpose and its legal framework. When confronted with why allowing exams to be written in foreign countries would be contrary to SANC's legislative framework I was referred to general objects of the Council set out in section3(b), (d) and 4(1)(c) of the Nursing Act 33 of 2005 [the Act].

The Act

3(b) *"Perform its functions in the best interests of the public and in accordance with national health policy as determined by the Minister;*

3(d) Establish, improve, control conditions, standards and quality of nursing education and training within the ambit of this Act and any

4(1)(c) *conduct examinations, and appoint examiners and moderators and grant diplomas and certificates in respect of such examinations.*"

[4] Paragraph 7.5 of the founding affidavit

[18] Nothing in the Act referred to, in any way, renders granting permission to write SANC examinations in foreign countries *ultra vires.* In fact, the finding of the Appeal Tribunal that SANC is required to perform its functions in the best interest of the public and to promote the provision of nursing services to the public speaks for itself. The finding that: *"Making reasonable provision for Council examinations to be conducted in a foreign location subject to the oversight of the Council and at the expense of the hospitals (as provided for in the previous MOUS) is consistent with the objects of the Council"* is rational and in terms of the Act.

The regulations

[19] Regulation 17 clothes SANC with a discretion to decide at which places examinations may be conducted. It does not prohibit overseas examinations. The decision to conclude no further MOU's however did not reflect that SANC had decided to exercise its discretion differently pertaining to writing exams in foreign countries. Its rationale was that the decision was not in line with SANC's regulations and other institutions were following suit. The exercising of a discretion was not raised in the decision on review, or before the Appeal Tribunal and there is thus no need for this Court to address this.

[20] Counsel for SANC did however raise the exercising of the discretion as a new argument in that there was no basis to interfere with the conferred discretion exercised as it was. It was argued that SANC exercised its discretion according to

the minimum standards of legality and good administration and did not abuse its power.

[21] If the findings of the Appeal Tribunal, quoted supra in para 18, are findings on the exercising of SANC's discretion, then the Appeal Committee entertaining the matter as a *"wide appeal"* is entitled to alter the discretionary decision on the basis that SANC did not promote the objects of the Act. There is nothing irrational in such finding. This is specially so in view of the shortage of trained nurses and midwifes, expanded on below in the reasons pertaining to the second ground of review.

Policies

[21] Reliance was placed on a SANC policy published in June 2016. This policy in guideline 6 sets out:

> *"6.1.1 FOREIGN NATIONALS*
>
> *The following must be submitted to SANC upon application:*
>
> *a) Letter of intent/application*
>
> *b) Curriculum vitae*
>
> *c) A letter of support to write examinations in South Africa from the NDoH:FWMP*
>
> *d) ..."*[5]

[5] SANC3

It was submitted that the Appeal Committee ignored this policy and specifically 6.1.1.c.

[22] A letter of support to write examinations in South Africa cannot, on any interpretation, be equated to a ban on writing exams in foreign countries. A letter of support is *inter alia* required when the exam is written by a foreign national in South Africa.

[23] The SANC policy must adhere to the policy of the National Department of Health. Neither the Department of Health policy, nor the SANC policy, sets out any blanket ban on conducting foreign examinations. This is not strange in the climate of a shortage of qualified nurses.

[24] The Appeal Committee did not ignore the policy, but rejected the contention of SANC that the Act, regulations and policies could be raised as ousting the writing of exams in foreign countries because the jurisdictional issue did not form part of the ratio of SANC's decision to ban same. The Appeal Committee was in law correct to do so.

[25] Furthermore policies are not binding enactments. What is worse, SANC submitted it has to adhere to the Department of Health Policy but could not rely on the Department of Health Policy to support their ban. They rely on a SANC policy and they cannot hoist themselves by their own petard.

[26] This ground of review is dismissed.

The appeal committee accepted out-dated evidence

[27] The evidence in support of HASA's appeal was, A Human Sciences Research Council Monograph of 2009, The 2013 Sector Skills plan, The 2017 National Scarce Skills list and Statistics available on SANC's website.

[28] SANC boldly disputed the veracity of this evidence and places the responsibility to have obtained better evidence on the shoulders of the Appeal Committee. The Appeal Committee should have summoned further, relevant and current statistics.

[29] Before the Appeal Committee evidence is placed that there is a shortage of nurses. In fact, it is common cause the shortage was one of the reasons for concluding the previous MOU's. SANC, the statutory body with the function to register nurses, puts up no evidence to the contrary. Now, surprisingly, SANC complains about the veracity of the evidence, but puts up no countervailing evidence. Not only is the statistical evidence before the Appeals Committee uncontested, the evidence is also unanswered before this Court. The evidence is simply not refuted. The evidence of HASA must be accepted because there is no factual dispute on the papers. A bare denial does not sustain a dispute of fact.[6]

[30] This ground of review is unmeritorious and in fact spurious; a body that has the statistics first hand now complains the Appeal Committee had a duty to call for it. The Appeal Committee in this instance had no legal duty to do so; one cannot quibble and cavil, yet put up no countervailing evidence and then lay the blame at

[6] *Laugh it Off Promotions v SAB International Finance (BV)* 2006 (1) SA 144 (CC) paras 31-33

the feet of the Appeals Committee. Relying on the ***Pepkor*** decision[7] is not support for SANC's submission because in SANC's affidavits no mistake of fact is set out. Complaining about incorrect statistics, without any evidence to the contrary, does not set up a mistake of fact and there is nothing that should have alerted this Court or the Appeals Committee that there is indeed a mistake of fact.

[31] This ground of review is dismissed.

The relief granted is too wide and unenforcable

[32] There are two complaints pertaining to the relief granted; the relief is for all *"'HASA['s] members', not limited to Life, Mediclinic and Netcare and the 'foreign countries'"* should have been limited to *"India"*. The Appeal Committee's decision thus exceeded the scope of the issues it had to determine.

[33] Both these complaints do not render the decision reviewable. There is no merit that *"foreign countries"* should be limited to *"India"* alone. The fact that one MOU related to only India is not the test; the question is what relief was sought and did the relief granted exceed the scope of the relief sought. The decision of SANC was that no exams could be written in foreign countries; this decision was appealed and the relevant relief sought was:

[7] *Pepcor Retirement Fund v Financial Services Board and Another* 2003 (6) SA 38 (SCA) para [31]

> *"84.2. The SANC's decision of 5 December 2017 not to permit foreign nurses to write the SANC entrance examinations in their country of origin is set aside; and ..."*[8]

The relief granted by the Appeals Committee accords exactly with the relief sought:

> *"34.2 the Council's decision of 5 December 2017 not to permit foreign nurses to write the SANC entrance examination in their country of origin is set aside;"*[9]

This ground of review is dismissed.

[34] The complaint that HASA members should have been restricted to Life, Netcare and Mediclinic is also meritless. Paragraph 84.3 of the lodged appeal requested that a new MOU with *"HASA's members"* be concluded. Paragraph 34.3 of the decision of the Appeal Committee granted exactly that. The argument that MOU's were initially concluded with only these members of HASA is irrelevant, simply because SANC did not decide that only Netcare, Life and Mediclinic could not accommodate foreign nurses to write their exams in their country of origin. SANC decided not to renew the

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MOU's. The further decision was *"... that Council should refrain from entering into memoranda of understanding with **any parties** ..."* [10] *[my emphasis]*

This ground of review is dismissed.

The decision is irrational for not setting out the proposed terms for the MOU to be concluded

[35] The argument was that a time-frame for concluding the MOU's was part of the relief, but no guidance was given by the Appeal Committee to the proposed terms or indicating the minimum aspects that should be contained in the MOU's. The Appeals Committee had the wide powers to do so and should have done same.

[36] I have to conclude that SANC is being obstinate and disingenuous; they have concluded previous MOU's with the specific purpose that foreign nurses can be examined in their country of origin, why they would need guidance escapes me. If the Appeals Committee had specified terms it can be safely assumed that SANC would have had great scope to submit that an Appeals Committee cannot negotiate and contract on behalf of the parties. The previous MOU's will be the backdrop to which negotiations will take place to accommodate the order that within a month a MOU must be concluded allowing for foreign nurses to write their examinations in their country of origin.

[37] I accordingly make the following order:

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37.1 The review application is dismissed with costs, including the costs of two counsel.

37.2 The MOU's must be concluded within three months from this order.

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S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 86011/18

HEARD ON: 19 June 2019

FOR THE APPLICANT: ADV. D.B. DU PREEZ SC

ADV. L. VAN WYK

INSTRUCTED BY: Maponya Incorporated

FOR THE 1ST RESPONDENT: ADV. S. BUDLENDER

ADV. S. PUDIFIN-JONES

INSTRUCTED BY: Norton Incorporated

DATE OF JUDGMENT: 29 July 2019