016-1

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

(3) REVISED: **NO**

Date: ***24 JUNE 2022*** Signature: _____

CASE NUMBER: 28965/2022

In the matter between:

KHANYISA NURSING SCHOOL (PTY) LTD **APPLICANT**

and

THE SOUTH AFRICAN NURSING COUNCIL **FIRST RESPONDENT**

THE MINISTER OF HEALTH **SECOND RESPONDENT**

016-1

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

[1] This is an opposed urgent review application in terms of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). In the application, the applicant seeks the Honourable Court to review and set aside what the applicant allegedly says is the invalid and unlawful decision taken by South African Nursing Council ("SANC "), to restrict the rights granted to the applicant in terms of its full accreditation. The applicant also seeks exemption from its obligation to exhaust internal remedies in terms of section7(2)(c) of PAJA read together with section 57 of the Nursing Act 33 of 2005('the Act').

[2] The application concerns the education of nurses and /or the invalid and unlawful restrictions imposed by the SANC on the applicant. The two courses relevant to this application are the education and training for the 'Higher Certificate Auxiliary Nursing' and the 'Diploma in Nursing: General Nurse' (hereafter collectively referred to as the "courses").

[3] The accreditation process is regulated by the Regulations to the Nursing Act 33 of 2005 ("the Act"). The Regulations relevant to the two courses are:

3.1 The 'Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration in the category auxiliary Nurse'(GNR.169 of 2013); and

3.2 The 'Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration in the category staff Nurse' (GNR. 171 of 2013).

THE PARTIES

[4] The applicant is a Nursing Education Institution ('NEI'), and a company with limited liability, duly registered and incorporated in terms of the company laws of the Republic of South Africa, fully accredited by the SANC, and holds 100% ownership and operated by a black women. The SANC, first accredited the applicant in 1998, over the past 23 years, the applicant established 5 campuses and has trained thousands of nurses over the years.

[5] The first respondent is body entrusted with setting and maintaining nursing education and is accountable to the second respondent.

BACKGROUND FACTS

[6] The background facts in this application are succinctly summarised in the applicant's heads of arguments as follows:

6.1 The applicant submitted its accreditation application for Higher Education in Auxiliary Nursing and Diploma in Nursing Programmes to SANC on 19 December 2014.

6 .2 After the applicant was not getting joy from SANC, a lot of internal remedies were pursued and unfolded which led to the applicant launching an internal appeal. For the sake of urgency and relevance in this application, I shall not deal with same in detail except to state that the appeal was heard by the appeal committee on 02 June 2021 and communicated its outcome on11 June 2021.Amongst other things, SANC

recommended that audit visits be conducted at the applicant's sub-campuses. These visits were expedited and indeed conducted towards the end of June 2021 and the respective concerns relating to the visits were attended to by the applicant between July and August 2021, chief amongst them was the employment of nurses' educators prior to having accreditation.

6.3 Since the employment of educators as aforesaid, the SANC never communicated with the applicant until October 2021, wherein, the applicant was advised, through annexure FA8 annexed to the founding papers in *casu*, of the next sitting of SANC to be 28 November 2021.

6.4 On or about 11 November 2021, the applicant was issued with an implementation letter for its sub-campuses, some campuses were granted conditional accreditation status subject to conditions and certain documents being requested by SANC. On 15 December 2021, the applicant submitted the documents sought. It was only on 31 March 2022, did SANC discuss the commencement conditions of the applicant and on 26 April 2022, the applicant was provided with accreditation letters coupled with the restriction for implementation date of 1 January 2023.

6.5 It is this restriction that the applicant seeks to review and set aside in this application based on the following grounds:

(a) The decision being communicated to the applicant only on 26 April 2022, the applicant could not utilise internal appeal procedures as demonstrated above, considering the manner SANC dealt with the applicant in delaying the internal appeals unreasonably.

(b) The applicant will not have the financial muscle to pay the educators salaries it had to employ in complying with some of the conditions set by SANC.

(c) The applicant is still able to commence with the accredited programmes in the 2022 academic year.

URGENCY AND LACK OF SUBSTANTIAL REDRESS IN DUE COURSE

[7] From the outset, I directed the parties to address me on urgency. Even though parties were directed to address me on urgency, I hasten to mention that this is one typical matter wherein urgency is intertwined with the merits. Because the issues involved herein attract constitutional imperatives and are quite involved, after listening to the addresses, I reserved my order to consider the authorities I was referred to in detail as they relate to the pleaded facts. Consequently, I deemed it necessary to draft this brief judgement.

[8] It is trite that the correct and crucial test to be applied in urgent applications, and confirmed to be the true test is whether or not an applicant will be afforded substantial redress in due course.(See the matter of E***ast Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others***(11/33767) [2011] ZAGPJHC 196 (23 September 2011))This in a nutshell means, if the matter were to follow its normal course as laid down by the rules, an applicant would not be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. It means that if there is some delay in instituting the proceedings, an applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact that an applicant wants to have the matter resolved urgently does not render the matter urgent.

[9] The applicant in paragraphs 67 to 76 of the Founding Affidavit contends that the deadline giving rise to the urgency in this matter originates from

the Course Regulations. The Course Regulations require students to complete 44 weeks of training in any calendar year before they can register to sit for their exams.

[10] Whereas SANC holds its exams in May and November each year; consequently, students starting in the middle of a year (June-July) sit for exams in May the following year after receiving the required 44 weeks of training. Students registering at the beginning of the year (January-February) sit for the exams in November of the same year.

[11] As a result of the severely delayed accreditation process, for which SANC is to be blamed, the applicant cannot afford to pay its employees and carry the overheads for its 4 sub-campuses without any form of income for the sub- campuses for another year. It was submitted at the hearing that the prejudice had increased with each year considering the fact that the accreditation applications have been pending since 2014.If the order is not granted on urgent basis, the applicant will have to close its doors should it not be able to commence in 2022 and will therefore not obtain substantial redress in the normal course, so its argument goes. In that, the applicant has one intake of students per course each year. The last day upon which students can commence with classes to satisfy the Course Regulations 44-week requirement this year is 4 July 2022.

[12] The relief sought by the applicant in this application will allow the provisionally enrolled students on the applicant's waiting list to timeously register and commence classes to sit for their exams in May 2023. SANC's decision to postpone the commencement date to January 2023 effectively deprives the applicant of its statutory right to present training and to students in 2022.

[13] The urgency is disputed by SANC on the basis of the interpretation that it has attributed to the academic year. It called upon SANC to provide the interpretation of the legislative framework in this regard, in particular, the dispute between the applicant and SANC is whether the SANC can

lawfully and reasonably restrict the commencement date of the accredited courses as it has done.

[14] For the aforegoing and the below evaluation, regarding urgency, I am satisfied that the applicant has satisfied the test for urgency as set out above and the matter is certified as semi-urgency.

APPLICABLE LEGAL PRESCRIPTS

[15] Regulation 11 of the GNR 173 of 8 March 2013: Regulation relating to the accreditation of institutions as Nursing Education Institutions for the accredited programmes listed therein('regulation 173'').

Regulation 173 which regulates the accreditation of Institutions as Nursing Education Institutions and states as follows in section 3 thereof:

> *"(1) The accreditation process includes—the submission of an application for accreditation;*
>
> *the review of application for accreditation; an audit, which may include an audit visit, to validate the evidence referred to in submitted documentation; a decision regarding accreditation; and the issuing of an accreditation certificate if the application is successful.*
>
> *(2) The institution must be accredited by the Council to offer a programme prior to the commencement of such programme.*
>
> *(3) The process may be extended if the information and documentation required at any stage during the accreditation*

process is incomplete or if there is a delay in the submission of such information."

[16] Regulation 10(1) of regulation 173 sets out what decisions can be made regarding the accreditation process and states as follows:

> *"(1) The outcome of the accreditation process must be communicated to the applicant in writing and may include one of the following decisions—*
> *(a) Full accreditation for a period not exceeding five (5) years;*
> *(b) conditional accreditation for a period not exceeding two (2) years; or*
> *(c) no accreditation."*

[17] Regulation 11(1) of regulation 173 sets out the issuing of the accreditation certificate and states as follows:

> *"(1) On.... the Council shall issue the institution with a certificate of the decision made in terms of regulation 10, the dates and duration of accreditation and any other information as determined by the Council."*

[18] Regulations 169 and 171 define an academic year to mean a period of at least 44 weeks of learning in any calendar year.

[19] In restricting the commencement period, the SANC argued that since an academic year comprises of a compulsory 44 weeks of learning in a calendar year, the applicant as at 26 April 2022 was only remaining with approximately 37 weeks and thus could not competently commence in this academic year. The SANC further argued that, properly interpreted, the 44 weeks stipulated in the Regulations cannot run over two calendar years as the applicant averrers.

[20] The applicant contends that a proper reading of the Regulation does not permit SANC to arbitrarily and capriciously decide when a successful applicant is permitted to commence with the implementation of the programme.

[21] The arguments thus centred around the interpretation of the word 'academic year' as defined in the regulations.

[22] In ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) at para [18], p603F – 604D,*** the court held as follows as to the manner of interpreting documents:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."*

[23] This approach has become a staple of modern interpretation. It is used not only when the language of a text is found to be ambiguous but, in every case, and at every stage of interpretation.

[24] Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safety be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language"

[25] Therefore, reverting to the present case, ordinary meaning of the word "calendar year" is " *a period of a year beginning and ending with the dates that are conventionally accepted as marking the beginning and end of a numbered year*".[1]

[26] In interpreting the phrase "calendar year" regard should be had to the context in which it is used, in this instance it is used to define the term "academic year", which if properly considered is used to establish the period within which the students have to complete 44 weeks of training. Any other interpretation would be unbusinesslike and would amount thereto that students are only allowed to write one exam per year.

[27] I agree that the use of the word calendar year in the definition of academic year imposes the 44 -week learning to be done within a conventional calendar year, being January to December however this matter does not end there.

[28] The applicant alleges that the decision of the SANC to restrict its commencement date under the circumstances was unlawful and unreasonable since, *inter alia*:

28.1 The applicant expected the SANC to grant it full accreditation to enable it to exercise its constitutional rights as exposed in the Act read with the Regulations, taking into consideration that the SANC had already granted it conditional accreditation; and

[1] https://www.merriam-webster.com/dictionary/calendar%20year

28.2 The SANC has on previous occasions granted other NEI's full accreditation mid-year. The applicant has further provided evidence that SANC has allowed other Nursing Education Institutions (NEI's) to commence with the accredited programme in April and June 2022. It is therefore apparent from SANC's own conduct that they have adopted the same interpretation as the applicant in dealing with other NEIs. This is supported by annex "**FA 1**" to the founding affidavit. The response proffered by the SANC that the regulations in those matters permitted SANC to adopt a different approach as opposed to it is the case in the present case. This argument ought to be rejected as baseless.

[29] Properly construed, the essence of the applicant's ground of review is that of **legitimate expectation**.

[30] The requirements for a legitimate expectation are well known, (a) A reasonable expectation that was, (b) induced by a decision-maker based on, (c) a clear, unambiguous representation which it was,(d) competent and lawful for the decision-maker to make. There was never a debate *in casu* between the parties that the first 3 requirements were met. This appears clearly from the set of affidavits before me. The only issue was the 4th requirement-the lawfulness of the decision.

[31] The applicant had a legitimate expectation, that upon being awarded full accreditation it would commence with the accredited programme in the 2022 academic year for the following reasons, *inter alia*:

31.1 The applicant fully satisfied conditions to its conditional accreditation, that of employing no less than 13 staff members and /or nurse educators at its sub-campuses;

31.2 The applicant passed the last aspect of the accreditation process.

31.3 The SANC is well aware of the financial prejudice to the applicant and the academic prejudice to the students and would not reasonably want to further the burden by a further delay to a process that has been running for almost over 8 years.

31.4 The SANC is aware that the applicant only has one intake of students per year.

[32] The expectation of the applicant that the SANC would perform its statutory function without unreasonable delay is legitimate and stands to be protected by this court.

[33] Unreasonable delay by administrative bodies has been criticised in a number of judgements by courts that recognised the severe prejudice that visits members of the public who wait for unreasonable periods for decisions to be taken. In amplification of this, relying on section 237 of the Constitution, Skweyiya J held in ***Khumalo v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC):***

> *"Section 237 acknowledges the significance of timeous*
>
> *compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.*
>
> *This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.*
>
> *In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to*

assess an instance of unlawfulness on the facts. . . . Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."

[35] Reverting to the present case and for reasons already discussed above, the imposition of restrictions by SANC is unreasonable and unlawful and stands to be set aside.

[36] The unreasonable delay that occurred in this matter and the regrettable sluggish manner the SANC has conducted itself in this matter warrants this court's intervention without the applicant exhausting the internal remedies required in accordance with PAJA and section 57 of the Act.

This then brings me to the issue of costs.

CONCLUSION AND COSTS:

[37] In this regard, I was referred to the matter of ***Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd*** 2015(5) SA 38 SCA at para [27]. 1929 ECD at 535, where the Supreme Court of Appeal applied the *dicta* in the matter In Re: ***Alluvial Creek Ltd 1929 CPD 532***, which states the following with regard to a punitive cost order:

"(27.) *Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their case, and yet those proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.*"

[38] In ***Nel v Waterberg Landbouers Ko-Operatiewe Vereniging,1946 AD 597 at 608;*** the basis for an attorney and client cost order was explained as follows:

> *"The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be by reason of special circumstances arising either from the circumstances which gave rise to the action or from the conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectuality than it can do by means of a judgment for party and party costs that a successful party will not be out of pocket in respect of the expense caused to him by litigation."*

[39] The applicant has illustrated to the Court that SANC has acted *mala fide* by delaying the applicant's accreditation because:

39.1 After the applicant submitted its documents required by SANC for accreditation in December 2021 with the SANC acknowledging receipt thereof on 20 December 2021; -

39.2 After weeks of non-responsiveness on the part of SANC, the SANC only discussed the commencement conditions of the applicant and the documents submitted on 31 March 2022.

39.3 Only on 26 April 2022, a month later almost, did SANC provide the applicant with accreditation letters in respect of the sub-campuses. This decision comes after it has already granted the applicant conditional accreditation to commence with the accredited programme at the end of January 2022.

39.4 It is trite that education is a key and fundament pillar within the health system that is currently under strain. The conduct of the SANC in delaying access to education to countless students is regrettable.

39.5 This conduct by the SANC must be discouraged. The court should show its displeasure with the dilatory and needlessly obstructive conduct of SANC, in an instance where SANC has allowed other NEIs permission to commence with the accredited programme as late as June 2022, by making an order for costs on a punitive scale.

[40] It is for this reason that the applicant contends that SANC should be liable for the costs associated with the application as on the scale between Attorney and Client, which costs is to include the costs of two counsel were so employed.

ORDER

The following Order is made:

[1] The matter is certified semi-urgent.

[2] The applicant is exempted from its obligation in exhausting internal remedies in terms of section7(2)(c) of PAJA read together with section 57 of the Nursing Act 33 of 2005('the Act').

[3] The decision of the SANC dated 26 March 2022, directing the commencement date of the full accreditation granted to the applicant to be 01 January 2023 for the courses is reviewed and set aside.

[4] It is declared that the applicant is permitted to commence with the accredited programmes in accordance with the full accreditation granted to the applicant for the Witbank Sub- Campus (SANG Ref: S1738), Bushbuckridge Sub-Campus (SANG Ref: S1740), Kroonstad Sub-Campus (SANG Ref: S1739), and Tonga Sub-Campus SANC Ref: S2076 on or before 4 July 2022; and

[5] The First Respondent is to issue the applicant with the certificates per regulation 11 of the GNR.173 of 8 March 2013: Regulations relating to the

accreditation of institutions as Nursing Education Institutions for the accredited programmes in terms of its full accreditation within 5 days from the order being granted by this Honourable Court.

[6] The First Respondent is ordered to pay the costs, inclusive of the costs of two counsels on a scale as between attorney and client.

N NDLOKOVANE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 24 June 2022

APPEARANCES

FOR THE APPLICANT:	ADV. E. VAN AS
	evert@advocate-vanas.com
	ADV AA BASSON
	abasson@clubadvocates.co.za
FOR THE RESPONDENTS:	JAL PRETORIUS
	kpretorius@gkchambers.co.za;
HEARD ON:	16 JUNE 2022

DATE OF JUDGMENT: 24 JUNE 2022