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 NO
DATE: **24 October 2022**
SIGNATURE:.....

APPEAL CASE NO: A205/2022
CASE NUMBER: 28965/2022

In the matter between:

THE SOUTH AFRICAN NURSING COUNCIL	Appellant
and	
KHANYISA NURSING SCHOOL (PTY) LTD	First Respondent
THE MINISTER OF HEALTH	Second Respondent

ORDER

On appeal from: The High Court, Pretoria (Ndlokovane AJ sitting as Court of first instance)

1. The appeal is upheld with costs, which costs are to include the costs consequent upon the employment of two counsel.

2. The order of the court granted on 11 August 2022 is set aside and replaced with the following order: 'The section 18(3) application is dismissed with costs.'

JUDGEMENT

Van der Schyff J (Millar J concurring)

Introduction

1. The case concerns an appeal against an order granted in terms of section 18(3) of the Superior Courts Act 10 of 2013 to put into operation a court order pending an appeal. An application for leave to appeal has already been granted as the judge in the court *a quo* was of the view that the appeal would have a reasonable prospect of success. Despite this, the section 18(3) application was granted and the order was set in operation.

2. The following issues arise:

   i. Whether or not a proper case has been made out to set the initial order in operation;

   ii. Whether this court may consider the merits of the 'main' application; and

   iii. Whether this court may grant an order that will result in a position that is contrary to what is provided for in Regulations.

Relevant facts and background

3. During November 2021 Khanyisa Nursing School (Pty) Ltd [Khanyisa] received conditional accreditation from the South African Nursing Council [SANC] to offer Nursing Programmes for the categories of Auxiliary Nurse and General Nurse respectively. The protracted history preceding the granting of the conditional accreditation is only relevant to the extent that is necessary to know that Khanyisa applied for accreditation when they received the conditional accreditation.

4. In terms of the respective letters of conditional accreditation, Khanyisa received conditional accreditation for a period of two years [1 January 2022 – 31 December 2023]. The date of of this accreditation was 29-30 September 2021. The letters of conditional accreditation stated explicitly that certain 'prior to commencement conditions' had to be met, and that SANC would provide it with commencement letters before teaching could commence. In each of the letters directed by SANC to Khanyisa regarding the conditional accreditation, it is noted in bold:

> *'NB: The Nursing Education Institute is reminded that to enrol the students to the programme, the above-mentioned conditions must be fulfilled and the Nursing Education Institute must have received a letter from SANC that informs the NEI to commence with the programme.'*

5. The conditions set out in the respective letters were that prior to commencement Khanyisa had to submit:

   i. Evidence of the appointment of Nurse Educators;

   ii. A clear description of roles and responsibilities for the Quality Asurer, Principal, and CEO.

In addition quarterly reports had to be submitted after the programmes commenced.

6. Khanyisa provided the required information pertaining to its sub-campuses to SANC on 15 December 2021, and awaited the respective commencement letters.

7. For reasons unknown, SANC did not provide commencement letters to Khanyisa in terms of the conditional accreditation they received but granted them full accreditation from 30-31 March 2022. They were informed of this decision during April 2022. In terms of the full accreditation, they could commence with the programs at the beginning of the academic year 2023. There is no indication on the papers at all, why SANC did not provide the commencement letters pertaing to the conditional accreditation after Khanyisa met the conditions stipulated in the letters for conditional accreditation. There can be no dispute that the documents Khanyisa submitted on 15 December 2021 addressed the remaining issues set out in the letters of conditional accreditation, because after having received that documentation the respective sub-campuses were fully accredited.

8. It is necessary to record the information set out in the respective accreditation letters:

> *'In line with regulation 11(1), the Council is expected to issue the Nursing Education Institution with a certificate of accreditation. Such certificate will be sent before the end of the calendar year 2022. The certificate of accreditation will reflect the information set out ans any other as the Council may deem fit:*
>
> - *Type of accreditation: Full Accreditation*
> - *Date of accreditation: 30-31 March 2022, however, the commencement date of the approved programme should be* ***at the beginning of the academic year 2023 considering that the Nursing Education Institution will now commence the process of marketing the accredited programme as well as recruitment and selection process.***
> - *Duration of accreditation:* ***Five (05) years****'*

9. Khanyisa approached the court with a review application in June 2022. Khanyisa sought an order for reviewing, and setting aside of one aspect of SANC's decision to grant full accreditation to Khanyisa's sub-campuses to offer Nursing Programmes for the categories Auxiliary Nurse and General Nurse respectively, namely the commencement date of the respective programmes. Khanyisa's case

was that the accreditation should have been valid from the date on which it was informed that its programmes were accredited, namely 28 April 2022. Khanyisa's main ground of review was that SANC is not empowered to postpone the commencement date of accreditation to 1 January 2023 and submitted that the decisions to do so, were unlawful. Khanyisa also sought exemption in terms of s 7(2) of the promotion of Administrative Justice Act 3 of 2000 [PAJA] from exhausting the internal remedy provided for in terms of s 57 of the Nursing Act 33 of 2005.

10. SANC submitted that the regulations for the approval of, and the minimum requirements for the two programmes are contained in Regulations R.169 and R.171 both dated 8 March 2013 [the Course Regulations] promulgated in terms of the Nursing Act. SANC submitted that Khanyisa's interpretation of specifically regulation 5(3) is wrong. The council's decisions to accredit the programmes to commence in the 2023 academic year, were taken according to the correct interpretation of the said sub-regulation.

11. Regulation 5(3) contained in both course regulations are identically worded and provides:

'The duration of the programme is one (i) academic year of full-time study'

The phrase 'academic year' is defined in regulation 1 of the Course Regulations as:

'a period of at least 44 weeks of learning in any calendar year.'

12. On Khanyisa's interpretation of the definition of the phrase 'academic year', the 44 weeks do not need to fall in the same calendar year because the regulation determines that the 44 weeks of learning fall in 'any' calendar year. As a result, they contend, the teaching of the programmes can commence in July 2022 and run for 44 weeks. On SANC's interpretation the phrase 'calendar year' restricts the 44 weeks of learning to one year reckoned from 1 January to 31 December, therefore the commencement dates of the approved programmes were 'at the beginning of the academic year 2023'.

13. In the urgent court judgment, the court *a quo* agreed that the use of the phrase '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. The court, however, held that the matter does not end at this point. The court then considered averments first made in Khanyisa's replying affidavit, that SANC has granted other Nursing Education Institutes [NEIs] full accreditation but allowed other NEIs to commence with their programmes in April and June 2022. As a result, the court found that SANC created a legitimate expectation that Khanyisa would be able to commence with the accredited programmes mid-2022. The court *a quo* held that 'the imposition of restrictions by SANC is unreasonable and unlawful and stands to be set aside.'

14. The court *a quo* further found that SANC conducted itself in a 'sluggish manner' and that this warranted the court's intervention without the applicant exhausting its internal remedies as required in accordance with PAJA and s 57 of the Nursing Act.

15. As a result, in an order granted on 24 June 2022, the court *a quo:*

    i. exempted Khanyisa from the obligation to exhaust the applicable internal remedies;

    ii. reviewed and set aside the decisions taken by SANC as far as it relates to the commencement date of the full accreditation being 1 January 2023;

    iii. declared that Khanyisa is permitted to commence with the accredited programmes on or before 4 July 2022;

    iv. directed SANC to issue Khanyisa with certificates for the accredited programmes as required in terms of the applicable Regulations.

16. SANC filed an application for leave to appeal. The main grounds of appeal were that the court *a quo*:

i. failed to apply the correct interpretation of the phrase 'academic year';

ii. failed to find that the provisions of Regulation 5(3) of the Course Regulations are peremptory and that SANC is bound thereby;

iii. failed to find that the two courses cannot commence during July 2022 as the required 44-week period of learning would by necessity run from the 2022 calendar year into the 2023 calendar year;

iv. failed to apply the principle of legality, namely that no organ of state or public official may act contrary or beyond the scope of its powers as laid down in the applicable law;

v. failed to disregard, but admitted into evidence, facts set out in Khanyisa's replying affidavit to the effect that SANC on a previous occasion allowed another NEI to commence mid-year with the learning part of a course with a similar minimum requirement;

vi. failed to apply the legal principle that the interpretation of the law to be applied to a decision by an administrator is the sole and final responsibility of the Courts, and not that of the administrator and that previous interpretations of the regulations by SANC are irrelevant;

vii. failed to find that the expectation held by Khanyisa was not a legitimate expectation;

viii. erred in finding that SANC unreasonably delayed its decision to grant accreditation to Khanyisa, and acted *mala fide* by delaying the accreditation application.

17. Khanyisa, in turn, submitted that:

i. any appeal of the order of 24 June 2022 will be academic by the time it is heard;

ii. the court correctly rejected SANC's submission that they were permitted in terms of the Regulations to adopt a different approach in dealing with other NEI's and correctly applied the test for legitimate expectation.

18. Khanyisa filed an application in terms of s 18(3) for an order to uplift the automatic suspension of the court order granted by the court *a quo,* pending the appeal. Khanyisa informed the court that it informed the student's on the waiting list on 25 June 2022, the day after the order was granted, that it had successfully obtained a court order, and commenced with the final enrolment of the students. It started with the induction and introductory classes on 4 July 2022. Khanyisa contends that its conduct was *bona fide* and an attempt to avoid irreparable prejudice to itself and the enrolled students. By the time the application for leave to appeal was filed, Khanyisa contends 'the proverbial train has already left the station. The students at Khanyisa's 4 sub-campuses had already paid their registration fees and were expecting to start on Monday 4 July 2022.'

19. Khanyisa submitted that:

> *'the predicament to be left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantial relief because of procedural delays [by the time the appeal is considered the 44 weeks in which the courses are to be presented would have passed and the 2023 academic year would have commenced] even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances.'*

20. Khanyisa further submitted that it stands to suffer irreparable harm, that cannot be cured by any damages claim, if the order is not granted for the following reasons:

i. Khanyisa has been unable to earn any form of income at the 4 sub-campuses since 19 December 2014 due to the continuous delays caused by SANC. It will have to close its doors if deprived of an opportunity to earn an income;

ii. Since the order was granted on 24 June 2022, 210 students were admitted for the respective programmes, the majority from previously disadvantaged communities. The students will be deprived of the opportunity to further their education and advance their careers if the order is not put into operation;

iii. Thirteen staff members are employed and if Khanyisa is not permitted to proceed with the academic programmes they will have to be retrenched.

21. SANC, on the other hand, contended that the applicant is in the same position as any other business trying to operate without a valid licence. It submitted that the students that were enrolled stand to suffer irreparable harm if they are allowed to proceed with their training, and an appeal eventually is successful. This is because the training they received before January 2023 would not be in compliance with Regulations 2(1)(a) to (c) and 5(3) as it was provided by an institution not accredited to provide such training. In short, the result of a successful appeal is that the training provided to the student before the commencement date linked to the full accreditation will be invalid. SANC avered that there is nothing extraordinary in the fact that the education of 210 students is being delayed by six months in an effort by SANC to ensure that the students receive quality education and training. In addition, the contracts of the staff members provided to SANC stipulate that the employees will not be paid as long as there are no students. SANC denied that an appeal will be academic as a final decision by the Supreme Court of Appeal will provide clarity about the practical effect and interpretation of Regulation 5(3).

22. SANC also submitted that:

i. There is no evidence on record showing that Khanyisa complied with the requirements for accreditation when it applied for accreditation during 2014;

ii. The founding papers in the main application show that Khanyisa is primarily to be blamed for the fact that accreditation could not be completed shortly after the audit visits of the sub-campuses during 2021;

iii. Contrary to what it alleged, Khanyisa did earn an income on the campuses because it trained students in the 'so-called legacy courses under regulations R. 2175, R. 2176 and R.683;

iv. Since training can commence in 2023, the alleged harm cannot be irreparable. Khanyisa did not provide sufficient information in its founding affidavit to substantiate the averment of financial prejudice;

v. Khanyisa has not shown that it will be able to provide 44 weeks of quality learning before the assumed examinations in May 2023. It failed to indicate how the 44 weeks will be fit into the limited time left without compelling tutors and students to work non-stop without vacation or breaks for more than 10 months.

23. SANC stands to suffer irreparable harm if the order is put into operation because it will be prevented from performing its duties as the regulator of nursing education.

24. It is apposite to indicate that Khanyisa reiterated in the s 18(3) application that SANC allowed other NEIs to commence with their accredited programmes during June 2022. SANC's reply hereto was that:

i. A decision by SANC regarding the commencement date of the accreditation of another accredited NEI does not have a binding effect on the Council when considering and determining the commencement date for accreditation of any other NEI;

ii. The circumstances of the different applications may differ, and the decision regarding the commencement date of training may have been made in error;

iii. The courts are the final arbiters on the question of what the law requires, and therefore the fact that other NEIs were allowed to commence with their training during mid-years as alleged by Khanyisa is therefore irrelevant and should be disregarded.

25. As stated above, the court *a quo* granted the s 18(3) application despite granting leave to appeal. The presiding judge held that Khanyisa indeed stands to suffer irreparable harm if the order remains suspended for the following reasons:

i. The 210 students enrolled by Khanyisa after the order was granted in June 2022 would be prejudiced, as would Khanyisa and the staff members.

ii. The educators' economic livelihood and that of their families will be compromised.

iii. SANC, would however, not suffer irreparable harm if the nursing programmes commence mid-year. There is insufficient evidence of any financial loss to be suffered by SANC.

Section 18(4) appeal

26. SANC appeals the s 18(3) judgment and order granted by the court *a quo*. SANC submits that the judge failed to differentiate between prejudice and irreparable harm. It is also submitted that by weighing up the harm to be suffered by SANC to the harm suffered by Khanyisa, s 18(3) was incorrectly applied. The section does not require a balancing exercise. The requirement of irreparable harm to an applicant and no harm to a respondent must both be established on a balance of probabilities. If Khanyisa cannot show that SANC will not suffer irreparable harm by the grant of the operation and execution order, it would be fatal to the application.

27. SANC submits that the court *a quo* failed to recognise that the training of the students will only be delayed for six months, and will not be permanently lost. It was not taken into account by the court that neither the students nor the employees were parties to the application and it is incorrect to consider any prejudice they would suffer because of the granting of the order.

28. SANC repeats the submissions made in the s 18(3) application. It reiterates that Khanyisa failed to substantiate the averment that exceptional circumstances exist that justify the deviation from the norm, with hard facts. The allegations made to this effect, SANC contends, are vague and superficial. Despite being challenged to do so in SANC's answering affidavit in the s 18(3) application, Khanyisa failed to file a replying affidavit wherein it provided detail regarding the actual dates on which the students were enrolled, dates on which tuition fees were paid and the dates on which the actual tuition commenced. Khanyisa should have provided more specific facts regarding its alleged financial prejudice, retrenchment of staff members and the plight of students.

29. SANC emphasises that students will be set up for failure if forced to undergo 44 weeks of non-stop studying and attending practical sessions to ensure that the 44 weeks of training is finalised by May 2023, the date of the alleged exam. There is nothing extraordinary in the fact that the education of 210 students is being delayed with six months in an effort by SANC to ensure that the students receive quality education and training.

30. In opposing the s 18(4) appeal, Khanyisa submits that the merits of the main application and main judgment are not pertinent to this appeal. The purpose of the appeal, it is submitted, is not to second-guess the correctness of the main judgment but only to consider the portions of the record dealing with the s 18(3) application.

Applicable legal principles

31. Ponnan JA comprehensively captured the requirements for a s 18(3) order disturbing the ordinary course of the appeal process in *Ntlemeza v Helen Suzman Foundation:*[1]

> *'[28] The primary purpose of s 18(1) is to reiterate the common-law position in relation to the ordinary effect of appeal processes — the suspension of the order being appealed — not to nullify it. It was designed to protect the rights*

[1] 2017 (5) SA 402 (SCA) paras [28] and [35]-[37].

of litigants who find themselves in the position of General Ntlemeza, by ensuring that, in the ordinary course, the orders granted against them are suspended while they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and, in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s 18(3). As already stated and as will become clear later, the legislature has set the bar fairly high.'

32. In *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*[2] the court said the following about s 18:

'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- *First, whether or not exceptional circumstances exist; and*
- *Second, proof on a balance of probabilities by the applicant of —*
  - *the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and*
  - *the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'*

33. Sutherland DJP concluded in *Jai Hind EMCC t/a Emmerentia Convenience Centre v Engen Petroleum Limited South Africa: In re: Engen Petroleum Limited South*

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[2] 2014 (3) SA 189 (GJ) para [16].

Africa v Jai Hind EMCC t/a Emmerentia Convenience Centre[3] that the court, in deciding a s 18(3) application, must:

> *'locate the exceptionality and thereafter determine, whether as a fact, irreparable harm shall be suffered by [the applicant], and therafter determine, as a fact, whether irrepearable harm shall be suffered by [the respondent] if the order is implemented at one'.*

Sutherland DJP highlighted that exceptionality' is a value judgment. The 'finite period within which the order can be effective' can, in appropriate circumstances, trigger exceptionality.

34. In a s 18(4) appeal the court is concerned with the question as to whether the court *a quo* in granting the order to execute had due regard to the relevant provisions of s 18 and applied them correctly.[4] While s 18(1) entitles a court to order the operation and execution of an order contrary to the norm, s 18(3) provides a further controlling measure in that a party seeking an order in terms of s 18(1) is required 'in addition to' prove 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 suffer irreparable harm if the court so orders. If these statutory requirements are met, the court has a wide discretion to grant the application,[5] if the requirements are not met, the court does not have a discretion to exercise and the application must be dismissed.[6]

35. In *Multisure Corporation (Pty) Ltd v KGA Life Limited and Others*[7] Govindjee J explained that for harm to be irreparable, the effects or the consequences must be irreversible or permanent.

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[3] (A503/2022; 11752/2020) [2022] ZAGPJHC 551 (4 August 2022) para [8].

[4] *Ntlemeza, supra,* par [34].

[5] *Swart and Another v Cash Crusaders Franchising (Pty) Ltd* (A98/2018 85149/2017) 2018 (6) SA 287 (GP) at para [4].

[6] *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) par [10].

[7] (2780/2021) [2022] ZAECQBHC 24 (30 August 2022) at par [30]

36. In the s 18(3) application, Khanyisa relied on the following to substantiate its claim that it will suffer irreparable harm if the order is not put into operation and executed:

i. The students on the waiting list were informed that a court order was obtained. Khanyisa commenced with the enrolment of 210 students. This process included the placements, signing of agreements and inductions during the week of 24 to 30 June 2022. By 30 June 2022 the students had already paid their registration fees and were expecting to start with classes on Monday 4 July 2022;

ii. Classes started on 4 July 2022;

iii. The suspension of the order resulted therein that 210 students are deprived of the opportunity to further their educaton and advance their careers; this will have a detrimental effect on hospitals as they will receive 210 fewer nursing staff;

iv. Khanyisa's staff members will have to be retrenched as Khaniysa will not be able to afford their salaries, and this will result in financial hardship and detriment to the employees and their families;

v. Khanyisa have been unable to earn any form of income at the 4 sub-campuses since 2014 due to SANC's delay, should it be deprived of the opportunity to earn an income it would be forced to close its doors.

37. In the first instance, it is necessary to highlight that the effect of the suspension of the operation of the order will not result in Khanyisa being unable to earn an income in perpetuity. The commencement of the programmes in terms of the full accreditation is only suspended pending the date on which the appeal is finalised in their favour, or 1 January 2023, whichever date occurs first. In addition, SANC stated in their answering affidavit that it is not correct that Khaniysa did not earn an income since 2014 because they trained students in other courses. This averment was not refuted in a replying affidavit.

38. In addition, the papers reflect that the litigation at hand only affects Khanyisa's 4 sub-campuses and not its main campus. Khanyisa has, on their version, been operating in similar circumstances since 2014. No reasons were provided why they would now be forced to close their doors if they were able to survive financially the preceding eight years.

39. Khanyisa was granted conditional accreditation in November 2021, and they met the requirements to commence with teaching early in 2022, when there were 44 weeks in the calendar year available for teaching. However, they did not approach the court on an urgent basis during January or February 2022 for an order to direct SANC to issue the commencement letters as per the letters of conditional accreditation. If Khanyisa stood to be financially crippled if they did not present the programmes in 2022, it would have been expected that they acted proactively as early in the year as possible. Khanyisa did not prove on a balance of probabilities that the suspension of the order granted by the court *a quo* will cause it irreparable financial harm.

40. SANC claimed in its answering affidavit that they were provided with copies of the contracts of 'provisional staff' wherein it is stipulated that when there are no students at school or practical areas, the particular tutors will be requested to stay home with no salary expected until they return when students are available in class or practical areas. This allegation was not refuted in reply. However, in the papers Khanyisa presented evidence that some staff members, at least, were appointed full time. No evidence was, however provided for the court to deduce that the educators and their families will suffer undue financial hardship if the order is not implemented, except for a general averment.

41. The averment that the students will be deprived of the opportunity to further their education and advance their careers is not substantiated. The students' studies are only postponed until the appeal is decided in Khanyisa's favour or 1 January 2023, whichever date occurs first. I agree with SANC that the prejudice that the students will suffer if the appeal is upheld, is far greater than any prejudice they will suffer by postponing the commencement of their studies. Sight should also not be lost of the fact that Khanyisa commenced with teaching and continued therewith, despite

the appeal to the main application, and the s 18(4) appeal being launched. In this respect, Khanyisa stands with dirty hands before the court.

42. Khanyisa is mistaken in its view that the proverbial 'train has left the station', and that the court must countenance their actions. In commencing with teaching on 4 July 2022 after the application for leave to appeal was filed, Khanyisa took the law into its own hands. Any prejudice suffered as a result thereof, lies at their feet. Although this court empathises with the plight of the students who will be affected by this order, the fact that their teaching commenced in circumstances which were in contravention of sections 18(1) and 18(4)(iv) of the Superior Courts Act 10 of 2013, cannot be ignored.

43. The alleged exceptional circumstances that necessitate the operation of the order must be considered against the background of the information provided by Khanyisa in the founding affidavit of the main application relating to the conditional accreditation granted to the respective sub-campuses. It is reflected in the letter confirming the conditional accreditation that:

> *'Date of accreditation: 29 – 30 September 2021,* ***however the commencement date of the approved programme should be at the beginning of the academic year 2022*** *provided that the Nursing Education Institution has met the short-term prior commencement conditions.' (My emphasis).*

44. The letter confirming the full accreditation contains a similar paragraph and reads as follows:

> *'Date of accreditation: 30-31 March 2022,* ***however the commencement date of the approved programme should be at the beginning of the academic year 2023*** *considering that the nursing education Institution will now commence the process of marketing the accredited programme as well as the recruitments and selection process.'*

45. Khanyisa took issue with the terms of the letter of full accreditation, however I am of the view that the Khanyisa's dilemma is not seated in SANC's decision to grant

it full accreditation but directed that the programmes may only commence at the beginning of the academic year 2023, but in SANC's failure to provide commencement letters in terms of the conditional accreditation after Khanyisa met the conditions set out in the letters of conditional accreditation.

46. Conditional accreditation and full accreditation are two distinct accreditations. Although the time periods for which the respective accreditations were granted overlap with a year, it is not stated anywhere in the papers that the conditional accreditation for 2022 lapsed when the full accreditation was granted. The fact that Khanyisa chose to commence with their teaching during July 2022 on its interpretation of the regulation that it is entitled to start mid-year, instead of requesting SANC to timeously grant a letter of commencement as it undertook to do in the conditional accreditation letter, refutes the contention of exceptional circumstances existing for the order to be put into operation.

47. Against this background and based on the regulatory prescripts dealt with below, it cannot be that any 'exceptionality' that might exist, justifies an order in terms of s 18(1) to be granted. Exceptionality, even if it exists, cannot render an illegality justifiable.

48. Khanyisa's contention that this court is not to have regard to the merits of the appeal, is not borne out by the existing case law. The Supreme Court of Appeal held in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[8] that one of the factors that a court to which application was made for leave to execute the judgment pending appeal, is:

> *'the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose…'*

[8] 1977 (3) SA 534 (A) in 545D-G

49. This approach was favourably referred to by the same court in at least *Ntlemeza.*[9] In *Knoop and Another NNO v Gupta (No 1)*[10] where Wallis JA referred to *Minister of Social Development and Others v Justice Alliance of South Africa and Another*[11] and stated that:

> *'it was held that the court has a wide discretion to grant or refuse an execution order once the statutory requirements are satisfied, and that prospects of success in the appeal have a role to play in considering the exercise of that discretion. There is a dictum in UFS v Afriforum that supports this approach, but in both that case and Ntlemeza the record in the main appeal was not before this court and the appeals had perforce to be decided without the full record or any consideration of the merits of the main appeals.*
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> *We had the full record in the main appeal before us and had read it in anticipation of dealing with the main appeal, but the argument on the urgent appeal did not include any debate over prospects of success in the main appeal. Our finding that the three requirements for making an execution order were not established means that we did not have to consider whether there is a discretion once they are present and, if so, whether the prospects of success should affect its exercise. There may be difficulties if the high court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s 18(4) will always be in a position to assess the weight of this factor.'* (Footnotes omitted)

50. *In* casu, SANC did debate the issue regarding the prospects of success in the appeal. The cumulative effect of:

i. the nature of the relief sought,

ii. the consequences that both the granting as the dismissing of the appeal will have,

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[9] *Supra*, par [44].

[10] [2020] ZASCA 149; 2021 (3) SA 135 (SCA) at par [(19 November 2020)

[11] [2016] ZAWCHC 34.

iii. the fact that as far as the offering of the courses by Kanyisa from July 2022 for 44 weeks are concerned an appeal will be moot or merely academic, and

iv. the fact that SANC admitted to granting other NEI's permission to start mid-year with teaching,

renders it necessary that this court considers Khanyisa's prospects of success on appeal.

51. I am of the view that SANC has considerable prospects of success in the appeal instituted against the judgment and order handed down on 24 June 2022. Like the court *a quo,* I agree with the interpretation that regulation 5(3), read with the definition of 'academic year' stated in regulation 1, as it currently stands, prescribes that the 44 weeks of training have to fall in a specific calendar year. This is consonant with the finding of the court a quo. SANC provides full accreditation for a maximum of 5 years or conditional accreditation for a maximum of two years.

52. In this context, the term 'any' calendar year' is to be interpreted as 44 weeks of training in any of the calendar years that the NEI is accredited to offer the course. The term 'calendar year' informs the interpretation of the term 'academic year'. I have extensively researched the ordinary meaning of the term 'calendar year' and all the dictionaries define the term as 12 consecutive months from 1 January to 31 December.[12] A distinction is, for example, made between a calendar year and a fiscal year, and while a calendar year starts on 1 January and ends on 31 December, a fiscal year can start and end at any time during the year, so long as it lasts 12 months.

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[12] See, amongst others:
https://www.lawinsider.com/dictionary/calendar-year [accessed on 9-10-2022];
https://dictionary.cambridge.org/dictionary/english/calendar-year [accessed on 9-10-2022];
https://www.collinsdictionary.com/dictionary/english/calendar-year [accessed on 9-10-2022];
https://www.duhaime.org/Legal-Dictionary/Term/CalendarYear [accessed on 9-10-2022];
https://www.betekenis-definitie.nl/kalenderjaar [accessed on 9-10-2022];
https://www.vertalen.nu/betekenis/nl/kalenderjaar [accessed on 9-10-2022].

53. The requirement that the 44 weeks of learning must occur in 'any calendar year' is not an obligation imposed by SANC, but a regulatory prescript enforced by them. Had Khanyisa approached the court for an order to direct SANC to issue commencement letters in terms of their conditional accreditation in January 2022, the outcome might have been different. At this time, however, it is impossible to adhere to the prescripts of the regulation since there are not 44 weeks remaining for training in 2022, as was the position in June 2022.

54. I cannot agree with the court *a quo*'s finding that a legitimate expectation ever existed that Khanyisa could commence with the programmes mid-year. The doctrine of legitimate expectation entails that a reasonable expectation based on a well-established practice or an express promise by an administrator **acting lawfully** gives rise to legal protection when the practice or promise is clear, unambiguous and unqualified. If SANC allowed other NEI's to commence mid-year with teaching programmes that are subject to the same prescribed minimum conditions as the programmes that Khanyisa commenced with, SANC created a dilemma, they acted in contravention of the regulations and will surely face the consequences in due course, but they did not create a precedent.

55. This court cannot grant an order that contravenes the applicable regulation on this court's interpretation of the regulation. Wallis JA stated in *Knoop*[13] that:

> *'a Court can no more grant an order contrary to a statute, than it can order a party to perform an illegal act.'*

Unless the regulation in question is subject to a constitutional challenge, it must be applied.

56. As a result the s 18(4) appeal stands to be upheld and the court *a quo*'s order stands to be replaced by an order that the section 18(3) application is dismissed.

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[13] *Knoop, supra,* at par [29]. See also in this regard *De Faria v Sheriff, High Court, Witbank* 2005(3) SA 372 (T) at 397 and *Schierhout v Minister of Justice* 1962 AD 99 at page 109.

ORDER

In the result, the following order is granted:

1. The appeal is upheld with costs, which costs are to include the costs consequent upon the employment of two counsel.

2. The order of the court granted on 11 August 2022 is set aside and replaced with the following order:

   'The section 18(3) application is dismissed with costs.'

E VAN DER SCHYFF
JUDGE OF THE HIGH COURT

I DISSENT

MPN MBONGWE
JUDGE OF THE HIGH COURT

I AGREE

A MILLAR
JUDGE OF THE HIGH COURT

MBONGWE, J (Dissenting)

Introduction

1. This is an appeal against the judgment and orders of the court a quo, per Ndlokovane AJ dated 11 August 2022. Prior to that judgment, the court a quo had granted orders sought by the first respondent to commence with the programme of training student nurses, following the granting to it of full accreditation by the appellant. The issue before the court was whether the present appellant, an organ of State, was entitled in terms of the provisions of the enabling statute, the South African Nursing Council Act 33 of 2005 ("the Act), to suspend the commencement of the training of aspirant nurses to a

future date from the date of accreditation. The court a quo found that in favour of the first respondent, declaring that it was well within its rights to commence with the training of nurses upon the receipt of full accreditation, and that the provisions of the Act do not provide the appellant with the authority to suspend the commencement date.

2. The issues before this court emanate from the above findings and orders of the court a quo. Following the hearing of the three subsequent applications and counter-application by the appellant and the first respondent being, the appellant's application for leave to appeal the decision of the court a quo dated 24 June 2022, the first respondent's opposition thereto and on application in terms of section 18(3) of the Superior Court Act, 2013 as well as the appellant's counter– application in terms of section 18(4) of the same Superior Court Act, the court granted the first respondent section 18(3) application. The orders of the court gave rise to the present appeal.

3. I have read the majority judgment in this appeal and I fully agree with the detailed facts of the case as set out succinctly in therein. I consequently will not repeat them in this judgment, save to the extent necessary. I, however, do not agree with the decision, order made and the reasons therefor. While I fully agree with the authority of the precedent decisions cited in the majority judgment, I hold the view that the principles in those decisions do not support the appellant and were cited without the necessary consideration of the peculiarity of the facts in the case, particularly the impugned conduct of the appellant.

Common cause facts

4. For convenience, I list, chronologically, the common cause facts between the parties:

4.1. The first respondent submitted its application to the appellant for accreditation for the training of students in Auxiliary Nursing and Diploma in Nursing Programmes in December 2014.

4.2. The appellant delayed the processing of the application for a number of years until the first respondent lodged a complaint to the Nursing Council. Matter was dealt with and finalised on 11 June 2021, when the appellant was ordered to conduct site inspections of the first respondent's campuses and provide the full council with the report on its next meeting on 29 June 2021.

4.3. Temporary accreditation was granted and communicated to the first respondent in a letter dated 13 December 2021.

4.4. The first respondent met all the outstanding requirements set out in the temporary accreditation by the 19 December 2021 and was issued with full accreditation only on 26 April 2022. The appellant's letter granting full accreditation contained a caveat that accreditation becomes operative on 01 January 2023, that is, eight months later. The first respondent raised issue with the suspension of the commencement date in that, in line with its fulfilment of the requirements in the temporary accreditation, it had inter alia, employed staff to carry out the training of its registered students.

5. The first respondent brought an urgent application in June 2022, following unsuccessful engagements with the appellant, for the review of the authority and decision of the appellant to impose the suspension. It contended that neither the enabling provisions of the South African Nursing Council Act 33 of 2005 nor the regulations made thereunder, lend such authority to the appellant. The court ruled in favour of the first respondent and set aside the suspension. The granted the appellant's subsequent application for leave to appeal to the Supreme Court of Appeal.

6. Subsequent to handing down its judgment dated 24 June 2022, the appellant brought an application court for leave to appeal against the decision of the court a quo. Leave to appeal to the Supreme Court was granted.

7. The first respondent brought an application in terms of the provisions of sections 18(3) of the Superior Court Act of 2013. In its application, the first

respondent seeking an order for it to continue with the programme as per the order of 24 June 2022, notwithstanding the appeal by the appellant. The appellant brought a counter –application in terms of section 18(4) seeking an order for the suspension of the execution of the order appealed against pending the determination of its appeal against by the Supreme Court of Appeal.

8. The court a quo granted the first respondent's section 18(3) application. This outcome is the subject in the appeal before us.

Extant position in the matter

9. The first respondent's commencement with the training of student nurses on 04 July 2022 was with the ostensible view to having its students complete the prescribed 44 weeks of training, prior to the scheduled first examination in May 2023. With provision made in the regulations for an additional three weeks, commencement of the training on 04 July 2022 would have provided sufficient time to meet the prescribed period of forty-four weeks of training and, consequently, eligibility to sit for the May 2023 examination.

10. That the first respondent did commence with the training of students and continues to do so is not in dispute. Counsel for the appellant has in fact confirmed it, albeit with an untenable added qualification that the first respondent is doing so unlawfully. It is untenable in that the appellant has admittedly allowed at least one institution, also serving the same purpose as the first respondent, to commence with the training programme mid- year 2022. This aspect is considered further in perspective later in this judgment and is at the heart of the dispute between the parties.

Detour

11. Prior to the consideration of the merits of the issues between the parties, I deem it prudent to traverse the nature and purpose of the South African Nursing Council Act 33 of 2005 ("the Act"). Like similar legislative instruments

akin to its purpose, the Act is a piece of legislative measure enacted to ensure health security. It is in my view befitting that it, like the Compensation for Occupational Injuries and Diseases Act of 130 of 1993 ("COIDA") and the Road Accident Fund Act of 1996 ("the RAF Act"), is aptly described in the same terms as a legislative social security instrument.

12. In my view, the services the Act provides for cover a much more wider spectrum and include the medical treatment of the beneficiaries and families of persons who sustain permanent disablement or contract terminal diseases in the work place under COIDA and the victims of motor vehicle accident under the RAF Act. The core purpose of the Act is to ensure the availability of health care and medical treatment to the citizens of and all persons within the borders of the Republic of South Africa. Considering the world-wide shortage of health-care givers, the ever increasing financial burden and constraints occasioned by the inescapable provision of health and medical care, it would be amiss to underestimate the onerous duties of the often underpaid health-care givers, the nurses in particular.

13. It is in this light that the purpose of the Act be constantly borne in mind in decision making on matters affecting the students aspiring to serve in the health care discipline. Thus, abuse of administrative authority is at odds with the purpose of the Act where it discourages or disadvantages students who conscientiously aspire to serve as medical caregivers, notwithstanding the objective challenges entailed.

The appellant's case

14. The core grounding of appellant's appeal before this court appears to be against the declaratory by the court a quo granting the first respondent the right to commence with the training programme in July 2022. The reason proffered by the appellant is that the calendar year for the programme commences on 01 January 2023. The appellant contended that the commencement on 04 July 2022 and current continuation of the first respondent with the training programme is, therefore, unlawful.

15. The first respondent disputed the appellant's averments, contending that it is standard practice to commence the programme prior to the beginning of the year. It further alleged, in support of contention, that the appellant has allowed eight other institutions serving the same programme to commence mid-2022. This was not disputed by the appellant and was in fact confirmed by counsel for the appellant, albeit with an untenable qualification that he knows of only one institution that the appellant has allowed to and did commence with the programme mid - 2022.

Dispute

16. For brevity and concise identification of the crisp issue between the parties it is apposite to commence by stating that, with the common cause facts stated in para 4.1 to 4.4 above and the admission by the appellant that it has allowed at least one institution to commence with the programme mid - 2022, the crisp issue in the dispute between the parties is whether the court a quo was correct in setting aside the decision of the appellant to suspend the operation of the accreditation granted to the first respondent to 01 January 2022.

Analysis

17. The appellant is the custodian of the regulations and is therefore clothed with discretionary authority in its application of the regulations by virtue of the regulations being made under the Act and, as such, the exercise of the discretionary powers is subject to the provisions of PAJA. Section 33 of the Constitution of the Republic of South Africa Act of 1996 explicitly provides that a decision taken in the exercise of statutory discretionary authority should be just, fair and impartial. To ensure the protection of the rights of persons affected by an administrative decision, section 33 of the Constitution provides for the enactment of a legislative instrument that would provide the means to challenge the decision concerned.

18. The enactment of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is the legislative instrument envisioned in the provisions of section 33 of the Constitution.

19. With these provisions in mind, I now consider the administrative powers the Nursing Council Act 33 of 2005 and the regulations made thereunder afford to the appellant. In terms of regulation A, upon consideration of an application for accreditation by a qualifying institute of higher education, such as the first respondent, the appellant may;

19.1. Grant full accreditation;

19.2. Grant temporary accreditation; or

19.3. Decline the application.

In respect of 19.2 and 19.3, the provisions of section 5 of PAJA require that the shortcomings and detailed reasons, respectively, be provided to the applicant.

20. It stems from powers of the appellant stated above that, the suspension of the operation of the full accreditation granted to the first respondent to 1st January 2023, falls outside the statutory authority of the appellant. Not only that, the impugned decision of the appellant was proven, and admitted by the appellant's counsel to be discriminatory against the first respondent. In this regard, the first respondent alleged and named seven other institutions serving the purpose it serves, who have been allowed by the appellant to commence with the training programme mid - 2022. Counsel for the appellant admitted to know of only one such institution.

21. The appellant's asserted reasoning that it is due to the academic year commencing only on 1 January 2023, that the suspension was imposed is an unambiguous shameful fabrication in the circumstances. The appellant has committed a transgression of the provisions of its enabling statute and the explicit provisions of the constitution by its unjust, unfair and discriminatory decision.

22. This forms the foundation for the dissent from the majority judgment. At line 5 of para [51] of the majority judgment it is stated, with regard to the flagrant and unlawful discrimination against the first respondent:

> "..... If SANC allowed other NEI's to commence mid – year with teaching programmes that are subject to the same minimum conditions as the programmes that Khanyisa commenced with, SANC created a dilemma, they acted in contravention of the regulations and will surely face the consequences in due course, but they did not create a precedent."

23. The majority judgment ignores the transgression of the fundamental principle encapsulated in the provisions of the Constitution requiring justice, fairness and impartiality in the exercise of statutory powers. Discrimination in the exercise of statutory authority is gross and not merely "a dilemma and a contravention of the regulations by the appellant for which the appellant will suffer the consequences in due course". The conduct of the appellant should not be countenanced, least of all by the court.

24. The latter paragraphs of the majority judgment tend more to turn a blind eye to the unconstitutionality and wrongfulness of the decision of the appellant, thereby adding salt to a wound. The established unconstitutionality and unlawfulness of the actions of the appellant to the detriment of the first respondent and its students is prejudicial. It deprives the students of their constitutional rights to education. That, befittingly, in my view, emboldened the dissent from the majority judgment.

25. The repulsive conduct of the appellant alone was justification for the granting of the first respondent's application in terms of section 18(3) of the Superior Court Act. I can think of no judicious reason warranting the grant of the relief sought by the appellant herein.

26. There is obvious prejudice to the students and the first respondent as stated above. The same cannot justifiably be said in respect of the appellant. Even if

the appellant was prejudiced, that will be of its own making and self - inflicted. Must the court come to the appellant's rescue in such that circumstance?

Justice and the balance of convenience

27. I agree with majority judgment that the appellant should suffer the consequences of its wrongdoing. However, it is necessary to abate the consequences where doing so will accord with justice. In the circumstances of this case, by simply allowing the first respondent to continue, just like the other similar institutions, the appellant has granted permission to, prejudice will be abated if not averted. This is given effect to by orders of the court a quo which I embrace.

Conclusion

28. Stemming from the findings in this judgment, I conclude that the appeal ought to fail.

Costs

29. The general principle that costs follow the outcome of the litigation applies in this case.

Order

30. Resulting from the findings in this judgment, I would have made the following order:

1. The appeal is dismissed
2. The orders of the court a quo are confirmed.
3. The appellant is ordered to pay the costs which costs shall include the costs consequent upon the employment of two counsel.

M.P.N. MBONGWE J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I DISAGREE

E VAN DER SCHYFF
JUDGE OF THE HIGH COURT

I DISAGREE

A MILLAR
JUDGE OF THE HIGH COURT

FOR THE APPELLANT:	ADV. JAL PRETORIUS
WITH:	ADV. RC NETSIANDA
INSTRUCTED BY:	MAPONYA INC.
FOR THE FIRST RESPONDENT:	ADV. E VAN AS
WITH:	ADV. AA BASSON
INSTRUCTED BY:	JJ JACOBS ATTORNEYS INC.
DATE OF THE HEARING:	10 OCTOBER 2022
DATE OF JUDGMENT:	24 OCTOBER 2022