IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: A15/07

In the matter between:

EMERGENCY MEDICAL SUPPLIES

AND TRAINING CC Trading as EMS **Appellant**

and

HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA **First Respondent**

PROFESSIONAL BOARD FOR EMERGENCY

CARE PRACTITIONERS **Second Respondent**

CORAM	**:**	**J M HLOPHE JP & D H ZONDI J**
JUDGMENT BY	**:**	**J M HLOPHE JP & D H ZONDI J**
FOR THE APPELLANT	**:**	**ADV. P TREDOUX & ADV. C CUTLER**
INSTRUCTED BY	**:**	**GILLIAN & VELDHUIZEN INC.**
FOR THE RESPONDENTS	**:**	**ADV. D I BERGER & ADV. T MANCHU**
INSTRUCTED BY	**:**	**GILDENHUYS LESSING MALATJI INC.**
DATE OF HEARING	**:**	**27 MAY & 30 MAY 2011**
DATE OF JUDGMENT	**:**	**28 OCTOBER 2011**

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HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA — First Respondent

PROFESSIONAL BOARD FOR EMERGENCY CARE PRACTITIONERS — Second Respondent

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JUDGMENT DELIVERED ON 28 OCTOBER 2011

HLOPHE JP & ZONDI J

INTRODUCTION:

[1] This is an appeal in terms of section 20 of the Health Professions Act No 56 of 1974 ("the Act").

[2] The appellant in this matter, Emergency Medical Supplies and Training CC is a close corporation registered in terms of the Close Corporations Act 69 of 1984 and had been accredited by the second respondent, the Professional Board for Emergency Care Practitioners, to conduct emergency care training to practitioners.

[3] The first respondent, the Health Professions Council of South Africa, is a statutory body established in terms of section 2(1) of the Act.

[4] The second respondent, the Professional Board for Emergency Care Practitioners ("the Board") is also a statutory body established in 1998 in terms of section 15(1) of the Act and carries out certain functions in terms of the said Act. One of its functions or objects is to control and exercise authority in respect of all matters affecting the training of the emergency care practitioners.

[5] Section 16 of the Act provides that no person or educational institution may offer or provide training unless the training to be provided has been approved by the relevant body who may attach such conditions and requirements as it deems necessary.

[6] The following categories of emergency care practitioners are registered under the auspices of the second respondent:

i. Basic Ambulance Assistants ("BAA");

ii. Ambulance Emergency Assistants ("AEA");

iii. Critical Care Assistants ("CCA").

[7] Section 20 of the Act affords any party aggrieved by the decision of the second respondent a right to appeal and provides as follows:

"20. Right to Appeal

1) Any person who is aggrieved by any decision of the council, a professional board or a disciplinary appeal committee may appeal to the appropriate High court against such a decision.

2) Notice of appeal must be given within one month from date on which the decision was given"

[8] Advocate P. Tredoux and C. Cutler appeared on behalf of the appellant and Advocate D.J. Berger S.C and I. Manchu appeared on behalf of the respondents.

[9] The basis for the appeal as alleged by the Appellant, is that the second respondent erred in its decision to withdraw the appellant's accreditation and failed to take into account the evidence that was presented to it. The appellant seeks to have the decision set aside. The respondents oppose the relief sought by the appellant.

FACTS:

[10] The appellant first applied to the second respondent to be accredited to conduct four BAA courses. The application was submitted on 1 July 1999 on the prescribed 169 form that was provided for by the respondent.

[11] The form itself required the appellant to state the number of courses it intended to teach. The appellant indicated that it intended to offer four BAA courses. The application was considered by the Board and an investigation team was sent to inspect the premises and equipment of the Appellant.

[12] Pre-accreditation evaluations were conducted at the appellant's premises and a final decision was taken by the second respondent. Its decision was communicated by the Acting Registrar of the first respondent to the appellant by way of a letter indicating that accreditation had been granted.

[13] The same procedure was followed with each of the appellant's following applications, being the AEA and CCA applications. On 10 November 1999 the appellant applied to conduct three AEA courses and between 2 November 2002 and February 2003 the appellant applied to conduct one CCA course.

[14] The pre-accreditation report for the CCA accreditation was conducted by Mr. A Dhai together with Mr. B Keruparshad and Dr G Dalbock. Mr Dhai also moderated the appellant's October 2003 CCA examinations wherein 13 students partook in the examinations. More about Mr. Dhai's role in this matter will be discussed at a later stage.

[15] Each year since 1999 when the appellant first obtained its accreditation until the date upon which its accreditation was revoked by the second respondent, the appellant would provide the second respondent with annual reports detailing the number of courses it had conducted during a specific year and the number it intended to conduct the following year.

[16] By the end of 2004 the appellant, in its annual report, stated that it had conducted eleven BAA, five AEA and two CCA courses.

[17] In 2005 the second respondent received an anonymous letter making material allegations against the appellant. The allegations were that:

1. The appellant was training beyond its accreditation;
2. The appellant used newly qualified students as examiners;
3. The instructors were not appropriately qualified;
4. Mr. Tucker who was a member of the appellant completed his AEA and CCA through the appellant.

[18] On 19 October 2005 the second respondent, through its appointed representatives, Mr. C Lambert and Mr. N Naidoo, visited the appellant and made the principal, Mr Craig Northmore aware of the allegations levelled against the appellant.

[19] The appellant's formal response came by way of a letter dated 3 November 2005 from its attorneys of record, Gillian & Veldhuizen Inc. This response was presented to the executive committee of the second respondent.

[20] On 8 December 2005 the second respondent wrote to the appellant pointing out amongst other things that the appellant was only accredited to conduct four BAA courses, three AEA Courses and one CCA course.

[21] In response thereto the appellant wrote a letter dated 12 December 2005 to the second respondent denying that it was training beyond its scope of accreditation.

It also pointed out that the accreditation letters in respect of the BAA and AEA courses were silent on the number of courses the appellant could offer and that accreditation for the CCA examination was granted orally and was silent on the number of courses that the appellant could offer provided there was a maximum number of fifteen students per course.

[22] On 23 January 2006, a meeting took place between the second respondent's respresentatives, namely; Adv Boyce Mkhize, Mr Kgati Malebalana, Mr JH Coetzee, Mr Emmanuel Chanza, and Mr Craig Lambert and the appellant who was represented by Mr Northmore, Adv T Irvine-Smith and Mr PJ Veldhuizen, the appellant's attorney of record.

[23] At that meeting the appellant contended that it had the necessary authority to conduct the number of courses that it offered and the courses were of good quality. The second respondent denied that the appellant had the necessary authority to conduct training beyond the four BAA, three AEA courses and one CCA course that it had been accredited to conduct.

[24] On 1 February 2006 the Acting Registrar, Adv B. Mkhize, sent a letter to the appellant requesting it to revert back to its accreditation status and that should the appellant wish to carry on further training, the appellant should apply for further accreditation on the prescribed 169 form.

[25] On 6 February 2006 the appellant's attorneys wrote a letter reaffirming its position, that it was not training beyond its accreditation. Nevertheless as a mere formality the appellant submitted a formal application to the second respondent on 7 February 2006. The appellant pointed out that in doing so, it was not to be understood as admitting the correctness of the respondents' version.

[26] In a meeting held by the second respondent on 14 February 2006 and which continued to 7 and 26 of March 2006, it was resolved amongst other things that the appellant should comply with the original accreditation and limit the number of students.

[27] On 6 April 2006 the appellant, through its attorneys, wrote to the second respondent requesting written reasons for the above decision. The appellant also threatened to have any decision taken by the second respondent which affected it, reviewed and if necessary, set aside unless the second respondent gave an undertaking that it would not interfere with the appellant's training pending a review application of the second respondent's decision. Needless to say the appellant did not carry out its threat.

[28] In a meeting held on 10 April 2006 the second respondent resolved that a team of evaluators be appointed to assess the appellant's capacity to conduct the additional courses.

[29] In a letter dated 15 May 2006 the respondents' attorneys, Gildenhuys Lessing Malatji Attorneys, responded to the appellant's letter of 6 April 2006 stating the following:-

1. that the appellant was conducting training beyond its accreditation scope;

2. requesting the appellant to provide the second respondent with the number of courses it had conducted since the beginning of the year to date, being from January 2006 to 15 May 2006;

3. requesting the appellant to provide the second respondent with reasons why it believed it was entitled to conduct training beyond its accreditation and in the manner and the extent it did by no later than 31 May 2006;

4. informing the appellant that it had appointed an evaluation team to conduct an accreditation visit at the appellant's premises and to provide a report which would be considered at the second respondent's meeting together with the accreditation application it made on 7 of February 2006.

On 21 June 2006 the appellant acknowledged receipt of the respondents' letter and confirmed that the matter would be dealt with on an urgent basis.

[30] On 31 July 2006 the education committee of the second respondent met and resolved amongst other things that the appellant was training beyond its accreditation; that for practical consideration the students that had already been enrolled be allowed to complete the courses that would commence on 2 August 2006, without prejudice to the second respondent's rights; that upon completion of the courses the appellant revert back to its original accreditation; and that the appellant should within 7 days furnish the second respondent with an undertaking that it would not, in light of this resolution, conduct training beyond its original accreditation.

[31] The committee further resolved that an inspection team consisting of Messrs N Naidoo, M Botha, JF de Beer, Dr Mk Nadioo and Ms D Muhlbauer be appointed in terms of section 41A(2) of the Act. The scope of their investigation amongst other things was to determine:

- The number of courses being conducted by the appellant;
- When such courses would end;
- If the appellant would be conducting new courses after 2 of August 2006;
- And whether the facilities and organizational structures were sufficient to allow continued training of the courses that had commenced as at 2 August 2006.

[32] The investigation took place on 24 and 25 of August 2006. The investigation report was handed to the second respondent for consideration and the appellant was given an opportunity to respond on 22 of September 2006.

[33] The investigation report noted that the appellant's organizational structure and facilities were not sufficient to allow for the continuation of the courses that had commenced on 2 August 2006 and recommended that:

- The second respondent not to accredit any additional courses conducted by the appellant beyond its original accreditation;

- The second respondent should determine whether an investigation into the professional conduct of the appellant should be conducted as a result of the issues mentioned in the report;

- The integrity of the education being conducted was questionable and there was sufficient information to warrant the withdrawal of the appellant's accreditation.

[34] The appellant contended that it was accredited to conduct the number of courses it did because its accreditation did not place any limit on the number of courses it could offer. With regard to the CCA courses it said there was verbal accreditation obtained from Mr. Dhai and that the training integrity had been maintained and that an enquiry of this nature was not warranted.

[35] On 16 October 2006, the second respondent held a meeting to consider the investigation report, the appellant's response and application for further accreditation. At the meeting it was resolved that the appellant would be allowed to continue to train only those courses that had already commenced as at 2 August 2006, on condition that the appellant provide the second respondent with the names of the persons enrolled for the courses; that the appellant submit an attendance register and logbooks upon completion of the practical components of such courses and that the examinations of such courses be conducted by the Board upon submission of the above documentation.

[36] The Board further resolved to advise the appellant of the following:

1. their intention to reconsider the accreditation of the appellant and to require the appellant to make representations why it should be allowed to keep its accreditation;

2. the appellant was to deal with the failure to keep logbooks, the insufficient equipment and the appellant's failure to inform the second respondent of change of ownership.

3. until such time as the issue of accreditation had been resolved all applications for registration of students who had passed their examinations had to be referred to the second respondent and not the first respondent.

[37] On 7 November 2006 the executive committee of the second respondent authorized the chairperson to appoint examiners and in this regard Mr. R Naidoo appointed Ms. D Mahlbauer as chief examiner to conduct the final CCA examination of the appellant and Mr. J Bowen as moderator.

[38] On 15 November 2006 Ms. Mahlbauer obtained the Object Structured Clinical Examination skills ("OSCEs") sheet from Dr. TH Stevens, which were intended to be used for the CCA examinations. Dr. TH Stevens was employed by the appellant on a full time basis to Co-ordinate the CCA course. Ms. Mahlbauer noted that a certain number of OSCE skills were missing from the OSCE skills sheet provided by Dr. TH Stevens.

[39] This issue was taken up with Dr. Stevens who advised Ms. Mahlbauer that only four skills from a total of fourteen skills had been deemed examinable. The rest had been taught to the students in their hospital phase. Therefore they were not examinable during the OSCEs.

[40] The lack of these skills was brought to the attention of Mr. Bowen who in turn brought it to the attention of Mr. Christopher and Ms. Phooko, the second respondent's then attorney with a recommendation that the November 2006 CCA examinations be postponed until the students had been properly taught these skills.

[41] On 16 November 2006 this recommendation was presented to the education committee of the second respondent and the committee resolved that the examinations scheduled to commence on 17 November 2006 should proceed. The moderator and chief examiner thereafter provide a comprehensive report and that appellant thereafter be allowed to comment on the results and its comments would be served at a special meeting of the executive committee to

enable the committee to take a holistic view of the situation and if satisfied ratify the results.

[42] The examination took place over 3 days, on 17, 21 and 22 November 2006. Six students, including learner Kruger, sat for the examination in which none of the students passed.

[43] Ms. Mahlbauer indicated in her report that it would be futile to allow the students to be reassessed without appropriate remedial education. In his report Mr. Bowen cited a number of logistical, teaching and administrative problems which had been identified in his previous reports and which in his opinion had affected the performance of the students. He was unable to recommend that they be permitted to register with the first respondent. He, however, recommended that they be permitted to re-write the examination after undergoing the appropriate remedial education.

[44] Mr. Bowen's report went even further and recommended that all further training conducted by the appellant be suspended until the appellant had undergone an inspection for each level of course that it wished to offer. The appellant was furnished with both reports and it fully responded thereto.

[45] On 8 December 2006 the respondents' attorney, Ms Phooko, addressed a letter to the Appellant, the admissibility of which was seriously contested.

[46] On 11 December 2006 the second respondent considered the information at its disposal and made a decision which was communicated by a letter dated 13 December 2006, to the appellant by the respondents' attorneys. The letter detailed the reasons for the withdrawal of the appellant's accreditation and advised the appellant that the second respondent had ratified the examination results of the CCA examinations.

[47] On 12 January 2007 the appellant delivered a notice of appeal in terms of section 20 of the Act and the matter came before our learned Brothers Motala J and

Manca, AJ. The court was called upon to make a ruling on a number of issues and interlocutory applications.

[48] One of the issues, which is more pertinent to this appeal, was whether the appeal was a narrow or wide one. In the judgment which they delivered on 12 December 2008 they held that this was a wide appeal in terms of section 20 of the Act. This meant that the appellant was entitled to introduce before this court, further relevant evidence that might not have been before the second respondent at the time the decision was taken.

[49] The respondents applied for and were granted leave to appeal against this ruling to the Supreme Court of Appeal ("SCA"). However, the SCA struck the appeal from the roll, holding that even if an order has a final effect it should not be appealed against where the balance of convenience requires that all the issues of the dispute be determined in one hearing *(Health Professions Council of South Africa and Professional Board for Emergency Care Practitioners v Emergency Medical Supplies and Training CC (Trading as EMS) (435/09 [2010] ZASCA 65 (20 May 2010))*. The matter was accordingly referred back to this court for full consideration of the merits.

[50] The appellant has approached this court seeking to appeal against the decision of the second respondent in terms of section 20 of the Act. Furthermore the appellant contends that such an appeal may include grounds of review.

WIDE APPEAL

[51] As stated in the preceding paragraphs, this matter was first heard by our learned Brothers Motala, J and Manca, AJ. They held that the appeal instituted by the appellant was a wide appeal. In coming to that conclusion our learned Brothers drew a distinction between an appellant who sought to appeal against a decision in terms of section 20 of the Act, in which the said decision was taken during a disciplinary hearing and one taken at a meeting. They noted that the two situations differed in that, in the former case, a record of the proceedings would have been kept and more likely the decision would have been taken in the

presence of an appellant who would either be present during the entire proceedings or elected not to be. However, in the latter case, the decision of the second respondent was taken during a meeting of the Board in the absence of the appellant, who was not required to be present, or whose presence was never sought.

[52] There is no reason why in this judgment we should deviate from the judgment of our learned Brothers in regards to the nature of this appeal. In fact this court is bound by the judgment of Motala, J and Manca, AJ that the appeal brought in terms of section 20 of the Act is a wide appeal. What this means is that the court is not limited to the record and the evidence that was placed before the second respondent when it made its decision. The court can hear further evidence on the matter.

[53] That is not however the end of the matter. As stated in the preceding paragraphs the appellant has approached this court seeking to appeal against the second respondent's decision and to introduce grounds of review in this appeal.

[54] The appellant sought to rely on a number of review grounds namely, the alleged bias and prejudgment of the issue by the second respondent. Furthermore, the appellant contended that the second respondent was not the correct entity to take the decision to withdraw the appellant's accreditation. It also pointed out that there was a material conflict of interest in regards to the members of the second respondent who took the impugned decision, as they would directly benefit from the closure of the appellant.

THE REVIEW GROUNDS SOUGHT TO BE RELIED UPON:

1. Incorrect body took the decision to withdraw accreditation

[55] Mr. Tredoux submitted that the second respondent was the incorrect body to take the disputed decision and lacked the authority to withdraw the accreditation of the appellant. This was the sole responsibility of the first respondent in terms of the Act, so ran his argument.

[56] In amplification thereof Mr. Tredoux submitted that the second respondent had caused itself to be registered as a Standards Governing Board (SGB) and the first respondent as an Educational Training Qualification Authority (ETQA) in terms of the Regulations, in particular regulation 9, promulgated in terms of the South African Qualifications Authority Act No. 58 of 1995. In terms of the regulation only an ETQA and not an SGB had the power to withdraw accreditation. He pointed out that in terms of section 15B (2) of the Act, only decisions which relate to matters falling within the ambit of the second respondent need not be ratified by the first respondent. He argued, because the second respondent is an SGB, the power to withdraw accreditation does not fall within its ambit.

[57] He pointed out that the same section 15B (2) confers powers on the first respondent to determine which functions fall within the ambit of the second respondent. Mr. Tredoux submitted that there was no evidence to indicate that the first respondent had determined which functions fell entirely within the ambit of the second respondent. He further argued that as a result, the first respondent had to ratify decisions that were made by the second respondent that did not fall within its ambit. He argued that there was no evidence that the decision to withdraw the appellant's accreditations had been ratified by the first respondent. Mr. Tredoux contended that without such evidence being placed before the court, the only reasonable inference that could be drawn was that the second respondent lacked the authority to withdraw the appellant's accreditation.

[58] In reply Mr. Berger argued that section 16(3) of the Act gives power to the second respondent to grant or refuse any accreditation application and having granted such application, it may prescribe such conditions and requirements as it may deem fit. Mr. Berger submitted that, because of the abovementioned section the second respondent was indeed the entity empowered to take the said decision.

[59] Mr Berger contended further that Mr. Tredoux's reliance on 15 (1) and (2) of **SAQA** was misplaced. He argued that section 15 (1) and (2) **of SAQA** provides

that a Board, in this case the second respondent, performing certain statutory functions which are outside its scope of alignment with SAQA, shall continue to do so despite its alignment with SAQA. The Board shall continue until such time as the functions have been amended by law, which shall not be made until the statutory body concerned and SAQA have examined the implication of such. This had not yet materialized at the time the decision to withdraw the appellant's accreditation had been taken, Mr. Berger argued. He also pointed out that the academic structure of the short courses was such that they could not fall within the National Qualifications Framework(NQF).

[60] It is our considered view that Mr. Tredoux's argument in this regard cannot stand. The evidence placed before this court is clear. The withdrawal of accreditation was done properly by the body authorized to do so in law. The contrary argument is untenable. Furthermore, common sense dictates that a body that has the authority to grant accreditation also should have the authority to withdraw it.

2. Bias and Prejudgment of the issue:

[61] Mr. Tredoux submitted that members of the second respondent who took the impugned decision were motivated by an ulterior motive. He argued that they wished to close down the appellant so as to open the way for the Universities of Technology to train students in emergency care without competition from private colleges.

[62] In support of this contention, Mr. Tredoux referred to various incidents in which members of the second respondent had displayed bias and prejudice in favour of the second respondent. He stated that members of the second respondent had during the inspection of the appellant's premises on 25 and 26 August 2006, become preoccupied by the fees that the appellant was charging its students. Mr. Tredoux argued that Mr. Craig Lambert, who was attached to one of the Universities of Technology, had commented that the training offered by the Technikons had to be made more viable. This was the true purpose of the inspection by the second respondent, Mr. Tredoux argued.

[63] Furthermore, the reasons for the closure of the appellant were other than those stated in the 13 December 2006 correspondence from the respondents' attorneys. Mr. Tredoux referred the court to the admission form of one Ms Debbie Steyn indicating that Ms Steyn had registered for the AEA course through Cape Pennisula University of Technology ("CPUT"), one of the appellant's competitors. Mr. Tredoux argued that the closure of the appellant has led to the financial benefit of the members of the second respondent or Universities of Technology. This was the true purpose of the withdrawal of accreditation, he argued.

[64] Mr. Tredoux further relied on the evidence of Michelle van der Merwe, who claimed that she had been informed by Mr. N. Naidoo that there was no future with the appellant. This utterance Mr. Tredoux argued, demonstrated that the second respondent was prejudiced against the appellant and was seeking ways to justify its decision.

[65] The appellant also referred to the evidence of three people who were either part of the November 2006 examinations or who were asked by the appellant to comment on the examination results. The evidence referred to is that of Dr Cooke, Dr Stevens and Dr de Vries, whose evidence shall be dealt with later in this judgment, save to say that Dr de Vries in his letter stated:

"Secondly. I have always endeavoured to ensure that any examination process not be biased against the candidates...I cannot rule out the possibility of mistrust between the training-facility and the HPCSA or their representatives, has not interfered with the examination process."

[66] Mr. Tredoux argued that this became apparent or could be seen in the conduct of the second respondent. One such case was that of learner Kruger, who according to the version of the appellant passed the examination by obtaining 51%, but was nevertheless failed by the chief examiner, Ms. Mahlbauer.

[67] According to Mr. Tredoux, the marking itself was suspect. He referred to the evidence of Dr Cooke who highlighted areas in which the students, according to

the appellant, were either marked harshly or incorrectly and were thus deliberately failed.

[68] In reply Mr. Berger argued that Mr. Tredoux's argument amounted to a conspiracy theory that was without substance. In short, Mr. Berger argued that members of the second respondent were elected in terms of the process defined in the regulations and in accordance with due process.

[69] He argued further, that the Universities of Technology are public institutions designed to offer a public function and not with profit as their aim. The employees of the said Universities are also public employees and could derive no benefit from the number of students that are enrolled for particular courses. Furthermore, the said members who took the impugned decision represented educational institutions from across South Africa and are not confined to the Western Cape.

[70] Mr. Berger further argued that the appellant was not the only private institution to have its accreditation withdrawn. Netcare's 911 Verrening branch also had its accreditation withdrawn.

[71] We are in agreement with Mr Berger that the allegations lack substance. The only evidence that was placed before this court by Mr Tredoux was the evidence of Michelle van der Merwe and the enrollment certificate of Ms. Steyn that shows that she had registered for the AEA course through CPUT. That evidence alone cannot sustain the allegations of bias and prejudice on the part of members of the second respondent. The primary reason suggested by Mr. Tredoux for members of the second respondent to be biased against the appellant, was that they stood to benefit from the closure of the appellant. But that allegation is not supported by the facts, which is that Universities of Technology are public institutions and their staff members are public servants.

[72] It was further argued by the appellant that evidence of bias also extended to the respondents' attorneys. In this regard he referred to the meeting which the second respondent and its attorneys held on 16 November 2006 and which he submitted was held in order to find a reason for the appellant's closure. At that

meeting Ms Phooko, the second respondent's legal representative at the time, advised the second respondent that the examination results should be ratified even before the examination had been written.

[73] Mr Tredoux argued that the result and purpose of that meeting soon became clear in the letter sent to the second respondent from Ms. Phooko on 8 December 2006, which was erroneously sent to the appellant. It was submitted that the letter contained instructions on how to legally close down a college, in this case the appellant. More or less the same reasons had been incorporated in the correspondence dated 13 December 2006, sent to the appellant.

[74] In reply Mr. Berger argued that the Mr. Tredoux misconstrued the 16 November 2006 meeting. Properly construed, Ms Phooko's advice was designed to place the second respondent in a position where it could evaluate the results and then decide if they should be ratified. Mr. Berger argued that it was clear from the minutes of the meeting that the second respondent had resolved that it would consider all the results, reports and representations which would enable it to take a holistic view of the matter, before the ratification of the results could be considered.

[75] Mr. Berger further argued that the 8 December 2006 letter was a privileged communication between attorney and client. It was privileged communication which could only be waived at the instance of its client. It was sent to the appellant by mistake. He further argued that the letter was inadmissible as evidence in the absence of waiver. He pointed out that even if this court were to find that the letter was not privileged or that privilege had been waived when it was sent to the appellant, the communication contained confidential advice on matters that the second respondent had to take into consideration in making its decision.

[76] In our view the letter of 8 December 2011 is not admissible. This letter was written when there was a dispute between the parties regarding the appellant's accreditation. At that stage the appellant had threatened to take any decision the

second respondent might make regarding its accreditation on review. The second respondent had been placed in possession of the reports and it is clear that at that stage, that the second respondent had to take a decision on whether or not the appellant was exceeding its accreditation limit and for that purpose it soon became necessary for it to obtain legal advice from the author of the contested letter. It is therefore clear that the advice which is contained in this letter was given by the second respondent's attorney confidentially and for that reason that advice was not meant for third parties.

[77] That is not the end of the matter. The appellant argued that the meeting held on 16 November 2006 and the 8 December 2006 letter, indicated bias against the appellant. At the time that both incidents occurred, the appellant was already threatening to have any decisions taken by the Board that affected its operation reviewed and if necessary set aside. The court has to infer that the conduct of the respondents in this matter was to seek advice on the correct procedure to be adopted. Moreover, if one examines the evidence relied upon, that the respondents attorneys were biased against the appellant and thus the appellant's allegation must fail. Looking at the matter holistically, we agree with the respondents that this contention is similarly without substance.

3.Material conflict of interest.

[78] The appellant argued that the membership of the second respondent was constituted mainly by people who were in the employ of the Universities of Technology. The appellant and every other institution that offers short course training are in direct competition with the Universities of Technology, it was argued. It was further pointed out that the second respondent had decided to do away with short course training, which would lead to the closure of institutions that provide short course training.

[79] In an attempt to demonstrate that certain members of the second respondent were conflicted and therefore could not fairly take part in the proceedings affecting its rights, the appellant referred to an occasion when Mr. N. Nadioo

enquired during the August 2006 inspection as to how much fees the appellant was charging its students and further to the comments made by Mr. Lambert that he was not a capitalist but had to make training at the Tecknikons more viable.

[80] The August 2006 inspection itself was tainted, Mr. Tredoux submitted, because the members who made up the inspection team were in the employ of the Universities of Technology, namely Mr. Lambert, Mr N. Naidoo, Ms Malbauer and Mr Bowen. As a result the appellant could not have been adjudged fairly by the second respondent as its members had a direct interest in the closure of the appellant.

[81] In his reply Mr. Berger refuted the contention that there was a material conflict of interest and that the appellant could not have been adjudged fairly by the second respondent. In our view, for the reasons already advanced, the material conflict of interest based on the allegation that the members who took the impugned decision were also employees of the Universities of Technology and therefore had a direct interest in the closure of the appellant must similarly fail. Nothing further need therefore be said of the grounds of review on which the attack was based.

APPEAL AND REVIEW:

[82] Mr. Tredoux argued that because this is a wide appeal, the court can take into account traditional grounds of review whether they are at common law or statutory law.

[83] He sought to persuade us by arguing that the dividing line between an appeal and review may sometimes be blurred. In this regard he referred the court to Cora Hoexter ***(Administrative Law of South Africa Juta, Cape Town, 2007 at 106)*** who states:

"The focus of judicial review in administrative law falls on the decision itself as opposed to the decision-making process. In truth it may be impossible in some cases to separate the merits from the rest of the matter...this is most easily

demonstrated in relation to action that is judged to be unreasonable, and for this reason most commentators today would readily acknowledge the relationship between review reasonableness and merits review. Cameron, JA did so with refreshing frankness in the Rustenburg Platinum Mine case, where he explained why the line was difficult to draw:

> *'This is partly because process related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision.'*

[84] Mr. Tredoux also referred to JR De Ville **(Judicial Review of Administrative of Action in South Africa (Lexis Nexis Butterworths, Durban, 2003)**, who makes an observation that the court in ***Konyn and others vs Special Investigating Unit 1999 (1) SA 1001 (TkH)*** appeared to understand its functions to hear appeals as including the power of review.

[85] He argued further that a wide appeal grants an appellate body wider powers that would allow it to review a decision and pronounce on its merits. He contended that an appeal body cannot be confined to the record in cases of a wide appeal as the record itself may be distorted by illegality. Furthermore, that if the court were to be confined to the record then an appeal body may not be in a position to effectively deal with the matter.

[86] Mr Tredoux also argued that even Baxter makes an observation that the dividing line between appeal and review, in practice, is notoriously difficult to draw and only the courts have the power to determine the legal limits placed upon their discretionary powers[1].

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[1] BAXTER, ADMINISTRATOR OF LAW (JUTA & CO, CAPE TOWN, 1984) AT P 306

[87] Mr. Tredoux contended that in the present matter the court has wide appellate jurisdiction, entitling it not only to be limited to the merits of the case, but also to have sight of and even act on grounds of review, if the court found that there were procedural illegalities that had engulfed the process. The court is thus not limited to appeal-related grounds. The legal limits, Mr. Tredoux submitted, can only be determined by the courts.

[88] Mr. Tredoux argued further that the nature of this appeal is such that it cannot be properly adjudicated upon without taking into consideration the grounds of review. To do otherwise would lead to injustice. The jurisdiction conferred on a wide appeal is wide enough to encompass grounds of review. He submitted that it is permissible in the circumstances for the appellant to raise the question of bias notwithstanding the fact that this is a wide administrative appeal and only, in the alternative, a review application. In this regard he relied on the decision of the Supreme Court of Appeal in **Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd 2005 (6) SA 182 (SCA).**

[89] In response Mr. Berger submitted that review and appeal are mutually exclusive. Thus a party cannot institute an appeal and then later request a review and vice versa, even in circumstances where review grounds were not pleaded. In support of his submission he sought to place reliance on the case **of Tickly & Others vs Johannes N.O & Others 1963 (2) SA 588 (T) at 593G-594A** in which the court had this to say:

> *Mr. Trengove relied heavily on Shenker's case, supra, for the contention that the 'appeal' was merely a review. Sec. 34 (2) of the Administration of Estates Act empowers the Master to appoint 'such person as he deems fit and proper to be executor dative'; and sec. 107 provides that, inter alia, every appointment by the Master was subject to 'appeal to or review by' the Court which could confirm, set aside or vary it. In Shenker's case the Appellate Division held that in relation to an appointment under sec. 34 (2) 'appeal' means in effect merely a review of the Master's appointment because sec. 34 (2) committed that appointment so entirely to the Master's discretion that it could never have been contemplated by the Legislature that the Court could and should under sec. 107 re-try the merits of the appointment and substitute its own appointment for that of the Master (pp. 146 - 7). That decision, therefore, turned on the particular wording of the Administration of*

Estates Act. In the present case, in my view, for the reasons given above, sec. 19 and the regulations clearly enact that the revision court on appeal must rehear the matter on the merits and substitute its own determination for that of the valuators. Shenker's case is therefore obviously distinguishable.

[90] This distinction, Mr. Berger argued, is well entrenched in our law. He referred the court to ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at 513 C-D, paragraph 45*** and ***Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA) at 589 – 590,*** as authorities for his argument.

[91] Mr. Berger argued that the court cannot in an appeal, barring legislation to the contrary, seek to enter into a review related enquiry. He argued that section 20 of the Act was clear in its wording and the appellant could have, if it believed that its case warranted a review, instituted review proceedings in terms of PAJA or the common law. The appellant elected not to do so and instead elected to appeal in terms of section 20 of the Act.

[92] In reply Mr. Tredoux submitted the distinction may sometimes be blurred. In such an event the court would be entitled to overlook the distinction and exercise its power of review.

[93] Mr. Berger reiterated that even if the court were to be persuaded by Mr Tredoux's argument, the court could not effectively deal with the matter as it was not properly pleaded before this court.

[94] We agree with Mr. Berger. The appellant has not made out a case that a court in a wide appeal may also take into account grounds of review. The appellant in challenging the impugned decision could have challenged it by reviewing the decision instead of appealing it. The appellant elected to appeal the second respondent's decision and that being the case it cannot introduce the grounds of review and argue the appeal as if it were a review.

[95] In our view when Motala, J and Manca, AJ held that an appeal under section 20 is a wide appeal, they could not have meant an appeal of the nature contended for by the appellant.

[96] Although the court in the *Rustenburg Platinum Mine* case supra noted that the merits may sometimes intrude in review proceedings, Cameron, JA found that this does not obliterate the distinction between appeal and review (**Rustenburg Platinum Mine case at 590, para [32]**):

"[32] But this does not mean that PAJA obliterates the distinction between review and appeal. As this Court has observed:

'In requiring reasonable administrative action, the Constitution does not . . . intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable. . . .'"

Even JR de Ville makes the point that a power of appeal will include a power of review where the authorizing statue expressly or impliedly makes provision for such.[2] This was not the appellant's case in the instant matter.

[97] In our view this is a wide appeal in terms of section 20 of the Act. This is not a review and therefore the court can only concern itself with the merits of the matter. The appeal in terms of section 20 of the Act is a wide appeal but not wide enough to encompass review grounds.

THE APPEAL:

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[2] **Judicial Review of Administrative of Action in South Africa (Lexis Nexis Butterworths, Durban, 2003, page 387 – 388, fn 789-790**

[98] We now turn to consider the evidence of the second respondent forming the basis of its decision to withdraw the appellant's accreditation.

[99] The issue is whether the second respondent's decision to withdraw the appellant's accreditation was correct. The appellant, as the party challenging the second respondent's decision, bears the onus of proof.

[100] On 13 December 2006, the second respondent's attorneys sent a letter to the appellant informing it of its decision for withdrawing accreditation and the reasons therefor. The reasons for the second respondent's decision are the following:

- Training beyond its accreditation;
- Insufficient Equipment;
- Failure to keep logbooks;
- Quality of training
- November 2006 CCA Examination

[101] Mr. Tredoux argued that the November 2006 examinations were the main reason for the withdrawal of accreditation. Mr. Berger argued otherwise. He submitted that the decision to terminate the appellant's accreditation was based on a number of transgressions of the rules.

[102] We will now analyze each reason advanced by the second respondent for its decision to withdraw the appellant's accreditation in order to consider whether there is sufficient evidential support therefor.

TRAINING BEYOND ITS ACCREDITATION:

[103] Mr. Berger submitted that the appellant was training beyond its originally approved accreditation. For this contention he sought to rely on section 16 of the Act which provides as follows:

> *"(1) Notwithstanding anything to the contrary in any other law contained but subject to the provisions of the Nursing Act, 1978 (Act No. 50 of 1978), no person or educational institution, excluding a university or a technikon, may offer or provide any training having as its object to qualify any person for the practising of any profession to which the provisions of this Act apply or for the carrying on of any other activity directed to the mental or physical examining of any person or to the diagnosis, treatment or prevention of any mental or physical defect, illness or deficiency in man, unless such training has been approved by the professional board concerned.*
>
> *(2) Any person or educational institution wishing to offer such training as is referred to in subsection (1) shall, before offering such training, apply to the professional board concerned in writing for its approval of such training and shall furnish such particulars regarding such training as the professional board concerned may require."*

[104] The appellant's accreditation was raised by the respondents in various correspondence dating back to 2005. On various occasions the respondents informed the appellant that it was training beyond its accreditation and the appellant would on each occasion deny that it was doing so.

[105] In support of the allegation that the appellant was training beyond its scope of accreditation, the respondents referred to form 169 which was submitted to it by the appellant when it applied for accreditation. The relevant portion is part two of the questionnaire which has two columns requesting the following information:

a) **Courses for which accreditation is required** is written in the first column and provides four spaces one below the other for the applicant to fill in;

b) **Number of Courses per Annum** is written in the other column and also provides four spaces one underneath the other.

[106] The first time the appellant completed the prescribed 169 form was in 1999. The appellant indicated that it intended to conduct four BAA courses. On 29 July 1999 the second respondent inspected the appellant's premises and compiled a pre-accreditation report. Both the pre-accreditation report and the accreditation application of the appellant were considered by the second respondent on 27 October 1999. Thereafter the second respondent informed the appellant by letter dated 8 November 1998 that it had granted accreditation.

[107] The letter states:

"APPLICATION FOR ACCREDITATION OF TRAINING OF BASIC AMBULANCE ASSISTANTS

With reference to your application in connection with the abovementioned matter. It is a great pleasure to inform you ***the Professional*** *Board...Resolved that Emergency medical suppliers be accredited..."* ***(Court's underlining).***

[108] On 10 November 1999 the appellant applied again on the prescribed 169 form for accreditation to conduct three AEA courses. On 12 and 13 July 2000 the second respondent's representatives inspected the appellant's premises and thereafter compiled a pre-accreditation report. Thereafter the pre-accreditation report and the appellant's accreditation application were placed before the second respondent for its consideration. After considering the matter the second respondent approved the appellant's application for accreditation and conveyed its decision to the appellant by way of letter dated 30 October 2000. The letter states:

"ACCREDITATION TO PRESENT AMBULANCE EMERGENCY CARE ASSISTANT COURSES/EMERGENCY MEDICAL SUPPLIERS

With reference to your application referred to above, I am pleased to inform you that your application to present AMBULANCE EMERGENCY CARE ASSISTANT

COURSES has been approved by the Professional Board." ***(Court's underlining.)***

[109] Between November 2002 and February 2003 the appellant applied on the 169 form for accreditation to conduct one CCA course. During May 2003 the premises were inspected and a pre-accreditation report was handed to the second respondent and the appellant was informed by way of a letter that its accreditation was granted, subject to its CCA examinations being moderated by Mr. Dhai. The examination and moderation took place between 1 and 5 October 2003. The appellant's accreditation was confirmed on 17 November 2003 at a meeting of the second respondent.

[110] By the end of 2004 the appellant was conducting eleven BAA, five AEA and two CCA courses which had been communicated in its annual report to the second respondent. The respondents contended that the appellant was deviating from its original accreditation of four BAA, three AEA courses and one CCA course. This was what the appellant originally applied for and was granted.

[111] In 2005 the second respondent also received an anonymous letter, which amongst other things alleged that the appellant was training beyond its accreditation. This was brought to the attention of the appellant by the task team that was appointed to investigate the matter.

[112] The issue of the appellant conducting more courses than it was accredited for became the subject of various correspondence between the appellant and the respondents from 2005 to 2006, when the appellant's accreditation was withdrawn.

[113] The respondents' argument was and still is that the appellant was training beyond its accreditation. Even when this was brought to its attention the appellant simply ignored this fact and proceeded with training.

[114] The respondents' argument is simply this; the appellant applied to conduct a specified number of courses in each of its three applications and all inspections, pre-accreditation reports were done with that in mind.

[115] In its meeting on 11 December 2006 the second respondent resolved as follows in regards to the accreditation of the appellant:

"4.1

b) EMS has failed to comply with the terms of its accreditation, by amongst others, exceeding the terms of its approval of training and hereby compromising the quality of the training offered at the college, and not complying with the selection criteria by allowing persons not registered with the HPCSA to enroll for AEA and CCA courses

h) EMS was requested by the board to deal with the issues pertaining to its accreditation, and with its compliance with form 169, but has not dealt with form 169, thereby making not providing the board with sufficient information to enable the board to justify EMS continued approval of training;" Page 961-962 and page 789 -790 of the record

This was also stated in the December 13, 2006 letter that was transmitted to the appellant.

[116] The appellant rejected the respondents' contention regarding the extent of accreditation. It denied that it was training beyond its accreditation. It argued that all accreditation letters were silent on a number of courses that the appellant could offer.

[117] The appellant pointed out that:

a) The letters granting the accreditation never indicated how many courses the appellant was accredited to conduct and therefore by default, the number was left to the appellant to consider;

b) The CCA application required a person to estimate the number of courses that it wished to conduct and did not require a specified number as alleged by the respondents;

c) Verbal accreditation in respect of the CCA course was given to the appellant by the Mr. Dhai, who was a member of the second respondent at the time that the accreditation was given. Had the respondent sought clarity from Mr Dhai, he could have provided them with that information;

d) The appellant completed the prescribed 169 form, but was requested to complete a totally different form from the one presented by the respondents. The said form required of the appellant to approximate the number of CCA courses it wished to offer and whether these would be offered full time or part time.

[118] It was and could never have been the intention of the respondents and the legislature that once accreditation had been granted for a specific course, that the appellant had carte blanche to offer as many courses as it wanted. Quite the opposite in fact. Had the appellant sought to provide more courses, the proper procedure for the appellant would have been to apply for further accreditation so that the second respondent could in fact do the necessary investigations.

[119] The appellant further submitted that in any event, it was allowed to teach students the CCA course and examine them in October 2003 without any provisional accreditation being given by the respondents. It was pointed out that 13 and not 12 students, as required by the rules of the CCA curriculum, sat for the October 2003 CCA examination. Mr Dhai who moderated the examination placed this fact in his report which report was considered by the second respondent before granting accreditation.

[120] The appellant argued that the respondents must have been aware of the situation prevailing at the appellant's premises, because each year the appellant provided the respondent with annual reports indicating the number of courses that it had provided and would provide the following year.

[121] We do not agree with the appellant's contention. If the appellant had wished to conduct more courses then the ones that it had already been accredited for, it was obliged to apply for accreditation for additional courses, which would have resulted in further inspections and an inspection report that would have been served before the second respondent when it considered the additional accreditation application.

[122] The appellant also relied on the evidence of Kathy Bodmer who was a member of the second respondent and who stated that it was a requirement of the second respondent that all colleges submit annual reports. This allowed the second respondent to monitor the performance and conduct of each college. In relation to the appellant she stated:

" I cannot recall that there were problems with the reports submitted by the Applicant in this matter, EMS. If it had come to the attention of the PBECP that EMS had submitted annual reports reflecting excessive training...I would have reported this...and the matter would have been taken further."

[123] In our view not much reliance can be placed on the evidence of Kathy Bodmer. She does not say as a fact that while in the employ of the second respondent she had checked the appellant's annual reports. Even if she had checked the appellants annual reports, she does not say that she was aware of how many courses the appellant was accredited to conduct.

[124] The respondents argued that if the court were to accept the contention of the appellant this would mean that the appellant was accredited to provide an endless amount of courses without recourse.

[125] In our view the extent of accreditation suggested by the appellant would render the accreditation process meaningless. The purpose of the accreditation process is to ensure that the applicant who applies for accreditation in respect of a course has the capacity and the equipment to offer the course. The appellant cannot thereafter unilaterally decide to increase the number of courses it wants to offer without following the accreditation process. In the circumstances the appellant's contention must fail.

INSUFFICIENT EQUIPMENT:

[126] Part of the second respondent's reason for recommending that the appellant not be endorsed or accredited for any additional courses was the inadequacy of the equipment and the state it was in. Mr. Bowen in his moderation report of the November 2006 CCA examinations noted the poor condition of the manikins and other equipment. He referred to prior moderation reports that were compiled in December 2005, February and June 2006 in which this issue was raised. He further noted that the appellant had done little if nothing at all to improve the condition of the manikins and equipment.

[127] In Mr. Bowen's moderator's report for the December 2005 CCA examination he noted that certain items of training equipment *"were quite worn and dirty"* and that attention be drawn to appellant for future examinations

[128] In the February 2006 moderator's report that was compiled by both Mr. N. Naidoo and Mr. Bowen, they dealt with the issue of the appellant's equipment extensively namely; the dirty and insufficient equipment, problems experienced with the rhythm and patient simulators, the naked manikins, broken equipment and consumable/disposable items being reused.

[129] In his June 2006 moderation report, Mr. Bowen noted that *"there has been some improvements in the equipment"*, but he nevertheless observed that "*some of the manikins are still damaged and missing limbs."*

[130] The second respondent, in its withdrawal of the appellant's accreditation stated the following in regards to the equipment of the appellant:

"4.1

a) EMS does not have sufficient equipment to continue with its training activities, as required by the professional board;

(f) The unavailability/unsuitability of some of the equipment at EMS for the purposes of the CCA examination was brought to EMS' attention, in the inspection report, the examiner and moderator's report but the representations from EMS, do not adequately address these deficiencies;"

[131] In reply the appellant sought to dismiss this allegation on a number of bases:

a) The appellant first argued that there were no problems with the equipment and the second respondent was seeking ways to justify its decision;

b) This was the same equipment that was approved by the second respondent when accreditation for the various courses was granted and in fact the appellant had added more equipment to the equipment they already had in stock;

c) The ALS manikins were manufactured naked/without clothing and with one arm and further, they were not a requirement in terms of the prescribed 169 form. If the issue was about the dirty manikins that certainly would not warrant withdrawal of accreditation, Mr. Tredoux argued.

[132] In her November 2006 report to the second respondent, Ms. Muhlbauer noted that on 20 November 2006 and in consultation with Dr. Stevens, a certain OSCE skill (not mentioned) was replaced due to lack of training aid. Certain manikins that were presented for the assessment on 21 November 2006 *"were in a terrible state. They were either damaged or very dirty. Due to the airway manikin being broken I had to change another one of the OSCE skills..."*

[133] It is clear from the evidence that the issue regarding the condition of the appellant's equipment was an ongoing tussle between the appellant and the second respondent. According to the appellant, when accreditation was granted in respect of all courses, the equipment was deemed to have been of sufficient quality and quantity and in fact since then they had added more equipment.

[134] The court is not persuaded by the appellant's argument regarding its failure to keep and maintain sufficient equipment. The poor condition of the appellant's equipment had been raised in various moderators' reports since December 2005. The appellant's failure to ensure that it has sufficient or fully functioning equipment compromised its ability to offer proper training in regards to the courses for which such equipment was required.

FAILURE TO KEEP LOGBOOKS:

[135] In relation to the appellant's failure to keep logbooks the second respondent had this to say in the letter addressed to the appellant on 13 December 2006:

> *"1.4 The CCA curriculum (sic) requires a college to keep a logbook of the practical components of the course. EMS has conceded that it has not complied with this requirement. The college is required to check such logbook to ensure that a student has completed all the compulsory skills before the examination;"*

[136] In this regard it was alleged by the second respondent's that the CCA curriculum stipulates as part of its minimum requirements, that each student must have ***"a minimum of 1000 (one thousand) hours of rostered duty work with an accredited ambulance service in terms of the scope of the profession for emergency care. This has to be documented in a logbook of the trainee."***[3]

[137] The second respondent pointed out that the CCA curriculum stipulates as follows:

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[3] CURRICULUM FOR THE CRITICAL CARE ASSISTANT COURSE, DOC 5 (PART 1) MAY 1999, at 5 para 3 b)

"Note This work book must be completed by critical care assistant students during their practical period...

Only medical officers, instructors and registered nurses may sign the procedures after the candidate has succesfully completed the procedure.

To gain entry to the final exams the area in the work book contents marked with a star(*) must be completed fully."

[138] Mr. Bowen, according to his November 2006 examination report, noted that one student was allowed to gain entry to the examination without all the compulsory skills being completed and another student made his logbook available after the last examination.

[139] In reply the appellant argued that it was informed by the second respondent in a letter dated 22 August 2001 that the principal of each college could decide on a method to use to comply with the curriculum requirements relating to the keeping of logbooks and in the present case the principal of the appellant did not require its students to keep logbooks. The appellant avers that it required its students to depose to an affidavit, confirming that they had met the minimum requirements as set out in the curriculum and this method, the appellant argued, was of far greater value than logbooks.

[140] It pointed out that it did require its students to complete compulsory skills and note them in their workbooks which would be tendered for inspection prior to the students gaining entry into the November 2006 examination. However, two students that failed to meet these requirements were allowed to sit for the November 2006 examination.

[141] We reject the appellant's contention. The CCA curriculum required the keeping of logbooks as a minimum requirement. The logbooks would have required the input of the person under whom the student would have performed the rostered duty. Although the letter states that the principal has a discretion on the issue of logbooks the respondents quite correctly argued that merely requiring students to

depose to an affidavit stating that they had completed the minimum required hours, was insufficient and there was no way of verifying this as fact.

[142] What the appellant also fails to take into account is the provision of section 16 of the Act which provides that the second respondent shall have control over training and in this case that control was exercised in the form of the CCA curriculum that was provided to the appellants.

QUALITY OF TRAINING:

[143] In its correspondence to the appellant the second respondent stated:

> *"1.3 EMS failed to fully cover the curricula that is set out by the board for the training of CCA students, thereby compromising the standards and quality of training offered and the poor performance of the learners during assessment;*
>
> *1.5 The practice by EMS of teaching students on only selected aspects of the syllabus on which students would be examined was unacceptable;"*

[144] The respondents alleged that the quality of training offered by the appellant lacked the standard that was expected by the second respondent. In support of this allegation the respondents relied on a number of reports including that of Mr. Bowen. Mr. Bowen in his November 2006 moderation report noted that the students that sat for the November 2006 examinations lacked a deep understanding of the theoretical knowledge and described their grasp of the theoretical issues as superficial. He made two recommendations in his report; firstly that he could not recommend that any of the students be permitted to register with the first respondent and secondly they be given a second chance to write the examination again after undergoing remedial training. He also recommended that the training at the college be suspended until the second respondent had undertaken an inspection of each level of the courses the appellant wished to offer.

[145] Mr. Bowen in his June 2006 report also noted problems with teaching and had this to say in this regard:

"...This certainly leads to questioning either the teaching or the amount of time allocated to the practice of the simulations...common problems amongst the group indicated that there may be teaching problems or inadequate preparations for examination..."

[146] What is noteworthy about the June 2006 moderation report is that seven students wrote the June examinations and none passed. However, six of the seven students passed the examination on their second attempt.

[147] The respondents argued that the poor performance of the students was the byproduct of the failure of the appellant to fully cover the entire syllabus. The effect thereof was that the students acquired superficial knowledge of the unexamined procedures.

[148] In reply the appellant pointed out that the skills in question which were not contained in the OSCE sheets set for the examinations but taught in the hospital phase could only be done in that manner, on real patients and under direct supervision because of the procedures in question, they could not be realistically done on the manikins. Furthermore it argued that that its failure to conduct the entire syllabus was only brought to its attention when the withdrawal of accreditation was communicated to it in a letter dated 13 December 2006.

[149] It was also submitted by the appellant that it had out of its own initiative applied the SAQA principles and standards of education. It insisted that all its lecturers obtain instructor qualification, which was not a requirement of the second respondent. The appellant went so far as to implement and establish the SAQA compliant educational system and required that its students achieve a 90% attendance amongst others. It pointed out that there could be no merit to the respondents' arguments as the appellant had taken additional steps to maintain the standard of the appellant. The appellant further sought to rely on the qualifications and experience of Dr. Stevens.

[150] We agree with the respondents. While we cannot criticise the appellant for the steps it had seemingly taken to ensure the quality of education it offered, we must take into account the November 2006 examination results. If some skills could only be taught in the hospital phases, as the appellant alleges, then the students should not have had a problem in passing the skills when they were being examined. But they did and this problem goes back to the previous issue of requiring logbooks/workbooks to be kept for verification. The fact of the matter is this; six students sat for the November 2006 CCA examinations and all six failed. In the June 2006 CCA examinations all the students that sat for that examination failed on their first attempt and only six passed on their second attempt.

[151] Furthermore, the appellant's failure to comply with the procedures meant that it had no way of ensuring that the students had indeed completed the minimum hours as required and therefore obtained the knowledge that they required. What is of significance is that Dr Cooke in his report also expresses his reservation in the ability of the students and attributes this to poor knowledge of the subject matter.

5.5 NOVEMBER 2006 CCA EXAMINATION:

[152] We now turn to deal with the fifth and final reason given by the second respondent for the withdrawal of the appellant's accreditation, namely the November 2006 CCA examination. At its meeting on 11 December 2006 the second respondent considered the examination results, the reports by the chief examiner and the moderator and the responses from the appellant before ratifying the November 2006 examinations.

[153] The second respondent stated:

1.7 "The performance by the students on the theory paper, OSCE's and oral evaluations clearly shows that the students lack the required training (both theory and practical) to be successful as Critical Care Assistants.

...

2 *having considered the examination paper, the answer sheets, the reports by the examiner and the moderator, and the response from EMS on these report, the committee further resolved that examination results as appears on the examination results as appears on the examiners for the following reasons:-*

2.1 *From the assessment conducted, the students were not competent to qualify as Critical Care Assistants;*

2.2 *The examination was fair and based on the curricula and there was no basis to allege that it did not cover the full curricula;*

2.3 *EMS failed to cover the complete curricula for CCA, thereby making it difficult for students to be successful in their assessment, which was based on the said curricula;*

2.4 *That EMS had failed to ensure that there was proper teaching and learning thereby leading to poor performance of learners during assessment.*

[154] Six students sat for the November 2006 examinations: T Kruger, J Harris, N Stallkamp, T Wadelely, J Krynauw and F van der Westhuizen and none of the students passed the examinations.

[155] Ms. Mahlbauer in her November 2006 report reported that none of the students passed the long question paper, where the highest mark was 41% and the lowest mark 22%. Again in the OSCE assessments none of the students passed the examinations, the pass mark being 75%.

[156] However, four students passed the short question paper, four failed the oral evaluations and only two students were found to be competent in the simulations. She summarized the students' performance as follows:

"As chief examiner I feel that it would be futile to allow any of these students candidates a reassessment without proper remediation. Numerous content issues were identified in both the theoretical and practical assessments..."

[157] Mr. Bowen in his moderation report repeated much of what Ms Mahlbauer stated in her report. He stated that:

"The students appear to lack a deep understanding of the theoretical knowledge. There is a superficial grasp, but insufficient to deeply explore a subject. This is evident by the inability of the students to put down sufficient points for a question..."

"There is an obvious lack in the teaching on this program as the students cannot demonstrate a detailed understanding of certain procedures, e.g pacing"

[158] Mr. Bowen notes numerous concerns with the performance of the students and the teaching offered by the appellant. He recommended that the students be given a second attempt at the examinations following remedial teaching.

[159] In respect of the of two learners Mr. Kruger and Mr. Stallkamp, who both passed the short question paper, oral examination and the simulation, Mr. Bowen noted:

"Despite Kruger and Stallkamp meeting the requirements to sit only for the OSCE examinations again, I believe that they (and their patients) would benefit from undergoing remedial teaching and reassessment. Thus I think that all students undergo a complete full set of examination again"

[160] The appellant on the other hand states that the November 2006 CCA examination was the primary reason for the withdrawal of its accreditation. The appellant contends that the examination was set in a manner that ensured that the six students failed their examination. For this contention the appellant relies on the evidence of Dr. Stevens, Dr. Cooke and Dr. De Vries.

[161] The appellant avers that the examination was not fair and that it was not done in consultation with Dr. Stevens. It says the examination that was set contained

trick questions and at least one of the questions was of such nature that most medical practitioners would not have been able to answer it. It further says even the chief examiner could not provide medically correct answers.

[162] The suggestion that the examination was not done in consultation with Dr. Stevens is not correct. It is clear from the record that there was correspondence between the chief examiner and Dr. Stevens, in which the chief examiner requested OSCE skills sheet from Dr. Steven in preparation for the November examination. When the chief examiner discovered that some of the skills were missing in the sheet provided by Dr. Stevens he asked the latter about them. Dr. Stevens explained that certain of the skills were taught at the Hospital Phase and therefore deemed not examinable.

[163] According to the appellant, Dr. de Vries who was the medical officer in the November 2006 examination, walked out of the examination in protest of the manner in which the examination was being conducted. After he walked out, he wrote a letter to the appellant expressing his disgust at the manner in which the examination had been conducted by the second respondent's appointed representatives.

[164] Dr. de Vries says in his letter:

"Secondly. I have always endeavoured to ensure that any examination process not be biased against the candidates...I cannot rule out the possibility of mistrust between the training-facility and the HPCSA or their representatives, has not interfered with the examination process."

[165] Dr. de Vries goes on to state that he saw his presence there as merely a legislative requirement as many of his observations and suggestions were not taken into account.

[166] This court will not attach any probative value to Dr. de Vries's letter. It does not in anyway take the appellant's case any further. It raises more questions than answers.

[167] There are a number of observations that the court made in regards to Dr. de Vries's evidence, the first being his opening sentence in which he states:

"As per request a few comments with regards to the examination process"

This is very strange for someone who alleges that he walked out in disgust. The opening sentence suggests that he waited until he was asked before he wrote the letter. He thereafter did not direct this letter to the respondents but instead sent it to the appellant. What is even more strange is that this court does not know at what stage he walked out in disgust. The examination took place over four days and there is no evidence indicating when exactly during the course of the examination he walked out. Whether he thereafter did not return to the examination, the court is left in the dark. The court also takes into account that Dr de Vries also signed the attendance register to acknowledge that he was present at the examinations and as this court has previous stated, he does not mention when in fact he walked out.

[168] It gets stranger still in that in his last paragraph Dr de Vries states:

"However, let me add that I do not disagree with any of the decisions that were made concerning the evaluation of the students' performance. To this end the chief examiners exhibited an almost stoic consistency and should be commended for this. My comments are directed at the procedural practices and inaccuracies."

Counsel for the appellant seems to suggest that Dr de Vries was being sarcastic in his remarks.

[169] We reject the appellant's contention. In our view no reliance should be placed on the evidence of Dr. de Vries. His evidence raises more questions then answers. A person who was aggrieved by the conduct of the representatives of the second respondent and wrote the letter to show his disgust, such a person could not have kept the letter to himself and only decide to send it to the appellant upon being requested to do so.

[170] The appellant further places reliance on the evidence of Dr. Cooke and the report that he complied on their behalf. In the report Dr Cooke makes the following remarks:

"3) In light of 2) above one must attempt an objective opinion ...

Opinion

1.1 The questions are all medically correct. There are minor issues as set out herebelow which would NOT make a major difference to this matter...

1.2 The questions are easily understood and very clear in their content of case scenario, exact requirements of answers and subsections.

1.3 The long questions are not misleading. There is some minor possibility of ambiguity or "trick" questions in the multiple choice

2.1 there are minor areas where the mark allocation may not be fair and appropriate

2.2 the mark allocation in the long questions will always carry some minor degree of subjectivity...I cannot comment on the oral and practical examinations...

The sample of answers supplied indicates that the candidates did not read the questions correctly/ did not answer the questions, in some cases obfuscated around the subject (which is extremely annoying to examiners!)/did not understand the questions, clearly in some instances because of poor knowledge ..."

Dr Cooke concludes by stating:

"...there is not a substantive issue that theses would have seriously influenced the outcome of this examination as required by the Council set standards.

Unfortunately the candidates were far below an acceptable standard for this examination."

[171] The court fails to the see the relevance of Dr Cooke's evidence except that it does nothing to help the appellant's case and in fact paints the respondents in a good light

[172] Dr. Cooke does not say in his report that Mr. Kruger and Stallkamp should have passed their OSCEs. He says the candidates were far below an acceptable standard for this examination. The court cannot on its own find that the students passed their examination.

[173] In our view Dr Robertson's evidence does not take the matter any further. In short the evidence is that there is a severe shortage of medical practitioners in the Western Cape and the closure of the appellant has not helped the situation. He further states that any short comings could have been addressed through various structures, such as moderation, consultation, advice and mentoring.

[174] What is significant in his evidence is that he says: *"I am not familiar with the detailed reasons for the closure of the appellant"*, but proceeds to express his views. The bases upon which Dr Robertson's statements are predicated are not clear. In the circumstances Dr Robertson's evidence should be rejected.

5.5.1 Mr. Kruger:

[175] Mr. Kruger only failed the OSCE's and it was recommended that he be granted an opportunity to re-write the examination after undergoing remedial training.

[176] The appellant contends that learner Kruger should have passed the examinations. According to the appellant learner Kruger passed 6 of the 10 stations when in fact there should have been eight, which is the prescribed number.

[177] Without taking the appellant's argument any further, the curricula states:

"Pass the OSCE with the following criteria:

i. OSCE'S have a minimum of eight critical stations of which the candidate must pass six.

ii. With a minimum mark of 75%

[178] In our view it is clear that the curriculum requires a minimum of 8 stations and does not as the appellant suggests, prescribe 8 stations. There were 10 stations in the present matter and as counsel for the respondents pointed out, the candidates were required to obtain a minimum of 75% to pass the examination. In other words they had to pass 8 of the 10 stations.

[179] To sum up, in our view the evidence that the appellant has sought to introduce is no different to the evidence that was before the second respondent at the time of the hearing and that being the case the appellant's appeal should fail.

[180] The order:

1. The appeal is dismissed with costs;

2. Such costs to include the costs of two counsel.

Hlophe JP

Zondi, J