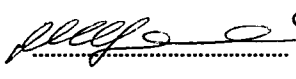


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA DIVISION,)

CASE NO:5652/2017

10/3/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
10/03/17	
DATE	SIGNATURE

THUTO BOPHELO TRAINING AND SKILLS

ACADEMY (PTY)LTD

APPLICANT

Versus

SOUTH AFRICAN QUALIFICATIONS AUTHORITY

FIRST RESPONDENT

HEALTH AND WELFARE SECTOR EDUCATION

AND TRAINING AUTHORITY

SECOND RESPONDENT

THE SOUTH AFRICAN NURSING COUNCIL

THIRD RESPONDENT

THE MINISTER OF HIGHER

EDUCATION AND TRAINING NATIONAL GOVERNMENT

FOURTH RESPONDENT

THE MINISTER OF HEALTH NATIONAL GOVERNMENT

FIFTH RESPONDENT



JUDGMENTLEGODI, J

Matter Heard on: 3 MARCH 2017
Judgment Delivered: 10 March 2017

[1] 'I chose nursing as my profession because I truly believe that the desire to help other people through nursing is a calling and I feel drawn toward helping those in need. Nursing is an honourable career, and should not be treated as just a job to earn a paycheck. My mission is to proudly provide nonjudgmental care to those in need regardless of race, spiritual beliefs, lifestyle choices, financial status, or disability.

My philosophy is that nurses have a responsibility to the public, to provide safe, holistic patient centered care. I must remember that my patients are not room numbers or medical conditions, but individuals that require and deserve individualized attention and care. Nurses should use clinical judgment to help meet the needs of the patients. As advocates, we should empower patients by encouraging them to become active partners in their own care and engage in mutual goal setting between ourselves and the patient. Nurses should maintain patient confidentiality except when we have a duty to report as mandated by law. We must educate patients and their families on diseases, treatments, and healthy behavior in order to improve their outcomes. We should also strive to model positive healthy behaviors in our own lives in the belief that we will provide better care to others if we care for ourselves first.

Nurses have a commitment to keep current in knowledge and skills and seek self-enhancement through perpetual learning. By doing this, we will not remain stagnant in our beliefs, but evolve professionally through evidence based practice and technological advance. My vision for myself as a nurse is that I will always continue learning, not only from the textbook and journals, but from interactions with other members of the healthcare team by being involved in the experiences of the patients and their families. I want to learn each day and apply what I have learned to improve my skills as a nurse'.



[2] This case is about people who want to choose nursing as a profession. The profound words quoted above were said by Brandi Dahlin in an article: "Personal Professional Philosophy of Nursing". The case is about whether Further Education and Training Certificate referred to as: "Community Health Work (SAOA ID 64697)" in respect of which the applicant (ThutoBophelo Training and Skills Academy (Pty) Ltd), is accredited by the Second respondent (Health and Welfare Sector education and Training Authority) to offer to the members of the public community health work course (referred to hereinafter as breaching course) is sufficient for admission to the two new nursing courses, namely, Higher Certificate in Auxiliary Nursing and Diploma in Nursing. Put differently, the question is whether the breaching course might be relied upon as a qualification to be allowed into the two new nursing courses aforesaid.

[3] Added to the question above, there are other ancillary questions raised by the two counsel for the second and third respondents as follows:

- 3.1 Whether the applicant has proven any of the jurisdictional facts required for a declaration of rights, specifically whether it is an interested parties?
- 3.2 Secondly, whether the applicant has set out the alleged rights it wants to be declared?
- 3.3 Thirdly, whether the applicant has proven that the breaching course is equivalent to a national senior certificate or senior certificate?
- 3.4 Fourthly, whether applicant has proven that the breaching course articulates horizontally and vertically with the two new nursing courses?
- 3.5 Lastly, whether the applicant has placed sufficient facts in order for the court to make declaration of rights?

Legislative Framework.

[4] The National Qualifications Frameworks Act no. 67 of 2008 was assented to on 17 February 2009 and became effective from 1 June 2009. The object of the Act is to provide for further development, organization and governance of the National Qualifications



Frameworks¹ (NQF) which is a comprehensive system approved by the Minister of Higher Education and Training,² currently the Honourable Dr Blade Nzimande. The Act applies to education programmes or learning programmes that lead to qualifications or part qualifications offered within the Republic by education institutions and skills development providers and professional designations subject to limitations prescribed in the Act.³

[5] The first respondent, that is, South African Qualification Authority is authority contemplated in Chapter 4 of the Act (referring to Act 67 of 2008) and its object are to:

- (a) advance three objects of the NQF in Chapter 2,
- (b) oversee the further development and implementation of the NQF, and
- (c) co-ordinate the sub –frameworks.⁴

[6] The first respondent is in terms of section 12 accountable to the Minister. In terms of section 13 (1) its functions are in order to advance the objective of the NQF to-

“(a)

- (i) *perform its function subject to this act; and*
- (ii) *oversee the implementation of the NQF and ensure the achievement of its objectives;*
- (b) *advise the Minister on NQA matters in terms of the Act;*
- (c) *comply with the policy determined by the Minister in terms of section 8 (2) (b);*
- (d) *consider the Minister 's guidelines contemplated in section 8 (2) (c);*
- (e) *oversee the implementation of the NQF in accordance with an implementation framework prepared by the SAQA after consultation with the QCs;*
- (f)

¹ Section 2 of Act 67 of 2008

² Section 4 of Act 67 of 2008

³ Section 3 of Act 67 of 2008

⁴ Section 11 of Act 67 of 2008.



(i) *develop a system of collaboration to guide the mutual relations of the SAQA and the QCs, after consultation with the QCs and taking into account the objects of the SAQA contemplated in section 11 and the regulations contemplated in section 33; and*

(ii) *resolve disputes regarding the QCs;*

(g) *with respect to levels-*

(i) *develop the content of descriptors for each level of the NQF reach agreement on the content of with the QCs*

(ii) *publish the agreed levels of the descriptors in the Gazette; and*

(iii) *ensure that they remain current and appropriate;*

(h) *with respect to qualifications-*

(i) *develop and implement policy and criteria, after consultation with the QCs, for the development, registration and publication of qualifications and part- qualifications, which must include the following requirements:*

(aa) *The relevant sub-framework must be identified on any document relating to the registration and publication or part-qualification; and*

(bb) *each sub-framework must have a distinct nomenclature for its qualification types which is relevant sub-framework and consistent with international practice;*

(ii) *register a qualification or part-qualification recommended by a QC if it meets the relevant criteria;*

(iii) *develop policy and criteria after consultation with QCs, for assessment, recognition of prior learning and credit accumulation and transfer;*

[7] In terms of section 8(1) of the said Act 67 of 2008 Minister has the overall executive responsibility for the National Quality Framework, South African Qualifications Authority and Qualification Council for General and Further education and Training, the Qualification Council for Higher Education and the Qualification Council for Trades and Occupations contemplated in Chapter 5. Furthermore, in subsection (2) the Minister further responsibilities are set out as follows:

“(2) The Minister must-

- (a) consider advice from SAQA or a QC in terms of this Act;*
- (b) determine policy on NQF matters in terms of this Act and publish the policy in the Gazette;*
- (c) publish guidelines which set out the government's strategy and priorities for the NQF, and which may be updated annually;*
- (d) provide funds from money appropriated by Parliament for SAQA to enable it to fulfil its functions in terms of this Act;*
- (e) after considering advice from the SAQA, determine the sub-frameworks contemplated in section 7;*
- (f) determine by regulation in the Gazette, the process by which a dispute involving the SAQA or a QC must be resolved, and any matter relating thereto.*

(3) The Minister must-

- (a) advance the achievement of the objectives of the NQF contemplated in Chapter 2;*
- (b) uphold the coherence and public credibility of the NQF;*
- (c) encourage collaboration among the QCs and between the QCs and SAQA.*

(4) The Minister may perform any other function consistent with this Act”.

[8] The third respondent, that is, the South African Nursing Council is one of the quality councils established in terms of the Nursing Act no 32 of 2005 and part of its functions or objects are mentioned in paragraph 19 hereunder. A person undergoing education or training in nursing must apply to the council to be registered as a learner nurse or a learner midwife⁵. The Council must register as a learner nurse or learner mid-wife any person who has complied and has furnished the prescribed particulars of a training programme at a nursing

⁵ Section 3(a) of Act no 33 of 2005



education institution.⁶ In terms of section 38 of Nursing Act, the Minister may on the recommendation of the Council prescribe particular qualifications obtained by virtue of examinations conducted by a nursing education institution in the Republic which, if held singly or conjointly with any other qualifications, entitled any holder thereof to registration in terms of the Act if he or she has, before or in connection with or after acquired of the qualification in question complied with such conditions or requirements as may be prescribed.

Who is to determine whether the breaching course is equivalent to National Senior Certificate or Senior Certificate?

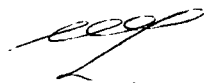
[9] The Minister of Higher Education and Training to which the first respondent is accountable in terms of section 12 of the Act, is cited in these proceedings as the fourth respondent and both the first and the fourth respondents elected to abide by the decision of this court.

[10] The crux of both the second and third respondents' contention is that the applicant has failed to prove that the breaching course is equivalent to either National Senior Certificate or Senior Certificate and that in any event a body that can determine whether the breaching course in question is so equivalent to national senior certificate is Umalusi which is not been cited or joined to these proceedings.

[11] The contention in my view does not seem to be supported by any legislative framework, seen also in the context of Government notice no 40545 dated 13 January 2017 and titled "ARTICULATION POLICY FOR THE POST-SCHOOL EDUCATION AND TRAINING SYSTEM OF SOUTH AFRICA." Paragraph 10 thereof deals with legislative and regulatory framework and provides.

"10. This articulation policy is issued in terms of section 8(2) (b) of the National Qualifications Framework (NQF) Act (no 67 of 2008), which requires the Minister to determine policy and NQF matters in terms of the NQF Act, and to publish the policy in the Gazette. The NQF Act gives the Minister overall executive responsibility for the NQF, the South African Qualifications Authority (SAQA), the Quality Council (QC)

⁶ Subsection (1) of section 32 of Act 33 of 2005



for General and Further Education and Training (Umalusi), the (CHE) and for the QC for Trades & Occupations (QCTO)”.

[12] Then in paragraph 13 of the notice under the heading, “The Scope of the Articulation Policy” it is stated that the Department of Higher Education and Training (DHET) is to establish strategic policy, principle and guidelines for articulation and the first respondent in its overarching co-coordinating role of the three sub-frameworks and to intervene in cases of unfair and irrational barriers to acceptance into learning programmes and or credit transfer.

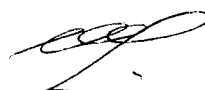
[13] It is very clear where the policy making authority lies and it is not Umalusi as suggested. That should further be seen in the context of the responsibilities of the Department of Higher Education and Training, (the fourth respondent) as articulated in the notice of relevance, paragraph 18 of the notice provides:

“18. DHET will be responsible to:

- (a) Provide overall leadership in the implementation of articulation.*
- (b) Provide the policy and guidelines of the articulation to occur across the post – school education and training system.”*

[14] There can be no question that one is dealing here with something which is post national senior certificate. Most importantly considering the policy as per the notice herein, read with the legislative framework articulated earlier in this judgment, all relevant parties with the authority to take and make decisions to determine the status of the breaching course in question are before this court, in particular the first and fourth respondents who are responsible to determine whether such a breaching course is equivalent to national senior certificate. The first respondent is the body which came with a formulation, introduction and scope of the breaching course in question.

[15] Before I conclude on the topic, General and Further Education and Training Quality Assurance Act No 58 of 2001 had been referred to in an affidavit deposed to by Emmanuel Sibanda acting Chief Executive Officer Umalusi. In paragraph 4 of the affidavit inter alia, he states:



4.2 *For the purposes of the issue before court, it is important to note that Umalusi is the Quality Council for General and Further and Training as contemplated in the NQF Act and has all the functions contemplated in Section 27 of the NQF Act."*

[16] Furthermore, in paragraphs 7 and 8 of his affidavit, Mr Simanda states:

"7. *Being the Quality Council responsible for Quality Assurance in the NQF 1 to 4 GENFET sub- framework, Umalusi is the institution that ought to be entrusted with the responsibility of evaluating whether a qualification placed, at say NQF level 4, is equivalent to one of the qualifications within the sub-framework for which it is responsible. The equivalence of a qualification registered on NQF (but not on the GENFET sub framework) to the National Senior Certificate would be a case in point. Determining equivalent requires a comparative evaluation of the qualifications (including their respective purpose and outcomes), the contents of the curricula of the two qualifications and the extent and nature of the assessment.*

8. ...

9. *If any educational institution offering a qualification on the NQF wishes to refer to such a qualification as being equivalent to the National Senior Certificate, it ought to approach Umalusi for such a determination. All the required information and documentation would need to be submitted to Umalusi for an evaluation. Umalusi is entitled to charge fees for its services."*

[17] As a start, there are two quality councils under Chapter 5 of Act 67 of 2008. It is Umalusi which in terms of section 24 of Act 67 of 2008 is the QC for General and Further Education and Training as provided for in the GENFETTQA Act and QC for Higher Education as provided for in the High Education Act. Now based on the quotation above, counsel for the third respondent argued that Umalusi is the only body that can make a determination on whether the breaching course under discussion is equivalent to the National Senior Certificate. Act 58 of 2001 applies to all education institutions which have been established, declared or registered under the –

- (a) South African Schools Act, 1996 (Act No 84 of 1986);
- (b) Further Education and Training Act, 1996 (Act 1998 of 1998; or



- (c) Adult Basic Education and training Act, 2000 (Act 52 of 2000).

[18] Section 23 of Act 58 of 2001 deals with the accreditation of private providers and it provides as follows:

- “23. (1) *The Council must develop criteria for accreditation of private providers and submit them to the Minister.*
- (2) *The Minister must determine policy in respect of such criteria in terms of the National Policy Act, 1996 (Act No.27 of 1996).*
- (3) *The policy contemplated in subsection (2) is binding on all private providers.*
- (4) *Any person who is required to register as-*
- (a) an independent school in terms of the South African Schools Act, 1996 (Act No.84 of 1996);*
 - (b) a private further education and training institution in terms of Further Education and Training Act, 1998 (Act No. 98 of 1998);or*
 - (c) a private centre in terms of the Adult Basic Education and Training Act, 2000 No. 84 of 1996); Education and Training Act, 1998 (Act No. 98 of 1998); or (Act No. 52 of 2000),*
must apply to the Council for accreditation in the manner determined by the Council.
- (5) *An applicant for accreditation must submit any additional information required by the Council.*
- (6) (a) *The Council must conclude its evaluation of the applicant and its educational programmes within a period of six months.*
- (b) *The Minister may extend the period contemplated in paragraph (a) if there are reasonable grounds for extension.”*

[19] Nursing Council under Act 33 of 2005 has its objects, amongst other, to serve and protect the public in matters involving health services generally and nursing services.⁷ On the other hand, the second respondent, (Health and Welfare Sector Education and Training Authority) is one of the 21 Sector Education Training Authority (SETA's) responsible for the education, training and skills development requirements of the “the health, social

⁷ Section 3 of Act 33 of 2005



development sector". The applicant is registered and accredited under the second respondent and in the first paragraph of its 'Extension of Scope Approval' dated 18 September 2015 and issued to the applicant, it is stated:

"This serves to confirm that THUTOBOPHELO TRAINING SKILLS ACADAMY is granted approval status for the following NQF registered Qualification of a primary Skills Development Provider with the Health and Welfare SETA (HWSETA)."

[20] The applicant's accreditation is in the field of health services and thus, making it different from the level 4 qualifications as in senior certificate or national senior certificate to which the Minister of Basic Education, the Honourable Angie Motshega assisted by Umalusi, is responsible. The post-school referred to in paragraph 18 of the Government notice quoted in paragraph [13] of this judgment seems to envisage a distinction between a formal schooling and educational qualifications in health services acquired outside a normal school set up. There seem to be the essence for various Acts and quality councils created thereunder.

Declaring breaching course to be sufficient for admission to the two new nursing courses

[21] This relief if granted would mean that what is supposed to be done by a functionary/functionaries must be done by this court. The functionaries with regard to who is entitled to register in terms of section 38 of the Nursing Act referred to in paragraph 8 of this judgment and who is learner complying with prescribed conditions and has furnished the prescribed particulars of a training programme as contemplated in subsection (2) of section 32 of the Nursing Act, is the Minister responsibility and the Nursing Council or at the recommendation to the Minister of Health by the third respondent. The Minister of Health is the fifth respondent in these proceedings. I am reluctant to accede to what I am been asked to do at this stage.

[22] The doctrine of "separation of powers" is acknowledged as an integral part of the basic features of our constitution. It is also commonly agreed that all the three organs of state, i.e the Legislature, the Judiciary and the Executive are bound by and subject to the provisions of the Constitution, which demarcates their respective powers, jurisdictions, and responsibilities and relationship with one another. It is assumed that none of the organs of the state including the judiciary, would exceed its powers as laid down in the Constitution. It



is also expected that in the overall interest of the country, even though their jurisdictions are separated and demarcated all the institutions would work in harmony and tandem to maximize the public good.⁸

[23] Courts now derive their power from the Constitution itself.⁹ It follows that courts too must observe the constitutional limits of their authority.¹⁰ In *Doctors for Life International v Speaker of the National Assembly & Others* the Constitutional Courts [2006] ZACC 11; 2006 (6) SA 416 (CC) para 37 it was held:

"Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the other branches of Government unless to do so is mandated by the constitution".

[24] The Constitution Court also reminded us that courts should assiduously refrain from exercising executive or legislative functions under disguise of judicial review (DPP, Transvaal Minister of Justice and Constitutional Development & Others¹¹ In paragraph 183 of DPP Transvaal it was held that judicial review permits courts to call upon the executive and legislature to observe the limits of their powers, but does not permit courts to exercise these powers themselves. Courts therefore have a duty to patrol-but not cross- the constitutional borders defined by the Constitution.¹²

[25] In paragraph 91 of the second respondent answering affidavit it is stated: "It is within SANC's power to register qualifications and state in them what the admissions requirements are..." I tend to agree as also indicated previously in this judgment when dealing with the legislative framework. Then in paragraphs 22 and 23 of the replying affidavit the applicant alludes to the issue as follows referring to a meeting of 13 December 2016:

"22. In the letter is recorded that the meeting was only attended by staff from the SANC Accreditation section and that any decision, outcome or view that was raised

⁸ Law teachers www.lawteacher.net.za December 2016

⁹ *Phillips & Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505

¹⁰ See Legal Aid Board *supra* at 39

¹¹ See [2006] ZACC 11, 2006 (6) SA 416 (CC) para 37.

¹² 2009 (2) SACR 130 (CC) , see also para 39 of the Legal Aid Board *supra*

in the meeting was not a formal decision or view of SANC. In the letter it is stated that after the enquiry, it was established that flowing from the meeting that there were no points referred to SANC's Council for deliberation and or decision.

23. *In the light of the aforesaid, the majority of the allegations contained in SANC's answering affidavit support the un-equivocal conclusion that SANC's failure to provide any assistance or clarification on the issue of dispute, directly contributed to the current position in which the applicant and its students find themselves."*

[26] It is very clear from the quotation above that the applicant approached this court on the basis that SANC (the third respondent)

and correctly so, is the body that must determine whether the Community Health Work qualification (the breaching course), is sufficient for admission to the new nursing courses, that is, Nursing in Diploma and Higher Certificate Auxiliary Nursing, the question being whether the third respondent has taken a definite decision on the issue.

[27] That being so, the applicant is effectively asking this court to poach into the third respondents' terrain. At the risk of repetition, courts have a duty to patrol-but not cross the constitutional borders defined by the constitution. The applicant alluded to the fact that the third respondent has not been formally approached to take a decision on the issue. Therefore, any attempt to make a declaration at this stage will be plunging into the unknown. For this purpose, I do not have to deal with the merits of the applicant's cause of action.

[28] I should however be concerned and be worried about the learners' plight. The decision on the issue should be very important for them. Firstly, they have, as it appears from the papers, paid a lot of money, most importantly they have to arrange their lives properly. Therefore, urgent certainty on the issue should be very important to them. Dealing with certainty to the affected learners, this court got more worried when counsel for the third respondent in the course of oral argument indicated that every learner who is a holder of national senior certificate is entitled to enroll for any of the two new nursing courses. One is tempted to conclude that he would not have made this submission without instruction by the third respondent. Counsel for the applicant responded by saying there can never be anything like that as such a stance would cause the third respondent to be flooded and overwhelmed by people wishing to enroll for nursing simply on the basis of national senior certificate. The confusion is clearly fueled and it is for the third respondent to set the record



straight as a matter of urgency, bearing in mind that this court was told that about 95% of learners who enrolled for Community Health Course (SAQA 64697) with the applicant are holders of national senior certificates or senior certificates. There seems to be competing interests based on the two conflicting submissions which I do not have to articulate at this point in time. It is the third respondent's responsibility to clear the air and avoid innocent learners to continue to be victims of something which is not their own making.

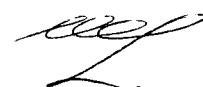
[29] One imagines that the scope of the breaching course, that is, Community Health Works Course (SAQA 64697), as articulated by the first respondent (South African Qualifications Authority) would serve as an added advantage to any person who applies to the third respondent to be enrolled as a nurse. For example, the first respondent in its document dated 5 December 2016 and attached to the applicant's founding affidavit as annexure "A11", dealing with the purpose of the breaching course (SAQA 64697) inter alia, states:

"This Qualification is for any individual who is, or wishes to be, involved in Ancillary Health Care services. A learner who has achieved this qualification will integrate a range of awareness and competencies to practice the roles of health promoter, health provider and health note worker within a community development context.

Learners working toward this Qualification will find that the acquisition of competence in the Unit Standards, which make up the Qualification, will add value to their work performance. This Qualification is intended to enhance the provision of entry-level service within the field care within all sectors.

Learners who complete this qualification will have better self and social awareness and will possess a range of thinking and problem solving skills. In addition, they will process the competence required to perform community health functions in a complex development world context. They will have the skill require for employment by a range of government and social sector employers, will be in possession of a further education and training certificate and will be eligible for certain credit recognition in various higher education health qualifications.

Qualified learners in this field will provide a service that will assist communities to better manage their own health and wellness. They will have the skills to work as



team members and as providers of support services within a multidisciplinary health care team.

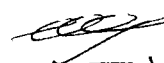
In addition, recipients will be able perform some of the following according to their choice of electives:

- *Facilitate and administrate community health activities\center via supervision of a team of health care workers.*
- *Provide community health care.*
- *Provide care for persons with intellectual and physical disabilities*
- *Assist in planning advocacy campaigns to support primary health care initiatives.*
- *Assist in facilitating and implementing primary health care projects within the community.*
- *Engage in inclusive communication with Deaf South Africa.*
- *Practitioners will generally carry out their roles within the context of:*
 - >The client's home.*
 - >A community care center.*
 - >The broader community.*

[30] The underlining is my emphasis. The purpose articulated in the quotation above, in my view, seems to be in line with the vision of a nursing profession set out in paragraph 1 of this judgment. I am however making no final determination. I find it necessary to refer the dispute herein back to the third respondent to make a determination whether the breaching course, (Community Health Work Course), entitles the holder of the Certificate thereof to enroll for Diploma in Nursing and or Higher Certificate Auxiliary Nursing. I now turn to other issues.

Declaring that Community Health Work Course is equivalent to National Senior Certificate

[31] I have already made a finding that the fourth respondent, Minister of Higher Education and Training is the Minister responsible. The first respondent is answerable to him and not to the Minister of Basic Education. Simply put, Further Education and Training Certificate called Community Health Work: SAQAID 64697 –NQF Level 4, should be seen as a qualification falling under the Department of Higher Education and Training as defined in



section 1 of Skills Development Act 97 of 1998 and the second respondent is created under the Act aforesaid.

[32] It is the responsibility of the Minister of Higher Education to establish sector education and training authority¹³ (SETA'S) with a constitution for any national economic sector and the second respondent is one such sector education training authority. The framework of sector education and training authorities is amongst other, to implement its sector skills plan by- establishing learning programmes¹⁴, promote learning programmes by supporting the development of learning materials¹⁵, improving the facilitation of learning¹⁶ and assisting in the conclusion of agreement for learning programmes, to the extent that it is required.¹⁷

[33] The applicant in its replying affidavit, amongst other, articulates the second and third respondents' opposition as follows:

"9. As a point of departure it is important to note that the first respondent, as well as the fourth and fifth respondents, have indicated that they will abide by the decision of the court and that they will not oppose this matter. The first and fourth respondent have not entered any appearance to oppose the matter. This is of importance as the first and fourth respondents are the only parties who have any say about the issue in dispute in this matter, namely whether the Community Health Work Course (SAQA 64697) enables a learner to register for the two new nursing courses referred to in the founding affidavit".

[34] Yes and no to the statement above. The first and fourth respondents are the only parties that can decide on the issue whether Community Health Work Course (SAQA 64697) level 4 is equivalent to national senior certificate level 4. However, it is not within their authority to determine whether such a course (SAQA 64697), entitles a learner to register for the two new nursing courses. That is the Nursing Council (third respondent) and Minister of Health (fifth respondent) responsibility as articulated in paragraphs 23 to 32 of this judgment.

¹³ Section 9(1) of Act 97 of 1998

¹⁴ Section 10(i) (b) (i) of Act 97 of 1998

¹⁵ Section 10(1)(c) (ii) of Act 97 of 1998

¹⁶ Section 10(1)(c)(iii) of Act 97 of 1998

¹⁷ Section 10(1)(c) (iv) of Act 97 of 1998

[35] It is unfortunate that the first and fourth respondents elected not to participate in these proceedings. The dispute clearly requires not only their intervention, but, also to determine the issue whether the Community Health Work Course in respect of which the first respondent accredited and registered the applicant is equivalent to national senior certificate. That being so, the first and fourth respondents cannot be passive in dealing with the dispute between the parties. It is the responsibility of the first respondent to seek to achieve the objective of the National Qualifications Framework by-inter alia ensuring that South African qualifications meet appropriate criteria determined by the Minister as contemplated in section 8, and internationally comparable¹⁸; and ensuring that South African qualifications are of acceptable quality.¹⁹ The Minister in terms of section 8(2) (b) of Act 67 of 2008 is required to determine by regulation in the Gazette, the process by which a dispute involving the first respondent or quality councils must be resolved and any matter relating thereto. (My emphasis).

[36] Clearly the fourth respondent (the Minister of Higher Education and Training) and the first respondent have legislative responsibility to resolve the impasse with the applicant, particularly seen in the light of the registration and accreditation by the second respondent and a course to which the first respondent is responsible as per annexure A11 to the founding affidavit and quoted in part, in paragraph 29 of this judgment.

[37] To abide by the decision of the court, is to put this court in collision cause with the separation of powers. What the first and fourth respondents seek to do instead is to set the court to interfere in the other branches of government where the constitution does not mandate the court to do so. Whilst judicial review permits courts to call upon the executive and legislature to observe the limits of their powers, court are not permitted to exercise those powers themselves. Until the first and or the fourth respondents have attended to the dispute amongst the parties, as they are so obliged to do, this court resists the temptation to venture into resolving the dispute at this stage and the necessary order will be made hereunder. It suffices for now to mention that this application is destined to be postponed pending compliance with the order to be made in paragraph 44 hereunder. I now turn to deal with another issue.

Interdict

¹⁸ Section 5(3) (a) Act 67 of 2008

¹⁹ Section 5(3) of Act 67 of 2008



[38] In its notice of motion the applicant also sought an interdict against the second respondent couched as follows:

"3. That HWSETA be prohibited from providing false incorrect and wrong information about the applicant's students".

[39] The second respondent's representative visited the applicant's Academy during or about October 2016 and insisted to speak to the learners without any representative of the applicant. It was during this meeting that a representative of the second respondent allegedly told the learners that Community Health Work course would not entitle them to register for nursing. That was followed by several disruptions, protests and damage to property at the Academy.

[40] The second respondent in response to the allegations should be seen in the context of what its view is concerning Community Health Work Course. For example, in paragraph 10 of its answering affidavit second respondent stated:

"10 The Community Health Work qualifications and accredited service providers such as the applicant are not permitted in terms of HWSETA policy (attached as "BSM3" to even infer that such qualifications has to do with nursing, pre-nursing or anything also that it not HWSETA"

[41] This being the attitude, the second respondent would have communicated its view to the learners. However as indicated previously in this judgment, it has no authority to express a final view. It is the third respondent which is entitled to set the criteria for itself and until a final determination is made by the body that is entitled to do so, the second respondent should be interdicted as prayed for by the applicant.

Striking out

[42] The second respondent objected to certain averments made in the applicant's replying affidavit. The aspect to which the second respondent objected to, has relevance to the merits of the applicant's case. The proceedings proceeded on the basis that a decision will be made on the striking out after having heard argument on the case as a whole. As I do not have to make a finding on the merits, I also make no finding on the striking out.



[43] At the conclusion of oral argument on 2 March 2017 I directed that any party who wishes to file further heads must do so by not later than Monday 6 March 2017. The second respondent filed written heads which were only brought to this court's attention on Tuesday 7 March 2017 and by this time judgment was already written. The applicant raised an objection to the additional written heads. This judgment is handed down without having regard to any of the submissions made in the additional written heads, firstly because they were brought to this court's attention late and secondly because of the objection raised and request to allow the applicant to file further written heads and thus creating a situation like re-arguing the matter, something which the court was not prepared to do.

Consequently, an order is hereby made as follows:

- 44.1 The applicant's application on declaratory order is hereby postponed sine die pending determination set out in paragraphs 44.2 and 44.3 hereunder.
- 44.2 The first and fourth respondents are hereby ordered to determine whether Community Health Work Course (SAQA ID 64697) Level 4, is equivalent to national senior certificate or Senior Certificate, such a determination to be made by not later than 31 March 2017.
- 44.3 The third and fifth respondents are hereby ordered to determine whether Community Health Work Course (SAQA ID 64697 entitles one to enroll for Higher Certificate Auxiliary Nursing and Diploma in Nursing, such a determination to be made by not later 31 March 2017.
- 44.4 The third respondent is hereby directed to clarify by not later than 31 March 2017 whether the holder of any national senior certificate or senior certificate as intimated by its counsel is entitled to enroll for Diploma in nursing and or Higher Certificate in Auxiliary nursing.
- 44.5 The second respondent pending determination in paragraphs 44.2 and 44.3 above is hereby interdicted from providing false, incorrect, wrong and or unconfirmed



information about the applicant to the applicant's students in particular whether or not Community Health Work (SAQA ID 64697) entitles one to enroll for Higher Certificate in Auxiliary Nursing and or Diploma in nursing.

- 44.6 It is hereby directed that upon determination and clarification as set out in paragraphs 44.2 to 44.4 above, any party would be entitled to supplement its papers with the opportunity for any party to respond thereto.
- 44.7 No order as to costs is made.



M F LEGODI
JUDGE OF THE HIGH COURT

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