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

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

24/12/19
DATE

[redacted]
SIGNATURE

Case No: 89420/19

EDUCOR HOLDINGS (PTY) LTD	First Applicant
DAMELIN (PTY) LTD	Second Applicant
LYCEUM COLLEGE (PTY) LTD	Third Applicant
and	
COUNCIL ON HIGHER EDUCATION	First Respondent
CHAIRPERSON OF THE HIGHER EDUCATION QUALITY COMMITTEE OF THE COUNCIL ON HIGHER EDUCATION	Second Respondent
THE MINISTER OF HIGHER EDUCATION & TRAINING	Third Respondent
THE DEPARTMENT OF HIGHER EDUCATION AND TRAINING	Fourth Respondent

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JUDGMENT

D S FOURIE, J:

[1] This is another urgent application which was set down for hearing one week before Christmas. I therefore do not intend to give a lengthy judgment, but to deal only with the main issues.

[2] The applicants seek interim interdicts suspending the operation and implementation of decisions taken by the second respondent on 7 November 2019 not to re-accredit certain academic programmes offered by the second and third applicants. This relief is sought pending the determination of final relief set out in Part B of the notice of motion in terms whereof the second and third applicants seek the review, setting aside and remittal of the non-accreditation decisions.

[3] The applicants contend that the decisions were unlawful because the second respondent failed to comply with its Framework for Programme Accreditation in making those decisions, which renders the decisions *ultra vires*, irrational and procedurally unfair. The first and second respondents oppose the application mainly because the requisites for an interim interdict have not been met. The two main issues relate to that of a *prima facie* right and the balance of convenience.

[4] It is contended in the founding affidavit that the second respondent's decision not to re-accredit all of the academic programmes concerned, does not comply with the second respondent's own criteria for programme accreditation. It is pointed out that if an academic programme does not meet *"the majority of minimum standards"* specified in the criteria, it will not be accredited. However, if it does not meet the *"majority of minimum standards"* it should be accredited and where necessary, with conditions.

[5] According to the applicants the record of proceedings also indicates that the second respondent did not even consider or evaluate the academic programmes according to any minimum standards, but only applied *"overall criteria"*. The applicants contend that this failure is the main reason why the impugned decisions are *ultra vires*, irrational and procedurally unfair. It is then concluded that the second and third applicants have at least a *prima facie* right to continue to offer these academic programmes.

[6] In the answering affidavit it is pointed out that the core functions of the first respondent include promoting quality assurance in higher education, auditing the quality assurance mechanisms of higher education institutions and accrediting programmes of higher education. This mandate of the first respondent, as the regulatory body, is set out in section 5 of the Higher Education Act No 101 of 1997. It is further explained that the programme accreditation function entails the evaluation of higher education academic programmes by senior academic peers in accordance with the Higher Education Quality Committees' criteria for programme accreditation, which stipulates the minimum requirements for programme input, process, output and review.

[7] It is also pointed out that the Higher Education Quality Committee uses a system of peer- and expert review in order to ensure credible and consistent programme evaluations. In this regard, specialists are appointed to evaluate programmes in accordance with the accreditation criteria, individually or in groups or panels, which may include site visits. These evaluators are drawn from the Council on Higher Education's database of academics, subject specialists and other senior pedagogues from both the public and private higher education

institutions. The accreditation criteria also specifically state that "*... the outcomes of the programme evaluation as a whole should be determined in a holistic manner and not by merely calculating the sum total of the evaluations against individual criteria*".

[8] According to the respondents the very nature of many of the decisions required to be made, require a value judgment that is based on the relevant evidence. It is therefore contended that the impugned decisions are policy laden polycentric decisions taken by appropriately qualified specialists that warrant deference. The respondents therefore deny that the applicants have demonstrated a *prima facie* right to continue to offer the academic programmes concerned.

[9] There also exists a serious dispute with regard to the question whether the applicants have shown that the balance of convenience favours them. According to the applicants one should distinguish between existing students in completing the affected programmes and new students who are for the first time enrolled in the affected programmes. Existing students are permitted to complete those programmes and therefore there can be no harm or prejudice to new students who are also enrolled in the same affected programmes.

[10] It is further pointed out that if interim relief is not granted, the second and third applicants will not be able to provide the relevant academic programmes to first year students in 2020. The reputational damage will be significant and will put the credibility of all other programmes into question. According to the applicants 387 staff members will be affected and there is a reasonable prospect that many, if not all, may lose their employment. There are 3 959 students

currently completing the affected programmes at the second applicant and 415 students at the third applicant. In total, 677 students have preregistered for the affected programmes as new incoming students.

[11] The respondents point out, in respect of new students, that the effect of an interim interdict will be to halt the operation and implementation of quality assurance and accreditation powers vested in the first and second respondents, before the exercise of those powers has even been successfully and finally impugned on review. If interim relief is granted, and the applicants' review fails, new students in the affected programmes will have spent years studying for a qualification which cannot be legally recognised because its accreditation had been withdrawn.

[12] It is then concluded that the harm that will follow to new students enrolling in the affected programmes, will be immediate, ongoing and manifestly contrary to the public interest. If the review application is not successful, the effects will be catastrophic for new students in the affected programmes who enrolled after the date of withdrawal of the accreditation of these programmes.

DISCUSSION

[13] In terms of section 5(1)*(c)* of the Higher Education Act the Council for Higher Education must:

> *"Subject to section 7(2), through its permanent committee, the Higher Education Quality Committee –*

(i) promote quality assurance in higher education;

(ii) audit the quality assurance mechanisms of higher education institutions; and

(iii) accredit programmes of higher education."

[14] The functions of the Council for Higher Education in relation to qualifications, quality promotion and quality assurance are set out further in section 7 of the Act. Sub-section (3) thereof provides as follows:

> *"The Council for Higher Education must establish the higher education quality committee as a permanent committee to perform the quality assurance and quality promotion functions of the Council for Higher Education in terms of this Act and the National Qualifications Framework Act."*

[15] There appears to be no dispute on the papers that in discharging its functions to promote quality assurance in higher education, the Council for Higher Education has a statutory duty to ensure that higher education institutions offer programmes in line with the programme accreditation granted and conditions attached to such accreditation. The Constitutional Court held in National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at par [44] that where an interim interdict or temporary restraining order is sought to restrain the exercise of statutory powers, such a case is no ordinary application for an interim interdict. Moseneke, J explained:

> *"The common law annotation to the said Setlogelo test is that Courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief*

has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires Courts to ensure that all branches of government act within the law. However, Courts in turn must refrain from entering the exclusive terrain of the executive and legislative branches of government unless the intrusion is mandated by the Constitution itself."

[16] In assessing the interim relief claimed by the applicants, this Court is required to consider the issue of the *prima facie* right for purposes of that relief. This is not to pronounce finally on this issue, for that is the task of the Court at a later stage. The Court's task now is to assess whether a *prima facie* right has been established for the purpose of an interim inderdict.

[17] Taking into account the statutory provisions referred to above, I am of the view that this is a case that falls into the same category as referred to in the National Treasury case referred to above. The first and second respondents perform their duties in terms of legislation. They have already decided, after having applied the procedures referred to above, not to re-accredit the academic courses concerned. If these decisions are suspended it will mean that the applicants can proceed to present these courses, contrary to the decision already taken in this regard. I am therefore of the view that, unless a strong case for this relief has been made out, the relief should not be granted.

[18] Taking into account the grounds for review as set out in the founding affidavit as well as the respondents' answer thereto, I am not convinced that a strong case for the relief sought, has been made out. In this regard I take into

account that at the core of this matter lie complex issues relating to higher education quality assurance and the substantive assessment and application of educational criteria for the accreditation of higher education programmes by a specialist regulatory body. I also take into account that the first and second respondents have a statutory mandate to perform their duties in the public interest.

[19] Furthermore, during argument counsel for the applicants conceded (rightly so in my view) that even if the review application were to be successful, that will not be the end of this process. In the notice of motion before me the applicants request in Part B of the application that the decision in respect of whether the second and third applicants should remain accredited for the academic programmes concerned, should be remitted to the first respondent for consideration afresh. Should that be the position, nobody knows what the outcome of that decision will be. For these reasons I am not convinced that a *prima facie* right, let alone a strong case, has been demonstrated.

[20] When considering the balance of convenience, I take into account that the exercise of a Court's discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience. The stronger the prospects of success the less the need for such balance in favour of the applicant. However, the weaker the prospects of success the greater the need for it to favour an applicant (The Law of South Africa, 2nd Ed, Vol 11, par 406).

[21] Furthermore, in the *National Treasury* case (*supra*) it was pointed out that the balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of

another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm ([par 47]). It was further pointed out that the Court must also keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the "*clearest of cases*" and after a careful consideration of the separation of powers harm ([par 47]).

[22] It is common cause that existing students will be allowed to complete their courses. The real issue concerns the registration of new students. With regard to new students, I take into account that the applicants are interested in continuing their business of providing private higher education. However, on the other hand, the first and second respondents as the custodians of the quality of higher education in South Africa, has a statutory duty to ensure that higher education programmes satisfy quality requirements and standards. In this regard it is important to also take into account the interests of future students who may be prejudiced by the discontinuation of these programmes, but who are also entitled to education that meets certain minimum standards. Moreover, this is not a new problem which has come upon the applicants unexpectedly. This problem already manifested during 2018. The applicants therefore had ample time to do whatever was necessary and to inform new students in time.

[23] Having regard to all these considerations, I am not convinced that the applicants have demonstrated a prima facie right to continue with these courses or that the balance of convenience favours them. For these reasons, and when this matter is considered from a holistic viewpoint, I am of the view that the application should be refused.

ORDER

In the result I grant the following order:

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

[redacted]

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 24/12/19