

SOUTH AFRICA / JUDGMENT

Educor Holdings (Pty) Ltd and Others v Director-General of Higher Education and Another (043233/2024) [2024] ZAGPPHC 556 (20 May 2024)

[2024] ZAGPPHC 556

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mali

CASE / FILE NUMBER

043233/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO: 043233/2024

DOH:

08 MAY 2024

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED.

SIGNATURE

DATE:

20/5/2024

In

the matter between:

EDUCOR
HOLDINGS (PTY) LTD
FIRST APPLICANT
CITY
VARSITY (PTY)
LTD
SECOND APPLICANT
DAMELIN
(PTY)
LTD
THIRD APPLICANT
ICESA
CITY CAMPUS (PTY) LTD
FOURTH APPLICANT
LYCEUM
COLLEGE (PTY) LTD
FIFTH APPLICANT
and
DIRECTOR-GENERAL
OF HIGHER EDUCATION
FIRST RESPONDENT
(DR N SISHI)
MINISTER OF HIGHER
EDUCATION AND
SECOND RESPONDENT
TRAINING SCIENCE AND
INNOVATION
(DR B E NZIMANDE)
This
Judgment was handed down electronically and by circulation to the
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May 2024.

JUDGMENT

Mali J

[1] On 8 May 2024 the applicants, the first applicant being the sole shareholder of second to fifth applicants who are Private Higher Education Institutions (Institutions) approached this court by way of urgency. The applicants sought orders against the first respondent, Director General responsible for the Department of Higher Education (the Department). There is no order sought against the second respondent, the Minister for the Department.

- [2] In Part A, they first seek an order that the decision of the first respondent to remove the second to fifth applicants from the Register of Registered Private Higher Education Institutions (the register), taken on about 17 March 2024, be suspended with immediate effect. Secondly, that the decision of the first respondent to cancel registration of the second to fifth Applicant published in the Government Gazette Number 50311 on 22 March 2024 (in Notice No. 4528) and ostensibly signed on 26 July 2023 be suspended with immediate effect.
- [3] The third prayer is that the first respondent should be interdicted from implementing the decisions referred to above, pending the outcome of the judicial review application sought in Part B. Fourthly, that the first respondent must be directed, within 24 hours of the Order in Part A;
- (a) Restore the names of the Second to Fifth Applicants to the Register of Private Higher Education Institutions as registered Institutions, and to confirm to the Applicants' attorneys of record that he has done so;
- (b) Publish a notice in the Government Gazette to the effect that he has done so in accordance with this Order; and
- (c) To release an official Press Statement in the daily and weekly print Media and on social media, that he has done so in accordance with this Order.
- [4] The applicants also seek cost order on Part A against the first respondent *de bonis propriis* with ancillary orders and seeks further and/or other alternative relief as may be deemed by the court. In paragraph B, the applicants seek an order declaring the first respondent's notice in the Government Gazette on March 2024 (Notice Number 4528) in terms of which he removed the second to fifth applicants from the register, as registered Private Higher Education Institutions, and his decision to remove these applicants from the Register of Private Higher Education Institutions, are unlawful and unconstitutional.
- [5] The applicants state that the application is based on the principle of legality because the first respondent's decision has not been taken lawfully. In essence the applicants seek to suspend and interdict the implementation of the above-mentioned decision.

BACKGROUND

- [6] It is common cause that the institutions failed to submit their 2021 Annual Report Forms on 30 April 2022 despite being granted extension by the Department to 30 June 2022. Again, on 23 November 2022 the Department issued an A-Guide to the Annual Report requiring the institutions to submit the 2021 Annual Report by 30 April 2023. They were granted further extension to 30 May 2023.

- [7] On 23 May 2023 the Department requested further outstanding information, inter alia Original Tax Clearance Certificate; Record of Academic Achievement; Auditor's Report on student data and reporting student data; Audit Programmes and Occupation Health and Safety Audit Report. On 27 June 2023 the first respondent issued the institutions with a Notice of Intent to Cancel Registration in terms of Section 57(2) (b) of the Higher Education Act, No. 101 of 1997 as amended (the Act) and Regulation 27
- (1) (i) (ii) of the Regulations for the Registration of Private Higher Institutions 2016 (the Regulations).
- [8] On 3 July 2023 the Department disseminated the notices of intent to cancel registrations to the institutions. On 10 July 2023 the institutions submitted extensive representations to the Department but without the requested information in the notice of intent to cancel registration. On 15 July 2023 the Deputy Director General responsible for Universities in the Department issued the institutions with recommendations for cancellation of the registration due to their failure to submit the requested information. On 28 July 2023 the first respondent issued notice to intention to cancel the registration of the institutions.
- [9] On 31 July 2023 the first respondent informed the applicants that their registrations were cancelled from the register and informed the institutions that their registration have been cancelled for failure to submit the following documents:
- 9.1. Auditor's report on student data and reporting of student data;
 - 9.2. Audit programmes;
 - 9.3 SAQA report on programmes;
 - 9.4. Occupational health and safety audit report;
 - 9.5. Proof if maintenance of financial surety or guarantee;
 - 9.6. Annual Financial Statements for the financial years ending 2021 and 2022;
 - 9.7. Record of academic achievement;
 - 9.8. Sample copy of any enrolment and application form;
 - 9.9. Institutional prospectus, calendar, or brochure; and
 - 9.10. Original tax clearance certificate.
- [10] It is common cause that on 22 September 2023 the institutions requested extension to file appeals against the decision to cancel the registration of institutions to the second respondent. They were granted two (2) extensions until February 2024 and a further extension until 30 May 2024. Of significance is that on 17 March 2024 their names were removed from the register.

- [11] The decisions were taken in terms of the Higher Education Act[1] (the Act) and Regulations for the Registrations of Private Higher Education Institutions[2] (the Regulations). The Act and the Regulations empower the first respondent to register the higher education institutions (the institutions) and require the Department to keep a register of such institutions. Section 62 of the Act provides that subject to section 63, the first respondent may cancel an institution's registration. Section 63 provides that the first respondent may not cancel registration unless the notice of intention to cancel and the reasons to do so are provided to an institution, and any interested persons an opportunity to make representations on the proposed cancellation and consider such representations.
- [12] It is common cause that on 22 September 2023 the institutions requested extension to file appeals against the decision to cancel the registration of institutions to the second respondent. They were granted two (2) extensions until February 2024 and a further extension until 30 May 2024.

URGENCY

- [13] According to the applicants the matter is urgent because it concerns the right of the institutions to maintain their registrations which are sanctioned by the Constitution. The institutions will suffer irreparable harm were the matter to be heard in the ordinary course. The position of learners who have already enrolled at the institutions is a factor that reinforces the need for the matter to be heard urgently. The applicants submit that the first respondent kept on engaging them giving the applicant false hope.
- [14] The first respondent acted unlawful in implementing the cancellation while the decision is under appeal. In paragraph 4 of the founding affidavit dealing with the removal of the names the applicant's averment is as follows:

"However, the First Respondent appears to have taken the third decision, notwithstanding that the first two decisions are a subject matter of an appeal to the Second Respondent who is considering the appeal."

- [15] The argument pertaining to this averment is that the first respondent could have waited for the prosecution of appeals. Accordingly, the first respondent's removal of the names whilst the decision to cancel is under appeal is unlawful and violated the institution's right to just administrative action. Thus, the institutions are entitled to the interim relief they seek in Part A.
- [16] Further, that the removal of the institutions from the Register is a separate administrative action, it could only be taken legitimately after the issuing of notice to be heard to the institutions. Thus, the first respondent's failure to give the institutions notice before removing the names from the register, has trampled the constitutional right of the institutions, prescribed in section 29
- (3) of the Constitution.

[17] Section 29 (3) provides that:

“Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.”

[18] The first issue on urgency is whether, based on the attack founded on legality, the matter must be considered as urgent. In *Apleni v The President of the Republic of South Africa and another*[3] it is held:

“... Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered.”

[19] The mere allegation pertaining to the detrimental impact on the Rule of Law does not render the application urgent. Factual enquiry is required in order to establish the abuse/unlawfulness and its attendant impact on the Rule of Law. In the present the decision that triggered the alleged urgency was taken on 17 March 2024 (removal decision). It has been preceded by the implemented decision which was taken on 31 July 2023. The applicants did not challenge the said decision neither on urgency nor in the ordinary course. The effect of the said decisions was the cancellation of names registration of the institutions, what followed on 17 March 2024 can simply be viewed as a further procedural step perfecting the decision of 31 July 2023. On its own it has no practical effect, and the court would be inclined to agree with the first respondent that the only effect is for the

institutions to hold out to the public, they are operating normally as if duly compliant with the Act.

[20] The court’s prima facie view is that what is being sought based on legality is intertwined with the decisions taken on 31 July 2023. In the light of no challenge being made prior to the 31 July 2023 on the same principle of legality the court is not inclined to agree that there can be an issue of legality on the latter decision unless that would be shown to exist during the proceedings in PART B. Furthermore, having regard to what the court has said about the practical effect, the current challenge is found to be wanting on the aspects of urgency for the same reason that the decision of 31 July 2023 was never challenged, not timeously and not at all.

[21] Flowing from the above, urgency in pronouncing whether lodging of appeals against the decision to cancel registration has the effect of staying the decision of 31 July 2023 (decision to cancel) will not be competent for determination in this court. The issue of appeals is directly linked with the second prayer and will have the effect of granting the order in the

second prayer when this court has already found that the applicant did not challenge the decisions of 31 July 2023 and only lodged appeals on 11 and 12 April 2024 after the second decision has been taken.

[22] Having said that I do not discount the fact that the institutions were granted extensions to lodge appeals on cancellation by the first respondent. The first respondent's submission is that the extensions granted resulting in keeping the names in the register was done in good faith same has not been returned by the applicants. The Act places responsibility on the first respondent to do what is right and reasonable.

[23] Furthermore, the question is whether the application meets the requirement of Rule 6 (12) of the Uniform Rules which provides as follows:

“(12)

- (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.
- (c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.”

[24] In *East Rock Trading 7 (PTY) LTD and another v Eagle Valley Granite (PTY) LTD and others* [4] the court held:

“The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at the hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application.”

[25] Regarding the substantial redress the applicants did not submit why they cannot be afforded substantial redress in the ordinary course. They simply say, “institutions will suffer irreparable harm”. The case of the applicants is also made on the suffering of the learners who are currently enrolled for the 2024 academic year. It is common cause that the affected learners have been given time until the end of the academic year. They are not affected by the decisions challenged. In conclusion the application is not urgent, in the result I grant the following order;

ORDER

1. The application is struck from the roll with costs because of lack of urgency.

2. Costs include costs of two counsel.

N P MALI

JUDGE OF THE HIGH COURT

Appearances

For the applicant: Adv. Soni SC Instructed by: RW, Pretoria nepaul@anand-nepaul.co.za
faathimaa@rwattorneys.co.za For the respondents: Adv. H Rajah (Ms) with Adv. L Brighton (Ms)
Instructed by: The State Attorney NkaMabasa@justice.gov.za

[1] Act 101 of 1997.

[2] Above (1)

[3](65757/2017)

[2017] ZAGPPHC 656; [2018] 1 All SA 728 (GP).

[4] Case Number 11/33767 South Gauteng High Court Johannesburg para 9

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