

SOUTH AFRICA / JUDGMENT

South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another (835/2022) [2023] ZASCA 86; 2024 (1) SA 103 (SCA) (2 June 2023) [2023] ZASCA 86

COURT

Supreme Court of Appeal

BEFORE

Dambuza, Gorven, Meyer, Daffue, Unterhalter

CASE / FILE NUMBER

835/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 835/2022

In the matter between:

SOUTH AFRICAN NURSING COUNCIL APPELLANT

and

KHANYISA NURSING SCHOOL (PTY) LTD FIRST RESPONDENT

MINISTER OF HEALTH

SECOND RESPONDENT

Neutral citation: South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another (835/2022)

[2023] ZASCA 86 (2 June 2023)

Coram: DAMBUZA ADP, GORVEN and MEYER JJA and DAFFUE and UNTERHALTER AJJA

Heard: 2 May 2023

Delivered: This judgment was handed down electronically by circulation to

the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 2 June 2023 at 11h00.

Summary: Interpretation of regulations – meaning of any calendar year in the definition of an academic year – regulations to accredit programmes in terms of the Nursing Act 33 of 2005 – use of dictionaries to attribute meaning – meaning that is functionally satisfactory – meaning within the context of the vocational training of nurses.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ndlovane AJ, sitting as the court of first instance):

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

Unterhalter AJA (Dambuza ADP, Gorven and Meyer JJA and Daffue AJA concurring):

Introduction

- [1] The first respondent, Khanyisa Nursing School (Pty) Ltd (Khanyisa), has for many years been accredited to train nurses. Khanyisa does so from its main campus in Johannesburg, and from campuses in other parts of the country. The appellant, the South African Nursing Council (the Council), was established in 1978. It derives its statutory powers from the Nursing Act 33 of 2005 (the Act). The Council's objects include the establishment of standards for nursing education and training within the ambit of the Act.
- [2] Khanyisa applied to the Council for accreditation to offer two nursing programmes: a diploma in nursing in the category 'general nurse'; and a higher certificate in nursing in the category 'auxiliary nurse' (the programmes). The approval of these applications was long delayed. On 26 April 2022, following a decision of the Council taken at its meeting on 30-31 March 2022, the Council notified Khanyisa that it had granted Khanyisa full accreditation to offer the programmes at four of its campuses. The letters of accreditation sent by the Council reflected the date of accreditation as 30-31 March 2022. This was made subject to a stipulation, framed as follows: 'the commencement date of the approved programme should be at the beginning of the academic year 2023 . . .'. I shall refer to this as the contested stipulation.
- [3] The contested stipulation was not acceptable to Khanyisa. If Khanyisa could have admitted students for the accredited programmes in May 2022, this would have allowed sufficient time to permit students admitted to these programmes to complete the programmes prior to the May 2023 board examinations. If Khanyisa was not permitted to do so, and was required to commence the programmes at the beginning of the following year, in 2023, this would be financially detrimental to it. Khanyisa's attorneys wrote to the Council. Khanyisa complained that the contested stipulation was unlawful. It sought urgent confirmation that it could commence its first intake in May 2022, failing which, Khanyisa would approach the courts on an urgent basis.

- [4] The Council was unmoved. It replied that the Council could not accede to Khanyisa's request because the Council was *functus officio*. Khanyisa then brought an urgent application in the Gauteng Division of the High Court, Pretoria (the high court) to review and set aside the accreditations, and, in essence, to order the Council to grant Khanyisa the accreditations, shorn of the contested stipulation. The review was predicated upon the proposition that the Council lacked the power to impose the contested stipulation, but if it did not, the contested stipulation was in any event an imposition that is arbitrary, capricious and unlawful.
- [5] The high court (per Ndlovane AJ) found that, in terms of the regulations promulgated under the Act, the accreditation of the programmes required that 44 weeks of training must be completed

within an academic year, which is defined to mean within a calendar year. A calendar year means 'a conventional calendar year', that is from January to December. This, the high court decided, did not conclude the matter. The high court held that as the Council had on previous occasions granted accreditation for programmes to commence in the middle of the year, Khanyisa had a legitimate expectation that the Council would accredit Khanyisa's programmes to commence on or before 4 July 2022. The Council, the high court reasoned, had unreasonably delayed the accreditation of Khanyisa's programmes. The high court declared that Khanyisa was permitted to commence the programmes on or before 4 July 2022, and ordered the Council to give full accreditation to Khanyisa to offer the programmes on this basis. The high court also ordered the Council to pay Khanyisa's costs, including the costs of two counsel, on the scale as between attorney and client. The high court considered that the Council's dilatory conduct in accrediting the programmes, when access to education is of such importance to the health care system, warranted the imposition of a punitive costs order. Aggrieved by the decision, the Council sought leave to appeal, which the high court granted.

Issues

- [6] The appeal turns on two issues. First, under the regulations that are of application to the accreditation of the programmes, an academic year is defined by reference to 'any calendar year'. The question therefore is this: Does any calendar year mean a year from 1 January to 31 December? And if it does, was the Council required to attach the contested stipulation to its accreditation of the programmes? If the Council was so required, then the contested stipulation was lawful. That conclusion would then give rise to a second issue. Did Khanyisa nevertheless enjoy a legitimate expectation to commence the programmes by the middle of 2022, given the past conduct of the Council, which had permitted accreditation of like programmes on the basis of commencement by the middle of a given year. This issue engages legal questions of no small complexity. In particular, whether an unlawful or *ultra vires* representation can found the basis of a substantive legitimate expectation. I need only engage this second issue if the first issue is resolved in favour of the Council.

The regulations: what is an academic year?

- [7] Section 42 of the Act sets out the requirements for an institution, such as Khanyisa, to conduct a nursing education and training programme. Khanyisa was required to apply in writing to the Council for accreditation of the programmes. To obtain accreditation, it had to submit information of the education and training programmes to be provided, and indicate how it would meet the prescribed standards and conditions for education and training.
- [8] Section 58 of the Act empowers the Minister of Health (the second respondent, who took no part in the proceedings) to make regulations, after consultation with the Council. Among the matters in respect of which the Minister may make regulations, two are here relevant. First, the Minister may determine the qualifications and conditions to be complied with which entitle a person to register to practise in one of the categories set out in s 31. This power is conferred in terms of s 58(1)(f). Section 31 lists five categories of practitioner, among them, a staff nurse and an auxiliary nurse. The programmes for which Khanyisa sought accreditation were, as I have indicated, to train learner nurses to qualify as practitioners in these two categories. Second, s 58(1)(g) gives the Minister the power to make regulations so as to accredit institutions as nursing education institutions.
- [9] The Minister has made regulations in terms of ss 58(1)(f) and (g). In terms of s 58(1)(f), the Minister made regulations specifying the minimum requirements for the education and training of a learner to register as an auxiliary nurse (regulation R 169 dated 8 March 2013) [1] and as a staff nurse (regulation R 171 dated 8 March 2013)[2]. Regulation 5(3) of R 169 stipulates that the duration of the programme is ‘one (1) academic year of full-time study’.

Regulation 5(3) of R 171 stipulates that the duration of the programme is ‘three (3) academic years of full-time study’.

The difference of duration reflects the difference in the qualification. Both regulations measure duration by reference to academic year(s) of full-time study. Both regulations define an academic year as ‘a period of at least 44 weeks of learning in any calendar year’.

- [10] The Minister has also made regulations in terms of s 58(1)(g). Regulation R 173 of 8 March 2013[3] sets out the conditions for the accreditation of an institution as a nursing education institution. Accreditation means the certification

of an institution, for a specified period, as a nursing education institution, with the capacity to offer a prescribed nursing

programme. Such programmes are those complying with the Council’s prescribed accreditation requirements.

- [11] Khanyisa applied for the accreditation of the programmes in terms of regulations R 169 and R 171. This was done on 19 December 2014. After lengthy engagements, the Council, at a meeting on 31 March 2022, decided to grant the accreditation sought. The letters of accreditation were dated 26 April 2022. These letters stated that the Council was to issue certificates of accreditation in the following terms (relevant for present purposes):

‘Type of accreditation: Full Accreditation

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

Duration of accreditation: Five (05) years

1 January 2023 – 31 December 2027.’

I have referred to this as the contested stipulation.

- [12] Khanyisa objected to the contested stipulation. The contested stipulation carried the consequence that Khanyisa could not commence the programmes and offer them to students to enrol in 2022, and have these students write their examinations in May 2023 (and thereby comply with the 44 weeks of learning prescribed by the regulations). Rather, Khanyisa would have to await the start of 2023. This would not only cause Khanyisa financial harm, it would constrain the training of nurses, when the country suffers from a shortage of qualified nurses.
- [13] As I have recounted, the Council was unyielding. Khanyisa brought urgent review proceedings to review and set aside the contested stipulation so as to enjoy the accreditation of the programmes, shorn of the contested stipulation.
- [14] It was common ground between counsel for the parties, who appeared before us, that the question as to whether the Council had the power to impose the contested stipulation turned upon the meaning to be attributed to the definition of an academic year in regulations R 169 and R 171. I recall that these regulations defined an academic year to mean ‘a period of at least 44 weeks of learning in any calendar year’. If a calendar year means a year starting from 1 January and ending on 31 December, then the Council could (and indeed was obliged to) attach the contested stipulation to the accreditation of the programmes because the academic year could only commence, at the earliest, on 1 January 2023. If, however, a calendar year means any one-year period, computed with greater flexibility, then the Council was under no obligation to impose the contested stipulation and should not have done so.
- [15] The principles that guide our approach to interpretation have often been stated: interpretation is a unitary exercise that takes account of text, context and purpose.[4] Frequently, lawyers have recourse to dictionaries as the repository of the ordinary meaning of words. This is often a good starting

point. But the lawyer’s reverence for dictionaries has limits. As this Court has observed, to stare blindly at the words used seldom suffices to yield their meaning in a statute or contract.[5] Dictionaries record the history of how (often disparate) language communities have used words. There is no straightforward attribution

of a dictionary meaning of a word as the word's ordinary meaning so as to construe a statute, subordinate legislation or a contract. The dictionary meaning of a word will often give rise to further questions: for whom is this the ordinary meaning, as used in which community? And the different shades of meaning with which a word has been used, over time, quite often lead to selectivity bias. That is to say, the interpreter chooses the dictionary meaning that best suits the preferred outcome of the case, rather than the meaning that shows the greatest fidelity to the meaning that best fits what has been written, given what we know as to the institutional originator of the words, what the words are used for, and the larger design of the instrument we are called upon to interpret.

[16] The case before us well illustrates the risks of using dictionaries to make simplistic attributions of meaning. Many dictionaries record that a calendar year is a period of 365 or 366 days, starting on 1 January and ending on 31 December. In many settings this makes sense. In other settings, this is not so. In astronomy, for example, a calendar year is the time taken by the earth to make one revolution around the sun. What a calendar year means depends upon the function the words are intended to serve. Dictionary entries seldom yield uniform meanings. One reputable dictionary includes this meaning of a calendar year: it is 'a period of time equal in length to that of the year in the calendar conventionally in use'.^[6] In an early judgment of this Court, a calendar year was defined as the period from 1 January to 31 December.^[7] Commentary on the meaning of a calendar year has been less categorical. The learned author of LAWSA writes that the meaning of a calendar year 'is ambiguous since it may mean one of the cyclical numbered years commencing on 1 January or similar period commencing on any date. What the term "calendar" seems to convey is that the period in question is calculated, not by the enumeration of a special number of days, but by fixing its effluxion by reference to the corresponding date in the succeeding year'.^[8]

[17] What then is the meaning of a calendar year which we find in the definition of an academic year in regulations R 169 and R 171? The function of the definition is to determine the duration of the programmes. In both regulations, regulation 5(3) specifies the duration of the programme, and does so by reference to the number of academic years of full-time study. How long is that? The definition of an academic year tells us that an academic year means 44 weeks of

learning. And then the question is this: 44 weeks of learning, bounded within what time period? The definition goes on to state 'in any calendar year'. That could mean within a period in any year commencing 1 January and ending on 31 December. And that is what the Council contends for. I am however disinclined to this interpretation, and for these reasons.

[18] First, these regulations are concerned to specify the minimum requirements necessary to train nurses in different categories of practice. The regulations thus treat vocational training and the meaning of an academic year within this setting. There is no reason to think that, in a modern era of vocational training, there is any convention that requires an academic year to run from January to December. On the contrary, there are very good reasons to suppose, as the founding affidavit reminds us, that the shortage of qualified nurses requires flexibility

as to the period within which an academic

year can run. Moreover, since vocational training requires practical training in hospitals and other health care facilities, rigidity as to the time period that may constitute an academic year is not indicated.

[19] Second, the function of the definition of an academic year is to demarcate the period within which the minimum of 44 weeks of full-time study must take place. The plain purpose of this demarcation is to ensure that the 44 weeks does not take place over an indeterminate time period, but a calendar year. That function is met if a calendar year means any year, reckoned from a starting month in a given year, and ending a year hence. There is some modest textual support for this, as Khanyisa submitted, by the use of the words ‘any calendar year’ rather than ‘a calendar year’. But the textual nudge is subsumed by the altogether greater weight that would attribute a meaning that is functionally

satisfactory, while also allowing for flexibility appropriate to vocational training.

[20] Third, the Minister made these regulations, as required by s 58 of the Act, after consultation with the Council. Given that the regulations concern vocational training, in a field of great national need, there is little reason to attribute to the Minister an intention to determine that an academic year must take place within the confines of 1 January to 31 December.

[21] This interpretation is strengthened by the following. The regulations were made after consultation with the Council. The affidavits before us make it plain that the Council has, over many years, accredited

programmes that were permitted to commence in an academic year that was not bounded by 1 January to 31 December.

[22] Of particular salience is the following conduct of the Council. On 22 November 2019, the Minister made regulations in terms of s 58(1)(f) to approve the minimum requirements for the education and training of students to qualify in the category of midwife (regulation No 1497).[9] This regulation was made after consultation with the Council. It contains much of what is to be found in R 169 and R 171 (promulgated in 2013). In particular, regulation No 1497 specifies that the duration of the programme is one academic year of full-time study. It defines an academic year in identical terms to the definitions found in regulations R 169 and 171, that is ‘a period of at least 44 weeks of learning in any calendar year’. If the Council, consulted by the Minister, had sought a change to the meaning of an academic year in regulation No 1497 it would no doubt have raised this issue. There is no evidence that it did so, and no change was made. The definition of an academic year was retained. And, both before and after the promulgation of regulation No 1497, the Council continued to accredit programmes with a mid-year intake of students. The Council has plainly conducted itself on the basis that an academic year, and thus a calendar year, does not mean 1 January to 31 December.

[23] The conduct of the Council is by no means dispositive of what an academic year must be taken to mean. The Council may have made these accreditations in error. But their conduct is at least indicative of the fact that the vocational training of nurses has not taken place under any convention that connotes an academic year to mean 1 January

to 31 December. And further, the Council, having been consulted in the making of the regulations, did not understand the regulations to mean what it now contends for.

[24] Fourth, the meaning of an academic year is informed by the timing of the examinations. The examinations of students in the different categories of practice have taken place in May. If the academic year must run for 44 weeks within the period 1 January to 31 December, this would give rise to the wasteful consequence that the teaching of certain programmes will end long before the examinations take place. This would delay students obtaining their qualifications and their

entry as qualified practitioners into the health care system, where their services are in short supply. The meaning of an academic year must be understood with practical common sense, given the manner in which vocational training needs to be offered and has been organised.

[25] For these reasons, I find that the meaning of ‘any calendar year’ in the regulations means a period that runs from a date of commencement in any given year and extends for 12 months from that date. Once that is so, the Council was not required to impose the contested stipulation, and had no defensible reason to do so, given

the extensive time it had taken to decide upon the accreditation of the programmes, and the evident need for the programmes to commence as soon as possible after accreditation.

[26] I caution that this conclusion as to the meaning of ‘any calendar year’ is confined to the regulatory setting in which this term is used in the regulations to which I have referred.

[27] Given my finding on the first issue in respect of the meaning of ‘any calendar year’, I need not engage the second issue in respect of whether Khanyisa enjoyed a legitimate expectation to commence the programmes by the middle of 2022 in light of the past conduct of the Council.

[28] The order made by the high court is accordingly sustained, though for different reasons. As to the costs order imposed by the high court, that order fell within the high court’s discretion, the exercise of which does not warrant our intervention.

[29] In the result, the following order is made:

D N UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For the appellant: J A L Pretorius and R C Netsianda Instructed by: Maponya Incorporated, Pretoria Phatshoane Henney Attorneys, Bloemfontein For the respondents: E van As and A Basson Instructed by: JJ Jacobs Attorneys Incorporated, Pretoria Pieter Skein Attorneys, Bloemfontein

[1] Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration

in the category Auxiliary Nurse, GN R169, GG 36230, 8 March 2013.

[2] Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration

in the category Staff Nurse, GN R171, GG 36232, 8 March 2013.

[3] Regulations relating to the accreditation of institutions as Nursing Education Institutions, GN R173, GG 36234, 8 March 2013.

[4] Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[5] Plaaslike Oorgangsraad, Bronkhorstspuit v Senekal 2001

(3) SA 9 (SCA) at 18J-19A.

[6] See for example in the Merriam-Webster Dictionary.

[7] R v Close Settlement Corporation Ltd 1922 AD 294 at 301.

[8] 27 Lawsa 2 ed para 298.

[9] Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration

in the category midwife, GN 1497, GG 42849, 22 November 2019.

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