

SOUTH AFRICA / JUDGMENT

Tax Faculty NPC v South African Institution of Taxation NPC (48140/21) [2022] ZAGPPHC 839 (28 October 2022)

[2022] ZAGPPHC 839

COURT

North Gauteng High Court, Pretoria

BEFORE

de Vos

CASE / FILE NUMBER

48140/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 48140/21

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

28

October 2022

In

the matter between

THE

TAX FACULTY NPC

Applicant

and

SOUTH

AFRICAN INSTITUTION OF TAXATION NPC Respondent

JUDGMENT

DE VOS AJ

Introduction

- [1] This Court is seized with a review application. The applicant contends it enjoyed accreditation with the respondent, until September 2021 when the respondent decided that the applicant had to re-apply for accreditation. The applicant seeks to review the September 2021 decision. The applicant's case is premised on the principles of administrative law. It contends the September 2021 decision was administrative in nature and was taken without prior notice or a hearing.
- [2] The respondent disputes the applicant's case in relation to accreditation. The respondent places the dispute between the parties much earlier than September 2021 when accreditation was allegedly revoked. The respondent disputes the applicant's version of accreditation. In particular, the disputes the authenticity and validity of the accreditation document the applicant relies on as the basis for its accreditation. The respondent contends that the accreditation document the applicant relies on is irregular (if not fraudulent) and does not have any validity at all. The respondent raises a host of reasons why it contends the accreditation document is irregular.
- [3] I must first determine if the applicant enjoyed accreditation on the basis it contends. If not, then the applicant's review does not get out of the starting blocks.

The parties

- [4] Both parties are non-profit companies. The respondent is a Controlling Body in terms of Section 240A of the Tax Administration Act. The respondent's recognition as a Controlling Body is on the basis that it maintains, in respect of natural persons who provide advice on the application of the Tax Act or to complete tax returns, relevant and effective continuing professional education requirements. The respondent's members must undertake a minimum of 15 tax related Continuous Professional Education hours per year. Of the required CPD, 60% must be verifiable by the respondent and the remaining 40% by be non-verifiable. The respondent is also a registered professional body recognised by the South African Qualifications Authority ("SAQA") in terms of section 31(1)(i) of the National Qualifications Framework Act, 67 of
2008. SAQA is charged with overseeing the further development and implementation of the National Qualifications Framework and promotes
- the framework as a system of communication, co-ordination and collaboration across education, training, development and work.

- [5] The applicant provides CDP training courses to benefit person who hold professional designations registered with SAQA.

Factual background to the alleged accreditation

- [6] Much of the background relating to the creation and functioning of the applicant is in dispute. This is however not where the action lies. Instead, the focus is the alleged accreditation and the circumstances under which the accreditation was allegedly obtained.
- [7] On 13 July 2018, the Head of CPD at the applicant, Ms Whitehead, sent an email to the respondent's (then) head of Education, Ms C Laubscher, enquiring whether the applicant should apply to the respondent for accreditation.
- [8] On 16 July 2018 Ms Laubscher replied to Ms Whitehead. Ms Laubscher provided Ms Whitehead with the policy and advised that in terms of the current accreditation policy it will not be feasible to accredit the applicant given that the respondent will have to accredit the applicant as an institution as well as each of the CPD's offerings. Ms Laubscher advised Ms Whitehead that the parties will either have to revisit Institutional Accreditation or put out a tender notice for a CPD provider for a period of five years. To summarise the position that Ms Laubscher conveyed to Ms Whitehead: [i] the applicant could not apply [ii] the parties would have to revisit its policy if the applicant were to apply and [iii] even then an accreditation period of five years would require certain further steps.
- [9] The answer to applicant's question whether it should apply for accreditation was categorically no.
- [10] On 18 July 2018, despite the categorial no, the applicant sought to apply for accreditation as a tax CPD provider. The application letter is addressed to Ms Laubscher (in the capacity as Head of Education and Standards for the respondent). The letter notes that there is no policy for the accreditation sought but that the applicant seeks an exemption. The letter contains nothing other than an indication of the applicant's current accreditations and approvals to provide certain short courses.
- [11] The respondent contends that aside from the non-compliance with the policy and non-payment of the fees, the application is curious in circumstances where -
- a) The applicant had already been advised by Ms Laubscher that it will not be feasible to accredit the applicant in respect of the existing policy.
 - b) To the extent exemption was sought from the policy, that in itself is curious, as the policy does not provide for exemption.
 - c) The basis on which the applicant sought exemption - its accreditation as a Skills Development Provider in respect of the Respondent's Occupation Qualifications - are not connected to the provision of CPD. The very basis for the exemption appears flawed. The respondent contends that the grounds for exemption was nonsensical.

- d) The application was not made in terms of the policies and procedures determined by the respondent for applications for accreditation as a CPD provider.
 - e) The applicant had not paid any of the prescribed application fees in respect of either institutional accreditation or programme accreditation.
- [12] On 20 August 2018 Ms Laubscher drafts a response to the application. This draft is central to the dispute. Ms Laubscher's version of these events are that she became "uncomfortable" with the application as Mr Klue (the applicant's CEO and deponent to their affidavits) "effectively dictated the content of her reply to her under the implied threat that, should she refuse, there would be consequences". Ms Laubscher's version is that this threat resulted in a first draft of the accreditation document. Ms Laubscher, "still uncomfortable" forwarded the draft accreditation document to the respondent's COO as well as Ms Whitehead. The Court has been provided with this email. In the body of her email Ms Laubscher asks for "input". Ms Laubscher contends that the matter did not go any further and, to the best of her recollection, the letter was in draft format only and never finalised.
- [13] The allegation that the applicant's CEO (and deponent), Mr Klue, dictated the contents under threat of repercussions receives a bare denial in the replying affidavit. It is a serious allegation made in detail and supported with objective, albeit circumstantial evidence, in the form of an email.

The 20 August 2018 letter (the accreditation document)

- [14] The applicant relies on a letter dated 20 August 2018 as the basis for its accreditation. The accreditation document, which is essentially a letter, states that the applicant is accredited with the respondent as a Tax CPD provider. It contains a host of conditions and explanations of what the accreditation entails. It is signed by Caretha Labuscher: Head of Education and Standards. The accreditation document appears on a SAIT letterhead. It is this accreditation document on which the applicant hinges its case for accreditation.
- [15] Ms Laubscher contends that -
- a) She first had sight of the accreditation document in 2021 when it was brought to her attention by the respondent's attorney of record.
 - b) The accreditation document came as a surprise to her since, to the best of her recollection the draft accreditation document was never formalised.
 - c) She notes that the accreditation document was ostensibly signed using a scanned copy of her signature.
 - d) She denies having approved the draft accreditation document or having affixed her electronic signature to the accreditation document, or that she gave instructions for the accreditation document to be signed on her behalf.

- e) Even had she signed the accreditation document she did not have the requisite authority to do so or to grant any form of accreditation or exemption in respect of CBD to the applicant. The deponent, Mr Klue, having been intimately involved in the affairs of the respondent, and especially with CPD, was well aware of this fact.
 - f) The CPD Accreditation policy specifically provides that any application for accreditation is to be considered by the respondent's accreditation committee.
 - g) The committee was never convened nor did it at any time consider or approve the applicant's application for exemption or, for that matter, accreditation.
- [16] The respondent provides a confirmatory affidavit from Ms Laubscher. The confirmatory affidavit specifically refers to the paragraphs in the main affidavit that deals with her version of events.
- [17] The applicant's dispute of Ms Laubscher's version hinges on the email sent from Ms Laubscher on 27 August 2018 in which the decision as conveyed to the applicant with the approval document attached. The respondent raised this allegation in reply. The respondent attached this email for the first time in reply. The applicant contends that the respondent's deponent has access to Ms Laubscher's emails and must have known of this email. The applicant requests the Court to draw a negative inference from the respondent's failure to mention the 27 August 2021 email. The applicant also, based on this email, seeks to cast aspersions on the "reliability of Mrs Laubscher's confirmatory affidavit".

The agreement

- [18] At the same time, the parties were concluding an agreement. It is common cause that this agreement was concluded on 18 August 2018 and terminated on 29 June 2021. The agreement is for services

provided by the applicant in the context of CPD. The respondent expressly does not rely on any rights contained in this agreement.

The respondent admits that the agreement was terminated in 2021.[1] The respondent contends that the cancellation of the agreement is not the subject of the review proceedings.[2] The respondent contends that any accreditation rights the applicant enjoyed were granted and regulated by this agreement. As the

agreement has been terminated, contends the respondent, the applicant enjoys no further rights to accreditation.

- [19] The communications surrounding the termination of the agreement, however, is relevant to the dispute and will be set out. On 29 June 2021 the respondent terminated the agreement with effect from September 2021.[3] The termination letter states that the agreement provided for a 3-month notice period for terminating the agreement and the respondent asserts the right to do so.

[20] On 10 September 2021 the respondent writes to the applicant. The letter refers to correspondence of 29 June 2021 in which the respondent gave notice of termination of the agreement effectively as of close of September 2021. The letter states that "in the absence of an agreement going forward" the respondent will only continue to recognise the applicant's courses accredited with the respondent until the end of September

2021. The respondent invites the applicant to apply for accreditation as a third-party service in future.

[21] On 14 September 2021 the respondent placed a public notice on its website that as of 1 October 2021 the respondent will not be providing accreditation of CPD provided by the applicant. On 14 September 2021 the applicant's CEO wrote to the respondent's Board of Directors in response to the public notice. The complaint was not the termination of the agreement, but rather the public notice. The email is then followed up two days later with a letter from the applicant's lawyers complaining about the notice as well as the termination.

[22] The lawyer's letter results in a response from the respondent's CEO on 17 September 2021 is of assistance. The core aspect of the letter is that -

3. We are also fully aware of the 2018 accreditation document to which you refer. Our investigation revealed that this accreditation never went through the formal process an approval normally requires. None of the standard documentation required was submitted based on our records, and all fees were waived. The agreement was set for a 5-year term as opposed to the normal three-year term for reasons unknown. Given these deviations, the alleged accreditation is grossly irregular, contrary to policy and has no status whatsoever.
4. It is patently evident from our understanding of the situation that you once again acted contrary to policy and outside of your scope of authority (if any). The SAIT staff operated under your instruction

and implicit understanding that they had to act as you commanded. I (as CEO) was never properly apprised of the details of this CPD accreditation until long after it was drafted. Given that the alleged 2018 accreditation was provided under circumstances wholly outside of its policy, this unique deviation can only be justified from a SAIT governance perspective as being in support of the SAIT/Tax Faculty agreement.

.....

The Tax Faculty was in a false monopoly over SAIT membership CPD. The TAX Faculty was allowed to offer COD to SAIT members while the other had effectively been pushed away.

[23] The contents of this letter plus Ms Laubscher's version of events creates the factual matrix on which the respondent disputes the applicant's reliance on the accreditation document.

The parties' positions

- [24] The applicant accepts that the agreement was lawfully terminated. However, the applicant contends that it enjoyed accreditation outside the agreement in terms of the accreditation document. The respondent's decision of September 2021 termination the accreditation as conferred by the accreditation document in an administratively unfair manner.
- [25] The respondent contends that the only accreditation the applicant enjoyed was in terms of the agreement. As everyone concedes the agreement has been terminated, there are no rights the applicant enjoys outside the agreement. The respondent contends that there was no decision in September 2021 that had to be exercised in a manner that complied with administrative rights. In fact, the "decision" of September 2021 was a letter in which the respondent reminded the applicant of the termination of the agreement a month earlier.

Consideration of the dispute

- [26] The applicant's case stands and falls on the accreditation document. The respondent disputes the authenticity and validity of the accreditation document. The respondent's version regarding the accreditation document is devastating.
- [27] The respondent contends that the accreditation document was in fact the result of the applicant's CEO asserting authority over the respondent's employees to draft the document. The applicant's CEO, the deponent, did not deny this allegation with any seriousness. Detailed allegations that Ms Laubscher felt threatened and the type of threat presented to her was pleaded. Ms Laubscher then pleaded that her discomfort resulted in her emailing the draft accreditation document (dictated to her by the applicant) to her COO and an employee of the applicant asking for "input". It is bizarre for Ms Laubscher to ask the applicant for accreditation for input on the accreditation document. But it makes sense if Ms Laubscher had been told what to state in the letter by the applicant's CEO and was checking if she had correctly captured it. But whatever inference the Court may be tempted to draw in this regard, there is no need to do so, as the applicant has presented a bare denial to a devastating and detailed allegation.
- [28] There is thus only one version before the Court regarding the process through which the accreditation letter was drafted: under threat from the applicant's CEO to Ms Laubscher. Had this allegation been false it would have detracted a serious dispute from the applicant. The severity of the allegation invites a detailed and comprehensive denial, yet, the applicant provides none. The absence of a detailed denial is made worse by the fact that the person Ms Laubscher accuses of threatening her and dictating the letter to her - is in the applicant's deponent.
- [29] The absence of a denial must be seen in light of the applicant's failure to dispute several other allegations regarding the process through which the accreditation document was created. The following facts are pleaded in detail by the respondent:
- a) None of the procedures required to provide accreditation were followed.

- b) Ms Laubscher never had authority to grant accreditation.
 - c) The applicant's CEO was aware of Ms Laubscher lack of authority and the absence of the correct procedures being followed.
 - d) The respondent's policy did not permit accreditation for the applicant nor for exemption from the policy.
 - e) The applicant applied for accreditation after being told categorically that it cannot be granted accreditation.
 - f) The applicant was then bizarrely granted accreditation (in a letter from the same person who categorically said it was impossible) without paying any fees for a period not provided for in the policy.
 - g) Ms Laubscher denies the authenticity of the accreditation document as she did not append her signature on the document.
- [30] These facts were pleaded in detail and not seriously disputed by the applicant. The Court is essentially faced with only the respondent's version in relation to the creation of the accreditation document, its authenticity and validity.
- [31] The applicant's case hinges on an accreditation document. The respondent disputes the accreditation document. The respondent disputes it is a letter signed by the person whose signature appears on the document. It is a dispute first about the authenticity of the document. In addition, the respondent contends that the document is irregular (if not fraudulent) and does not have any validity at all. The Court in fact only has the version of the respondent before it that the accreditation document is the result of the applicant's CEO dictating the contents of the accreditation document to Ms Laubscher under threat. The accreditation document is not a valid document created by the respondent as it was drafted under threat and dictated by Mr Klue. The applicant's case has not been proven as it has failed to show it enjoyed accreditation in terms of the accreditation document.[4]
- [32] Even if the Court were to view the applicant's bare denial of these events as sufficient to raise a bona fide dispute of fact, as these are motion proceedings, seeking final relief, Plascon-Evans is the Court's touchstone and the version of the respondent is to be preferred if a bona fide dispute of fact had arisen.
- [33] Lastly, the Court must consider the email of 27 August 2018 sent by Ms Laubscher to the applicant to which the accreditation document was allegedly attached. The applicant requests the Court to draw an inference, based on this email, that the respondent's CEO must have known about the accreditation document and is not playing open cards with the Court. The applicant contends that as the respondent's CEO had access to Ms Laubscher's emails he must have known of the 27 August 2018 email. Firstly, the argument does to follow. The respondent's CEO having access to Ms Laubscher's email account does not mean he would know of the 27 August 2018 email. Secondly, the first time the applicant refers to

the email is in reply. The respondent has not been afforded an opportunity to respond to this. The Court does not accept the invitation to draw an inference based on the email of 27 August 2018 as contended for by the applicant. In any event, even if Ms Laubscher had sent the email - her unchallenged version is that the accreditation document was a document dictated to her by the applicant's CEO and extracted under threat.

ORDER

[34] The court orders -

- a) The application is dismissed with costs, including the costs of senior counsel.

I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicants: EC LABUSCHAGNE SC

Instructed by: Johan

Victor Attorneys

Counsel for the Amici: B C STOOP SC DR SHOZI

Date of the hearing: 01

August 2022

Date of judgment: 28

October 2022

[1] CL 10-7 para 14

[2] CL 10-12 para 30

[3] CL 2-200

[4] Of course the applicant enjoyed accreditation in terms of the agreement - however, everyone agrees that has been terminated

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