THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another (835/2022) [2023] ZASCA 86 (2 June 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal with costs, including the costs of two counsel, against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The facts of the matter were as follows. The first respondent, Khanyisa Nursing School (Pty) Ltd (Khanyisa), had for many years been accredited to train nurses. Khanyisa applied to the appellant, the South African Nursing Council (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 . . .'. (The contested stipulation.)

The contested stipulation was not acceptable to Khanyisa. If Khanyisa was required to commence the programmes at the beginning of the following year, in 2023, this would have been financially detrimental to it. Khanyisa's attorneys wrote to the Council and complained that the contested stipulation was unlawful. The Council was unmoved. Khanyisa then brought an urgent application in 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 was arbitrary, capricious and unlawful.

In the SCA, the appeal turned on two issues. First, under the regulations that were of application to the accreditation of the programmes, an academic year was defined by reference to 'any calendar year'. The question therefore was this: Did any calendar year mean a year from 1 January to 31 December? And if it did, 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. The SCA needed only engage this second issue if the first issue was resolved in favour of the Council.

It was common ground 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 the 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 (regulation R 169) and the 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 (regulation R 171). The SCA found that both regulations measured duration by reference to academic year(s) of full-time study. And that both regulations defined an academic year as 'a period of at least 44 weeks of learning in any calendar year'.

Notably, the SCA cautioned against lawyers' frequent recourse to dictionaries as the repository of the ordinary meaning of words. The SCA remarked that while this was often a good starting point, the lawyer's reverence for dictionaries had limits. There was 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 SCA found that the case before it well illustrated the risks of using dictionaries to make simplistic attributions of meaning. What a calendar year meant depended upon the function the words were intended to serve. Dictionary entries seldom yielded uniform meanings.

The SCA found that it was disinclined to the Council's interpretation that 'any calendar year' meant within a period in any year commencing 1 January and ending on 31 December for the following reasons. First, there was no reason to think that, in a modern era of vocational training, there was any convention that required an academic year to run from January to December. Second, the function of the definition of an academic year was to demarcate the period within which the minimum of 44 weeks of full-time study had to take place. That function was met if a calendar year meant any year, reckoned from a starting month in a given year, and ending a year hence. Third, the Minister made these regulations after consultation with the Council. Given that the regulations concerned vocational training, in a field of great national need, there was little reason to attribute to the Minister an intention to determine that an academic year had to take place within the confines of 1 January to 31 December. And further, the Council, having been consulted in the making of the regulations, had plainly not conducted itself on the basis that the regulations meant what it now contended for. This, because, inter alia, the Council had, over many years, accredited programmes that were permitted to commence in an academic year that was not bounded by 1 January to 31 December. Fourth, the meaning of an academic year was informed by the timing of the examinations: in May. If the academic year had to run for 44 weeks within the period 1 January to 31 December, this would have given rise to the wasteful consequence that the teaching of certain programmes would end long before the examinations took place.

The SCA thus found that the meaning of 'any calendar year' in the regulations meant a period that ran from a date of commencement in any given year and extended for 12 months from that date. Once that was so, the SCA found that 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. The SCA cautioned that this conclusion as to the meaning of 'any calendar year' was confined to the regulatory setting in which this term was used in the relevant regulations.

The SCA found further that it did not need to engage the second issue in respect of whether Khanyisa enjoyed a legitimate expectation, given the SCA's finding on the first issue being resolved in favour of Khanyisa.

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