**IN THE HIGH COURT OF SOUTH AFRICA**

**(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO.: EL365/2018

Matter heard on: 27/06/2019

Judgment delivered on: 09/07/2019

In the matter between:

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| **PHILASANDA GUNGQA** | **1ST APPLICANT** |
| **YAMKELA MBUNDE** | **2ND APPLICANT** |
| **NOZIQOQO NTAME** | **3RD APPLICANT** |
| **CEBOLAKHE SUKWANA** | **4TH APPLICANT** |
| **NTOMBIZANELE MZOLA** | **5TH APPLICANT** |
| **SOYISO SOGWEDLA** | **6TH APPLICANT** |
| **ZANELE KOYANA** | **7TH APPLICANT** |
| **AYANDA YOYO** | **8TH APPLICANT** |
| **AMKELWE NINI** | **9TH APPLICANT** |

and

**LILITHA COLLEGE OF NURSING** **1ST RESPONDENT**

**THE ACTING PRINCIPAL:**
**LILITHA COLLEGE OF NURSING** **2ND RESPONDENT**

**THE EAST LONDON CAMPUS HEAD**
**LILITHA COLLEGE OF NURSING** **3RD RESPONDENT**

**THE MEC: DEPARTMENT OF HEALTH** **4TH RESPONDENT**

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**JUDGMENT**

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**SMITH J:**

[1] The applicants instituted urgent proceedings against the respondents in two parts. In the first part they sought an interdict reinstating them as students of Lilitha Nursing College ("the College") and interdicting the respondents from prohibiting them from writing their exams. And in the second part they sought an order reviewing and setting aside the decision taken by the respondents on 31 May 2019 to cancel their registrations as students of the College.

[2] On 18 June 2019, however, apparently because the applicants had been allowed to continue attending classes and writing exams, Mbenenge JP ordered that only the second part of the notice of motion, namely the review application must be enrolled for hearing on 27 June 2019.

[3] The College admitted and registered the applicants for a four year nursing course during January 2018, and they are currently still attending classes in those capacities, despite the impugned decision to cancel their registrations. The respondents are: the Lilitha College of Nursing, a nursing college established in terms of the provisions of the Education and Training of Nurses and Midwifes Act, No. 4 of 2003 ("the Eastern Cape Act"); the Acting Principal of the College; the East London Head of the College; and the Member of the Executive Council for Health, Eastern Cape.

[4] The facts are mainly common cause and can be briefly summarised as follows. During February 2017 the College published a notice inviting applications from prospective students. The following requirements were stipulated: a Grade 12 Certificate, with aggregate D or E pass; English Language 3 (D symbol or better); Biology (Life Sciences) level 4 (D symbol or better); and other science subjects which are considered when the Admission Point System is computed, the minimum points required being 18.

[5] All the applicants submitted duly completed application forms, together with their year-end matric results. They were all called for interviews and thereafter, during January 2018, advised that their applications were successful and they were accordingly enrolled for the four year nursing diploma.

[6] They attended classes from 2 February 2018, and were required to sign various forms in order to formalise their enrolment and registration in terms of the provisions of the Nursing Act No. 33 of 2005 ("the Nursing Act").

[7] On 9 March 2018 they were told by the third respondent that the College discovered that they had been enrolled erroneously since they failed to secure the minimum admission points. They thereafter launched urgent proceedings challenging the decision to cancel their registrations, *inter alia*, on the ground that they were not given a hearing before the decision was taken.

[9] On 29 March 2018 an interim order issued in terms of which they were reinstated as students pending the finalisation of the review application. They thereafter resumed their studies and successfully completed their first year of study.

[10] On 19 April 2019 the first respondent filed a counter-application seeking to review and set aside its decision to admit and enrol the applicants to the four year nursing diploma course. That application was, however, not pursued, and on 2 May 2019 Tokota J granted an order (by agreement between the parties) in terms whereof: the decision expelling the applicants from the four year programme was reviewed and set aside; the applicants were declared entitled to make representations as to why their registrations should not be cancelled; and the College was directed to consider the applications *de novo*, in the light of the applicants' representations.

[11] All of the applicants submitted written representations pursuant to that court order, and the College responded to each of them individually, stating that it had given due consideration to the representations, but had nevertheless decided to cancel the applicants' respective registrations. The decision was taken on the basis

that a candidate who fails to meet the prescribed requirements should not be allowed to enrol for the four year nursing programme. The applicants were all told that since they failed to obtain the minimum admission points, their admissions were unlawful and *ultra vires*.

[13] The applicants now challenge that decision on the ground that the College authorities did not have either express or implied powers in terms of the Eastern Cape Act or the Nursing Act to cancel the registration of a student after his or her admission. They contend that after having taken the decision to admit and enrol them for the course, the College was *functus officio*, and should have applied to court for an order reviewing and setting aside the decision.

[14] While the initial decision to cancel the applicants' registration was fatally tainted by the fact that *audi alteram partem* had not been observed, that irregularly has since been remedied by the order of Tokota J. In terms of that order, the impugned decision was aside and the College compelled to reconsider the matter *de novo,* in the light of the applicants' written representations. And in terms of the principle of *omnia praesumuntur rite acts esse*, I am constrained to accept that the decision was taken by the duly empowered structure or functionary of the College. The only issue which accordingly falls for decision is whether the College has implied authority to cancel an erroneous registration.

[14] It is trite that administrative powers can either be derived from express or implied legislative provisions. Where an implied power is relied upon, the fundamental enquiry will always be whether the power is ancillary to the express

power, in other words, that it is reasonably incidental to the proper carrying out of an authorised act. (*Johannesburg Municipality v Davies* 1925 AD 395 at 402).

[15] In deciding whether the contended power must be implied the court will have regard, *inter alia*, to the following factors:

(a) the language of the legislation. In this regard the court must consider whether the language is peremptory rather than directory. The court will be more inclined to find an implied power which may be necessary to enable the administrative functionary to comply with its mandate, where the language is peremptory (Cora Hoexter: Administrative Law in South Africa, at page 44);

(b) whether the express power is of a broad discretionary nature or narrowly circumscribed. Where the power is of a discretionary nature, the court will be more inclined to infer an implied power ancillary to the express power. *In Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C) at 753 J – 755C, the court found that since the Commissioner has a wide discretion whether or not to place a prisoner on parole, the power to promulgate directives in this regard was impliedly authorised. (See also: *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at par 32);

(c) whether the implied power is necessary for the achievement of the objectives of the legislation, or the administrative body cannot function without it. (*Nouwens Carpets (Pty) Ltd v National Union of Textile Workers* 1989 (2) SA 363 (N) at 367 H-J);

(d) the court will be loath to find an implied power where it will have coercive, oppressive or undesirable far-reaching consequences. *In Mokoena v Commissioner of Prisons and Another* 1985 (1) 368 WLD, the court declined to find an implied power entitling the Commissioner of Prisons to promulgate regulations stipulating that the consultations with legal representatives must be held within the hearing (as supposed to within sight) of a prison officer, since it was considered to be "manifestly desirable that the least possible inroad be made upon the principle that communications between client and legal adviser are confidential".

(See also*: Lipschitz NO v South African* 1985 (2) SA 702 (C); *and City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 C).

[16] Neither the Eastern Cape Act nor the Nursing Act makes express provisions for circumstances in which the registration of a student may be revoked, other than for disciplinary reasons. While Section 8 of the Eastern Cape Act provides for an admission policy and minimum requirements for admission, it is silent on whether a registration of a student, once admitted, may be cancelled without judicial sanction.

[17] And section 32 of the Nursing Act makes it compulsory for any person undergoing education or training in nursing to apply to the Nursing Council to be registered as a learner nurse or midwife. In terms of this section the Nursing Council is only required to register a person "who has complied with the prescribed conditions and has furnished the prescribed particulars for a training programme at a nursing education institution."

[18] In terms of subsection 32 (6):

> "The Registrar must delete from the register the name of a learner, nurse or mark in the register the name of any person, suspended from study and must notify such learner nurse or person accordingly in writing".

[19] Returning to the facts of this case, it is important to state upfront that it is common cause that: the applicants did not comply with all the prescribed requirements, in particular the requirement relating to minimum admission points; the applicants' admission and enrolment to the four year nursing course occurred as a result of a *bona fide* error on the part of the College authorities; and if they had been alerted to the shortcoming, they would have been entitled lawfully to reject the applicants' applications for admission to the course.

[20] Having regard to the language of the Eastern Cape Act, it is manifest that the intention was to circumscribe the College Council's discretion regarding the admission of students. The admission criteria are painstakingly prescribed, albeit that subsection 8 (d) vests in the College Council the power to refuse "any application for admission to the college", despite the fact that the admission requirements had been met.

[21] Ms Da Silva, who appeared for the applicants, submitted that properly construed, neither of the statutes impliedly empowers the College to cancel a student's registration in circumstances where: it had admitted the student after having had regard to his or her matric final results; has led the student reasonably to believe that he or she has met the relevant admission criteria; and has allowed the

student to attend classes and to write tests. She argued that such a construction would be oppressive and would have prejudicially far-reaching consequences for the applicants. She submitted that in the circumstances, after admitting the applicants to the course, the College authorities were *functus officio*. They were consequently constrained to seek judicial sanction and to apply for the review and setting aside of the impugned decision.

[23] Mr Nzuzo, who appeared for the respondents, on the other hand submitted that such an implied power is evident from the fact that the College is entitled, in terms of its admission policy, to cancel a student's bursary under certain circumstances. He submitted that the withdrawal of a student's bursary makes it impossible for the affected student to continue with his or her studies, and hence in effect amounts to a cancellation of his or her registration. The authority to reverse an erroneous admission, whatever the circumstances, must consequently also vest in the College authorities, or so he argued.

[24] I do not agree with the latter submission. It is indeed manifest that both the Eastern Cape Act and the Nursing Act expressly circumscribe the entitlement of prospective students to be admitted to nursing courses. Section 8 of the Eastern Cape Act provides for the academic admission requirements that applicants must satisfy, and section 32 of the Nursing Act provides that only candidates who have complied with the training institution's admission requirements are eligible for registration.

[25] It is common course that the College Council adopted an admission policy, the criteria of which were clearly stated in the advertisement inviting applications for the admission to the four year nursing course. It is common course also that the applicants did not meet those criteria. The College authorities were accordingly entitled - and perhaps even legally obliged - to refuse registration. The question is whether they were precluded from doing so once the applicants had been informed that they complied with the admission criteria and admitted to the course.

[26] In my view, having regard to the language and objectives of the empowering statutes, the College must have the implied power to refuse admission to any student who do not comply with the admission criteria, and where a student had been admitted as a result of a *bona fide* error, in particular where it has overlooked the fact that the candidate does not satisfy one or the other admission criteria, the College has the power to cancel the student's registration. In the latter case the affected student would have to be notified of the fact that his or her admission may be reconsidered and allowed reasonable opportunity to make representations in this regard. This is of course on the assumption that the error is discovered soon after admission and there can be no conceivable undue hardship for the student. Where, however, as is the case here, a student has progressed with his or studies to a point where it would be unfair for the College unilaterally to cancel the registration, it seems to me that it would be necessary for the College to seek judicial sanction, and itself apply to court for appropriate relief. The main reason for such an approach is that the student will otherwise be denied the opportunity to ask the court to grant just and equitable relief, instead of simply setting aside the original decision. It is common that the applicants have been attending classes and writing tests for the

past 18 months. And by all accounts they are doing well and have successfully completed their first year of study. They may therefore well have good grounds for applying for such just and equitable relief.

[27] It is indeed not difficult to conceive of the devastating consequences that summary cancelation of their registrations would have for the applicants. In circumstances such as these, where finding the contended implied power would be oppressive for the applicants, the court should be reluctant to do so. A finding against the contended implied power, on the other hand, will not enervate the provisions of either statute. The power of the College to implement its admission policy will remain unaffected, so also its power to cancel an erroneous admission immediately after it had been detected and before a student had been allowed to sit for classes and to write tests.

[28] Having said this, is important to state that, as a matter of fact, the applicants do not qualify for admission to the course, and may still be confronted with a decision by the College Council not to award their diplomas in due course. The College cannot be criticised for the stance that it has taken, and must rather be commended for their commitment to ensure strict compliance with its admission policy. I am accordingly at pains to state that my judgment should not be interpreted as compelling the College to allow the applicants to complete the course despite the fact that they have not met the prescribed admission criteria.

[29] I am, however, not convinced that the only option open to the parties is the one which will have the abovementioned deleterious consequences for the applicants. I

have little doubt that in the likely event that the College apply to court for its decision to be reviewed, the court hearing the matter would be constrained to consider whether in the circumstances it should exercise its discretion not to set aside the decision, but to grant some other just and equitable remedy in terms of section 8 of the Promotion of Administrative Justice Act, No. 3 of 2003. By way of example, the court may compel the College to allow the applicants reasonable opportunity to re-write some matric subjects to enable them to achieve the required admission points, while in the meantime continuing with their studies. I have, during the course of the hearing, alluded to counsel that it may well be salutary for the applicants to make representations to the College Council in this regard. It is indeed not only important for the College to protect its academic integrity, but also for the applicants to avoid a situation where the integrity of their qualifications is in doubt. If the parties are able to reach an agreement of this nature it will have the effect of protecting the academic integrity of the College and at the same time provide peace of mind to the applicants that their qualifications will be beyond question. One can only hope that the parties will seriously attempt to find such a mutually acceptable resolution to the impasse.

[26] I am accordingly of the view that the decision taken by the College authorities on 31 May 2019 was not sanctioned by the provisions of either the Eastern Cape Act or the Nursing Act. The College accordingly did not have implied power to cancel the applicants' registration, and should have approached court for appropriate relief in this regard.

[27] In the result the following order issues:

(a) The decision taken by the first respondent on 31 May 2019 to cancel the applicants' registrations for the four year nursing course, is hereby set aside.

(b) The respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved. The costs shall include the costs occasioned by the employment of two counsel.

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**J.E SMITH**
**JUDGE OF THE HIGH COURT**

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| Counsel for the Applicants | : | Advocate Da Silva |
| Attorneys for the Applicants | : | Phillip & Associates Inc.<br>Office No. 110, 2nd Floor<br>Milner Building<br>Kimberly Road<br>East London<br>(Ref: M0006/2018) |
| Counsel for the Respondents | : | Advocate Nzuzo |
| Attorneys for the Respondents | : | State Attorneys<br>Old Spoornet Building<br>17 Fleet Street<br>East London<br>(Ref.: 287/18-P4 (Ms Myoli)) |
| Date Heard | : | 27/06/2019 |
| Date Delivered | : | 09/07/2019 |