IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – EAST LONDON CIRCUIT COURT

Case No: EL1908/2024

In the matter between:

OLWETHU MLAHLWA Applicant

and

LIFE HEALTHCARE EAST LONDON LEARNING CENTRE Respondent

JUDGMENT

B B Brody

[1] This matter proceeded as an urgent application on the 1st of August 2024.

[2] After perusing the certificate of urgency I ordered that the papers in the matter be served by the 19th of October 2024, and with further structured time periods, so that the matter could be called at the end of the opposed roll in this court on Thursday, the 24th of October 2024. I was satisfied, in considering the certificate of urgency, that the matter was sufficiently urgent in terms of the rules of court, to be considered by this court as an urgent matter in terms of rule 6(12) of the uniform rules of court.

[3] The applicant was about to write examinations and the failure to give a ruling in the matter prior to those examinations may well have compromised her irretrievably for this academic year.

[4] The applicant is a 37-year-old trainee nurse and she explained in her founding affidavit that on Friday, the 18th of October 2024 Ms Pillay removed her name from the group of students enrolled by the respondent, and in her view, this resulted in an expulsion which would compromise her examination, (which was to take place on 28 October 2024).

[5] After service upon the respondent, an answering affidavit was served and filed and Ms Thriscilla Pillay ("Ms Pillay"), the Regional Education Manager for the respondent, indicated that the parties had in fact entered into a formal written settlement agreement on 16 October 2024, finally compromising the dispute between the parties. A copy of the duly signed settlement agreement by both the applicant and representatives of the respondent, was attached to Ms Pillay's answering affidavit.

[6] No mention had been made by the applicant in her founding affidavit, or the initial letter of demand by her legal representatives, of this settlement agreement, that was signed by her.

[7] What is clear from the answering affidavit and the settlement agreement is that, the applicant's enrolment for a three-year diploma in nursing was erroneous as the applicant did not have the minimum requirements to be admitted for the diploma in terms of duly promulgated regulations of the South African Nursing Council ("the Nursing Council"). Ms Pillay in fact, emphasised the following:

> "As will become clear, even if the respondent would accede to the relief claimed by the applicant it would be an exercise in futility as she will never be able to qualify, register and lawfully practice as a nursing practitioner under the auspices of SANC."

[8] Ms Pillay explained that it transpired, after the applicant's enrolment, that the applicant had written her matric exams on two occasions, namely in 2006 and again in 2019, but had failed her exams on both occasions. This was common cause in the matter.

[9] What was also common cause in the matter was that a matriculation examination was a prerequisite for enrolment for the relevant diploma. A perusal of the deed of settlement also indicates that a dispute resolution is built into the agreement which makes provision for the matter being arbitrated in East London in respect of any dispute.

[10] Ms Pillay also attached a copy of an offer made to the applicant, through her attorney of record, when it was clear that the applicant intended to litigate about the dispute. The relevant portion of the offer reads as follows:

> "In as far as there may be uncertainty and in an attempt to remove any doubt, we confirm that:
>
> 9.1 Our client waves its right to repayment of the tuition fees as contained in the Employee Student Funding Acknowledgement of Debt (annexure "A" to the addendum agreement), for the studies undertaken by your client since January 2024 to date hereof.
>
> 9.2 Your client upon completion of her National Senior Certificate, will be re-enrolled at the East London Learning Centre.
>
> 9.3 Our client tenders all reasonable travelling and accommodation expenses incurred as a result of your client attending the Learning Centre, upon presentation and proof of such actual incurred expenses.

9.4 As a further gesture of goodwill, our client will reimburse your client for her purchases of textbooks, by purchasing the textbooks previously bought by your client from her at the actual cost incurred by her for the said textbooks."

[11] In the applicant's replying affidavit she did not dispute that she had signed the deed of settlement, however, stated the following:

"8.5 The settlement agreement which respondent alleges I signed on 16 October 2024 was never given to me so that I can have it. I have stated clearly that the deponent caused me to sign documents which I have no knowledge of."

[12] What is immediately clearly from this response is that the applicant was not relying on any defence of "duress" or an ulterior motive.

[13] Mr Quluba appeared on behalf of the applicant, when the matter was called, and Mr Bezuidenhout appeared on behalf of the respondent.

[14] Mr Quluba handed in a judgment by my brother Smith in the matter of Philasanda Gungqa and others vs Lilitha College of Nursing and others, which is a judgment of this court handed down on the 9th of July 2019.

[15] Mr Quluba argued that this judgment was "on all fours" with the present matter and that unless this court came to the conclusion that the judgment was wrong, it was of persuasive authority in the urgent application.

[16] Mr Quluba also argued that it was in fact the respondent that had admitted the applicant for the diploma and could not now resile from their decision to allow her to be educated without following due procedure and that the respondent was not a "spokesperson" for the Nursing Council.

[17] Mr Bezuidenhout argued that the application was fatally defective and principally as a result of the fact that section 32 of the Nursing Act, where the Nursing Council was an organ of state, required the senior certificate as a minimum requirement for the diploma, and as a matter of law, this could not be deviated from.

[18] He further argued that the respondent fully accepted that it had made a mistake by enrolling the applicant for the diploma in circumstances where she did not qualify to do so.

[19] Mr Bezuidenhout also argued that my brother Smith's judgment was entirely distinguishable from the present dispute as the respondent was not an organ of state, the application brought by the applicant was not a PAJA review and there was no doubt that the decision taken by the respondent was not in terms of an empowering provision. These were private parties whereas in the Smith J judgment much of that judgment had to do with the powers of the respondent in taking the decision, which was taken, and the issue of legality.

[20] Mr Bezuidenhout also argued that the respondent had admitted its error, called a meeting with HR representatives, and that the deed of settlement was concluded under normal circumstances, and was binding between the parties.

[21] In answering questions put to Mr Bezuidenhout, by this court, he confirmed that the procedure followed by the respondent was initially a WhatsApp invitation to attend a meeting, a day to consider the issue at hand, and then a meeting where everything was explained to the applicant. He also confirmed that the applicant was a 37-year old female and not a young student.

[22] His further argument was that the offer made by the respondent to the applicant to prevent the urgent application was fair and reasonable and went beyond even the terms of the deed of settlement.

[23] His final argument was that there was non-joinder in that the Nursing Council had not been cited as a party to the proceedings.

[24] Mr Quluba argued, in reply, that the Smith J judgment was indeed authority for the present dispute and that the issue of a public body had nothing to do with the *ratio* of his judgment.

[25] According to Mr Quluba the applicant was entitled to an enforcement of the contract of enrolment, as a matter of contract law, and that the settlement agreement did not, in any event, substitute the original agreement.

[26] Mr Quluba also argued that the respondent was not relying on administrative law, that procedure was not followed in concluding the deed of settlement, and that the application should be granted with costs on the scale as between attorney and client. He did, however, argue that if costs were awarded against the applicant, that these costs should be on scale B.

[27] Given the urgency of the matter I reserved the issue of the order until the next day, being the 25th of October 2024, and on that date handed down an order in which I dismissed the application, and indicated that the issue of costs be reserved and that the reasons for the order would follow thereafter.

[28] I am in agreement with Mr Bezuidenhout that the Philasanda Gungqa vs Lilitha College of Nursing matter is indeed distinguishable from the present dispute that judgment essentially dealt with the competency of the respondent, as an organ of state, to make the decision which it did at the time. This is made clear at paragraph 14 of the judgment where my brother Smith states the following:

"The only issue which accordingly falls for decision is whether the College had implied authority to cancel an erroneous registration."

[29] At paragraph 20 Smith J stated the following:

"[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 admission of students. The admission criteria painstakingly prescribed, albeit that sub-section 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."

[30] There can be no doubt that the ratio of the judgment had to do with the empowering provisions of the respondent, as an organ of state, and not as two private bodies.

[31] A further important distinguishing factor in the present dispute is that the parties had concluded a binding and enforceable deed of settlement which made it clear that the applicant's enrolment had been terminated, by agreement.

[32] Smith J indicated at paragraph 28 the following:

"[28] Having said this, it 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 the decision by the College Council not to award their diploma in due course. The College cannot be criticised with 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."

[33] This statement by Smith J removes any possible interpretation that the judgment is authority to prevent the cancellation of an admission where the minimum prerequisite requirements are not met by a student.

[34] Smith J also indicated the following at paragraph 25 of his judgment:

> "One can only hope that the parties will seriously attempt to find such a mutually acceptable resolution to the impasse."

[35] I am of the view that the offer made by the respondent, as set out above, to avoid the litigation was fair and reasonable and went beyond that which could be considered enforceable damages by the applicant, (conceivably).

[36] I am of the view that the settlement agreement reached between the applicant and the respondent is enforceable, that the respondent has the authority to terminate the admission, (for want of the minimum prerequisite requirements for admission to the diploma), and that the offer made by the respondent to the applicant was fair and reasonable in the circumstances. That offer clearly is not an amendment of the settlement agreement, however, was made to prevent the unnecessary incurring of exorbitant legal costs.

[37] In the result, the following order issues:

[37.1] The dismissal of the application is confirmed.

[37.2] The applicant is to pay the respondent's costs on scale B as contemplated by rule 69(7).

B B BRODY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the APPLICANT	**:**	**MR QULUBA**
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For the RESPONDENT	**:**	**ADV BEZUIDENHOUT**
Instructed by	**:**	**Whalley & Van Der Lith Inc.** **1st Floor, Cornerstone House** **Stonemill Office Park** **300 Acadia Road** **Darrenwood, Randburg** **TEL: 011 880 3473** **REF: Roland Bottin/nh/LIF2/249** **EMAIL: roland@wvl.co.za** **c/o Smith Tabata Inc.** **Smith Tabata Building** **12 St. Helena Street** **Beacon Bay**

EAST LONDON

Matter heard on	**:**	**24 October 2024**
Order granted on	**:**	**25 October 2024**
Judgment delivered on	**:**	**12 November 2024**