

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

2024/05/07

DATE



SIGNATURE

CASE NO: 2023/134433

In the matter between:

GRADUATE INSTITUTE OF FINANCIAL SCIENCES (PTY) LTD APPLICANT

and

INSURANCE SECTOR EDUCATION AND

TRAINING AUTHORITY

GUGU MKHIZE

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

Flynote : Sleutelwoorde

Practice – Appeal against interim order - Section 18 Superior Courts Act – Default position in terms of section 18(1) is that an application for leave to appeal or appeal suspends the order – Requirement in section 18(2) for the suspension of an order pending an application for leave to appeal or appeal that order must be interlocutory and not have the effect of a final judgment – Question is not whether the order is appealable – Test in section 18(2) is whether the order has the effect of a final judgment – Not every form of prejudice created by interim order that has final effect results in an order that is equivalent to a final judgment – “final in effect” is a technical concept that entails that the order must in some way affect the final determination of an issue in the suit or stands in the way of an issue being determined at a later date – test for appealability set out in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) and followed in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* 2023 (5) SA 163 (SCA) nevertheless instructive in deciding whether order has the effect of final judgment – whether order has final effect, whether the order is susceptible of alteration by the court of first instance, whether the order is definitive of the rights of the parties, whether the order must grant definitive and distinct relief and whether the order has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Headnote : Kopnota

The applicant, an accredited skills development service provider, obtained an order on an urgent basis interdicting the first respondent, a Sectoral Education and Training Authority (SETA), from implementing the de-accreditation of the applicant as a service provider (paragraph 2 of the order). The order, furthermore, contained an order that the first respondent must notify all internal and external service stakeholders that the applicant shall remain fully accredited until 30 June 2024 (i.e. the expiry date of its current period of accreditation), as well as further orders that would immediately give effect to

the interdict. The order furthermore provided (in paragraph 6) that the interdict (paragraph 2) would be an interim order pending the finalisation of an application for the review of the first respondent's de-accreditation.

The first respondent did not comply with the order, but applied for leave to appeal against the order, which application was dismissed on 8 April 2024. The respondent persisted in the non-compliance with the order and filed an application for leave to appeal with the registrar of the Supreme Court of Appeal.

The applicant brought the present application against the first and second respondents (the second respondent being the CEO of the first respondent) for an order declaring that the respondents are guilty of contempt of court, and for an order committing the second respondent to prison for 90 days, suspended on condition that the order is complied with.

The respondents contended that the applications for leave to appeal suspended the operation of the order in terms of section 18(2) of the Superior Courts Act, being an order having the effect of a final judgment and that the first respondent was not obliged to comply. Alternatively, it was argued that because of the advice the respondents obtained, that the order is suspended (which is dependent on an intricate legal question), the first respondent did not willfully, and mala fide, disregard the order and that at least reasonable doubt exists as to whether the first respondent is guilty of contempt of court.

Held

The default position in terms of section 18(1) of the Superior Courts Act is that an application for leave to appeal or appeal suspends an order of court.

The requirement set in section 18(2) for the suspension of an order pending an application for leave to appeal or appeal, is that order must be interlocutory and not have the effect of a final judgment. The test is not whether the order is appealable.

Not every form of prejudice created by interim order that has final effect results in an order that is equivalent to a final judgment – “final in effect” is a technical concept that entails that the order must in some way affect the final

determination of an issue in the suit or stands in the way of an issue being determined at a later date.

Test for appealability set out in Zweni v Minister of Law and Order 1993 (1) SA 523 (A) and followed in TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others 2023 (5) SA 163 (SCA) are nevertheless instructive in deciding whether order has the effect of final judgment, such as whether order has final effect, whether the order is susceptible of alteration by the court of first instance, whether the order is definitive of the rights of the parties, whether the order must grant definitive and distinct relief and whether the order has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

The interpretation of a court order is subject to the same principles applicable to the interpretation of legislation, contracts and other written instruments. The general principle is that interpretation is a unitary process, whereby the language used, the context in which certain provisions appear and the surrounding circumstances leading to the creation of the document are all taken into consideration in deriving the meaning of a document. In this regard, a sensible interpretation ought to be preferred over an insensible or unbusinesslike one, or one that undermines the apparent purpose of the document.

Regarding the language used in the order, whilst the interdict preventing the first respondent from implementing the de-accreditation (paragraph 2) is ultimately formulated as an interim order (paragraph 6), the remainder of the order contains orders which have immediate final effect. In particular the order that notice must be given that the applicant shall remain fully accredited until 30 June 2024, does not permit of any doubt as to the effect of the order as a whole; the order is in express terms final in effect.

The purpose of the original order was undoubtedly to fully restore the applicant's accreditation for the period up to 30 June 2024. It could not have been intended that the original order would create a situation where external parties would on the strength of the original order make use of the services of the applicant, only to find themselves in a position at a later stage that the

dismissal of the review applications resulted in the training having been rendered un-accredited.

The circumstances leading to the granting of the original order are also vital. The applicant was in the process of providing accredited training and its clients were receiving such accredited training. The status of the training was abruptly changed by the first respondent de-accrediting the applicant. The purpose of the original order was to reverse this change of status and to provide for the applicant to remain fully accredited until 30 June 2024.

The language used in paragraph 6 of the order, that the interdict mentioned in paragraph 2 shall operate as an interim order pending the finalisation of the review applications, read in context, and read against the background of the order contained in paragraph 4 of the order (i.e. that external parties must be notified that the applicant would remain fully accredited until 30 June 2024), is contradictory. It also created ambiguity in the order. On a proper interpretation of the order, paragraph 6 of the order should be disregarded. The court was unable to interpret the order in another manner, so that some effect is given to paragraph 6, whilst the apparent contradiction in the order is removed.

The effect of this is that the outcome of the review applications will be entirely academic; even if they will fail, the effect of the original order will be that the applicant's status of an accredited service provider until 30 June 2024 will remain intact. As such, the original order irreversibly anticipated the outcome of the relief sought in the main proceedings.

Therefore, the order is not merely an interlocutory order but is indeed an order which has the effect of a final judgment. The obvious consequence is that section 18(2) of the Act is not applicable, and that the original order was suspended in terms of section 18(1) of the Act by the two applications for leave to appeal.

Consequently, the first respondent cannot be guilty of contempt of court, and the application was dismissed.

JUDGMENT

- [1] This is an urgent contempt application for an order aimed at the enforcement of the order that was granted on an urgent basis by Jacob J on 4 January 2024, when the learned judge granted an interdict against the first respondent, a SETA (being Sectoral Education and Training Authority established by section 9 (1) of the Skills Development Act) in terms of which the first respondent was interdicted from implementing a decision to de-accredit the applicant as a skills development service provider, together with certain ancillary orders (“the original order”).
- [2] The interdict (paragraph 2) was expressed as an interim order (paragraph 6), pending the finalisation of a pending review application (an application purporting to review an investigation report that was rendered pursuant to certain complaints against the applicant), as well as Part B of the notice of motion, which is a review of the first respondent’s decision to de-accredit the applicant as a service provider. Certain other the mandatory orders were also made, including an order which compelled the first respondent to publish a notice to stakeholders to the effect that the applicant would remain fully accredited until 30 June 2024 (paragraph 4).
- [3] The first respondent applied for leave to appeal against the original order, which application was dismissed by Jacob J on 8 April 2024.
- [4] It is common cause that after the original order was granted, the first respondent, being fully cognizant of the order, not merely failed, but refused to

comply with the order dated 4 January 2024. Initially it did so on the basis of the pending application for leave to appeal, which according to the first respondent suspended the original order, allegedly in terms of section 18(1) of the Superior Courts Act (“the Act”).

- [5] It is also common cause that after the application for leave to appeal had been dismissed on 8 April 2024, the first respondent continued to intentionally fail to comply with the original order.
- [6] This precipitated the present application in which the applicant seeks an order declaring the first and second respondents (the latter in her personal capacity as the Chief Executive Officer of the first respondent) guilty of the crime of contempt of court and an order for the committal of the second respondent to prison for 90 days, suspended on condition that the first and second respondent immediately comply with the order dated 4 January 2024.
- [7] In *Fakie NO v CCII Systems (Pty) Ltd*¹ the following summary was provided regarding the legal position relating to contempt orders:

“(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an accused person, but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”

[8] In this matter it is beyond any doubt that the first respondent intentionally failed to comply with the original order after the application for leave to appeal was dismissed on 8 April 2024.

[9] In the respondents' answering affidavit, deposed to by the second respondent, the reason that was given for this non-compliance was after the applicant's attorneys demanded compliance with the order by way of a letter dated 10 April 2024², the first respondent's attorneys replied that they had been instructed by the first respondent to apply for leave to appeal to the Supreme Court of Appeal, and that such papers were expected to be served by 12 April 2024, or so soon as they could be completed.³ The respondents continued to state that the rules of the Supreme Court of Appeal affords a party 30 days to apply for leave to appeal, and that the first respondent accordingly has until 7 May 2024 to deliver such application.⁴ The respondents then also make the statement that *“in the circumstances it is difficult to understand how GIFS can contend that INSETA is in contempt or wilful default of the 4 January 2024 order”*.

[10] The respondents also, paradoxically, contended that upon it having been intimated that the first respondent intended to seek leave to appeal from the

SCA, the application was pending and, accordingly, non-compliance with the order could not be wilful⁵, whilst also stating that the order will be suspended upon the delivery of the application for leave to appeal.⁶

[11] In the event, the first respondent filed an application for leave to appeal at the Supreme Court of Appeal on 23 April 2024, prior to the hearing of this matter on 26 April 2024.

[12] The respondents argued that the applications for leave to appeal suspended the original order, and as there is currently an application for leave pending in the Supreme Court of Appeal, the original order is similarly suspended.

[13] A further argument on behalf of the respondents was that the first respondent was advised by its legal representatives that the order was, and currently is, suspended and that as a result, the first respondent did not wilfully, and *mala fide*, disobey the order. The respondents' argument in essence boils down to a defence of absence of knowledge of wrongfulness, resulting in the absence of *mens rea*. In this regard, the requirement of *mala fides* in contempt proceedings has been equated to knowledge of wrongfulness.⁷

[14] Section 18(1) of the Superior Courts Act ("the Act") provides that, subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

[15] Section 18(2) provides that, subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an *interlocutory order not having the effect of a final judgment*, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

[16] Some attention was devoted during the argument of this matter to the question whether the original order issued by Jacob J was appealable or not. I hold that this is not the essential question to be answered, given the legislative framework created by section 18(1) and (2) of the Act.

[17] In terms of section 18(1), an order is suspended by a pending application for leave to appeal. This is the default position. Section 18(1) does not invite an answer to the question whether the order is appealable.

[18] The basic test set by section 18(2) for non-suspension, is similarly not whether the order is, conversely, not appealable according to the prevailing test⁸ for appealability, but whether the order is an *interlocutory order not having the effect of a final judgment*. In terms of the latest jurisprudence, referred to hereunder, the test may currently be practically the same, but in theory it may differ, depending on which test for appealability is preferred by the highest courts at a particular time.

[19] The original order purportedly provides that the order interdicting the first respondent to implement the applicant's de-accreditation was an *interim* order

pending finalisation of the review applications. However, an interlocutory order can also constitute an order which has final and definitive effect.⁹

[20] The real question is, therefore, whether the order has the effect of a final judgment. In determining the nature and effect of a judicial pronouncement, not merely the form of the order must be considered but also, and predominantly, its effect.¹⁰ The question whether an order has final effect is intertwined with the questions whether the order is susceptible of alteration by the court of first instance, whether the order is definitive of the rights of the parties, that is, the order must grant definitive and distinct relief and whether the order has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.¹¹

[21] Regarding the question of appealability of a decision, the Supreme Court of Appeal has recently held in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*¹² that these considerations as set out in *Zweni*¹³ are decisive in determining appealability of judgments where the court of appeal is the Supreme Court of Appeal. The court in the process rejected the notion that in appeals to the Supreme Court of Appeal (as opposed to appeals to the Constitutional Court) the question of appealability must be based on an overarching interest of justice test.

[22] Whilst the question *in casu* is not whether the original order is appealable, I find the considerations mentioned in *Zweni*, and reaffirmed in *TWK* as instructive regarding the question whether an order has the effect of a final judgment.

[23] The respondents relied heavily on *MR v KR*¹⁴ where a full bench lead by Sutherland ADJP (as he then was) held that an *interim* order relating to the care of and contact with a minor child pending finalisation of main proceeding, where the interim order effected extreme changes in the circumstances of the minor child, was final in effect for purposes of section 18(2) of the Act. The following was held, which was of importance in the present matter:

“ . . . even with a reversible order, the aspects of the duration that the order is to operate, the likelihood of contingent factors that might provoke a reconsideration of the order and the logistics of a reverse transition from a change brought about by a new status quo created by the implementation of the order all weigh in the assessment of the true "effect" of an order.”

[24] It must be accepted as axiomatic that there are certain interlocutory orders which may have final effect, and each case must be considered on its own facts. No doubt different consideration come into play in the present matter compared to matters that concern the well-being of a minor child, were a drastic order which is likely to be operative for a long period of time, is deemed to be final in effect for the period of its duration.

[25] As indicated above, the respondent argued that the review applications (including further appeals) will only be finalized after the end of June 2024, when the applicant's accreditation will come to an end, with the result that the original order will have final effect with reference to the period of its applicability, being from the date the order was granted to 30 June 2024.

[26] In this regard, the respondents relied on the judgment in *BHT Water Treatment (Pty) Ltd v Leslie and another*¹⁵ where Marais J held that an application for an interim interdict enforcing a restraint of trade of a limited duration, where it was clear that the main suit will not be finalized before the expiry of the restraint period, should be dealt with on the basis of the requirements for a final interdict, because the interim order will have final effect.

[27] In the present matter, it is common cause that the applicant's accreditation with the first respondent will end on 30 June 2024. The purpose of the pending review applications is to reverse the de-accreditation that occurred during December 2023.

[28] No matter when the review applications are heard, assuming the applications will be successful, the remedy that will be granted will be limited to restoring the applicant's accreditation for the period December 2023 to June 2024. In such instance, the order in the main proceedings will supplant the interim order.

[29] The litmus test in this matter is, however, what the effect will be of the *dismissal* of the review applications. The fact that an interim order has a definite effect, even a prejudicial effect, does not in itself render the interim order final in effect. In *Cronshaw and Another v Coin Security Group (Pty) Ltd*¹⁶ it was held that there is a long line of authority that held that not every kind of prejudice that is relevant to the question of appealability of an interim order, only that which directly affects the issue of the ultimate suit.¹⁷ The court held as follows¹⁸:

“Where to draw the line between decisions which are ‘interlocutory’ and such as have to await their decision on appeal until the proceedings in the court of first instance have been concluded, and those which are ‘final’, deserving to be appealable before the main suit is, is a question that has vexed the minds of eminent lawyers for many centuries, and the answer has not always been the same. The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results. There has to be a rule, however, and that rule was laid down by not later than the Pretoria Garrison case. It is, as stated by Schreiner JA (at 870) that

‘ . . . a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to “dispose of any issue or any portion of the issue in the main action or suit”, or, which amounts, I think, to the same thing, unless it “irreparably anticipates or precludes some of the relief which would or might be given at the hearing” ’.

[30] *Cronshaw* was quoted with approval in *Maize Board v Tiger Oats Ltd and Others*¹⁹ and *JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd*²⁰.

[31] In *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others*²¹ the majority of the Supreme Court of Appeal followed *Cronshaw*, and also found that that the only prejudice which may make an order appealable is prejudice which in some way affects the final determination of an issue in the suit or stands in the way of an issue being determined at a later date. This is what the cases have consistently meant when using the words ‘final in effect’.²²

[32] Having regard to this binding authority, I am not convinced that *BHT Water Treatment (Pty) Ltd v Leslie and another*²³ was correctly decided. In accordance with what was said in *Crownshaw*, it may well be that an interim order can cause prejudice (such as enforcing a restraint of trade for a limited period), but such prejudice does not mean that the order will have final effect in the technical sense of affecting the final determination of the main action. This judgment was also overruled by this court in *Radio Islam v Chairperson, Council of the Independent Broadcasting Authority, and Another*²⁴. I refrain from deciding the conflict between these cases, as I would rather focus on the effect of the order, rather than simply the period for which it is to operate.

[33] The interpretation of court order is subject to the same principles applicable to the interpretation of legislation, contracts and other written instruments.²⁵ The general principle is interpretation is a unitary process, whereby the language used, the context in which certain provisions appear and the surrounding circumstances leading to the creation of the document are all taken into consideration in deriving the meaning of a document. In this regard, a sensible interpretation ought to be preferred over an insensible or unbusinesslike one, or one that undermines the apparent purpose of the document.²⁶

[34] The language and content of the order as a whole need to be considered first. Whilst the interdict preventing the first respondent from implementing the de-accreditation (paragraph 2) is ultimately formulated as an interim order (paragraph 6), the remainder of the order contains orders which have immediate final effect, such as an order forcing the first respondent to immediate withdraw memoranda issued to external parties, an order ordering

the first respondent to issue a notice to all internal and external stakeholders that the applicant ***remains fully accredited up to 30 June 2023***, and that the first respondent shall immediately grant the applicant access to the first respondent's online portal. In particular the order that notice must be given that the applicant shall remain fully accredited until 30 June 2024, does not permit of any doubt as to the effect of the order as a whole; the order is in express terms final in effect.

[35] The applicant states that employers who make use of its services have certain statutory skills development obligations, and that the applicant's de-accreditation may result in them being penalized for non-compliance. In this regard I accept the applicant's statements²⁷ as correct in the face of a clearly unfounded and bare denial by the respondents. However, this factor works against the applicant in the interpretation of the order in the present application.

[36] Furthermore, an aspect which is highly relevant is that the various Broad Based Black Empowerment Codes place an extremely high premium on skills development, and in particular training of employees through ***accredited*** training providers. The scores attached to skills development are of such a nature that it may have a profound effect on the BBBEE Recognition Level of the relevant company.

[37] This has a further knock-on effect, in that other third parties doing business with the applicant's clients may also be negatively affected, in that they may suffer a reduced BBBEE procurement score, which may also affect their overall BBBEE

status. This is, of course, not the end of the problem, because the knock-on effect will continue all along the supply chain.

[38] The purpose of the original order was undoubtedly to restore the applicant's accreditation for the period up to 30 June 2024 (**fully** as stated in the order) and to enable the applicant to provide accredited training to its clients during that period. I cannot conceive the possibility that it was intended that the original order would create a situation where external parties would on the strength of the original order make use of the services of the applicant, only to find themselves in a position at a later stage that the dismissal of the review applications resulted in the training having been rendered un-accredited.

[39] The circumstances leading to the granting of the original order are also vital. The facts of the matter are that the applicant was in the process of providing accredited training and its clients were receiving such accredited training. The status of the training was abruptly changed by the first respondent de-accrediting the applicant. The purpose of the original order was to reverse this change of status and to provide for the applicant to remain fully accredited until 30 June 2024.

[40] The language used in paragraph 6 of the order, that the interdict mentioned in paragraph 2 shall operate as an interim order pending the finalisation of the review applications, read in context, and read against the background of the order contained in paragraph 4 of the order (i.e. that external parties must be notified that the applicant would remain fully accredited until 30 June 2024), is contradictory. It also created ambiguity in the order. On a proper interpretation

of the order, I am of the view that paragraph 6 of the order should be disregarded. I was unable to interpret the order in another manner, so that some effect is given to paragraph 6, whilst the apparent contradiction in the order is removed.

[41] The effect of this is that the outcome of the review applications will be entirely academic; even if they will fail, the effect of the original order will be that the applicant's status of an accredited service provider until 30 June 2024 will remain intact. As such, the original order irreversibly anticipated the outcome of the relief sought in the main proceedings.

[42] Therefore, I hold that the original order is not merely an interlocutory order but is indeed an order which has the effect of a final judgment. The obvious consequence is that section 18(2) of the Act is not applicable, and that the original order was suspended in terms of section 18(1) of the Act by the two applications for leave to appeal.

[43] I am mindful of the fact that my finding herein goes contrary to the declarator issued by Jacob J on 8 April 2024 when the application for leave to appeal was dismissed. What was before the court during the application for leave to appeal was the question whether leave to appeal should be granted. There was no counterapplication by the applicant herein for a declaratory order that would render section 18(2) applicable. The applicability of section 18(2) was not an issue that arose for consideration in the application for leave to appeal. In the present matter the applicability of section 18(2) is directly in issue. The relief sought in the two matters are vastly different. That being the case, I am

respectfully of the view that the matter cannot be a *res judicata* in accordance with the principles applicable for the application of *res iudicata* or issue *estoppel*, even if some of the requirements are disregarded, as may be permissible.²⁸ Consequently, I am of the view that I am within my powers to decide this matter independently, especially in view of the severity of the relief sought in this matter. I wish to emphasize that the judgment in this matter is in no way intended to detract from the original order granted by Jacob J. To the contrary, my finding herein has the effect of bolstering the original order and will ensure that ultimately full effect is given thereto.

[44] In the premises, the respondents cannot be guilty of contempt of court by failing to comply with the original order, and the applicant's contempt application must be dismissed.

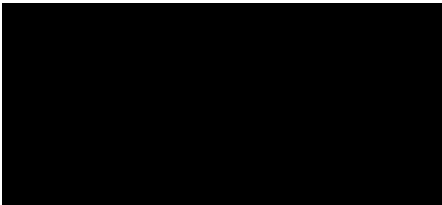
[45] I deem it necessary to point out to the parties that their actions in this matter do not only affect their own rights and interests. The first respondent is a statutory body who is tasked with the responsibility of promoting skills development for the benefit of employers and employees, who are the partial funders of the first respondent through payment of skills development levies. As already discussed above, employers have certain statutory skills development obligations, and the provision of *accredited* skills development plays a vital role in the employers' Broad Based Black Empowerment recognition level scores. I am *prima facie* of the view that the first respondent recklessly and in complete disregard for the interests of the employers and employees it is obliged to serve, abruptly de-accredited the applicant, with the result that all the employers and employees who had planned on receiving accredited training, and paid for such training,

were faced with a situation where such training will be unaccredited. This can have a devastating effect on both the employers and employees in question, who are completely innocent parties. There is no suggestion that the applicant is not in a position to provide proper training; the basis for the de-accreditation was a specific instance of non-compliance some years ago. The first respondent, with knowledge of such alleged non-compliance (having received an investigation report in this regard) renewed the applicant's accreditation until June 2024. I fail to see how the de-accreditation of the applicant under these circumstances during December 2024 was a rational response. In my mind it was a complete disregard of the rights of innocent third parties, amounting to a gross failure by the first respondent to comply with its duties.

[46] It is patently clear that the real solution to this matter is not multiple, drawn-out, and costly litigation, but that a sensible solution should be found and implemented that will benefit those that are supposed to be the beneficiaries of the services rendered by both parties.

[47] Having regard to the above considerations, I am of the view that despite the applicant being unsuccessful in this application it should not be ordered to pay the costs. An appropriate order will be that each party must pay their own costs.

[48] Consequently, the applicant's application is dismissed, and each party is ordered to pay its own costs.



DAWID MARAIS
Acting Judge of the High Court
7 May 2024

Notes

¹ Fakie NO v CCI Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

² See Answering Affidavit, par 21.7

³ Answering Affidavit, paragraph 21.8

⁴ Answering Affidavit, paragraph 21.9

⁵ Answering Affidavit, paragraph 25.4

⁶ Answering Affidavit, paragraph 25.3

⁷ See *H v M* 2009 (1) SA 329 (W) par 11

⁸ The test appears to be in a constant process of flux.

⁹ See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 534C

¹⁰ *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H

¹¹ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)

¹² *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* - 2023 (5) SA 163 (SCA)

¹³ *Supra*

¹⁴ *MR v KR* 2021 JDR 0601 (GJ) par 14`

¹⁵ *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W)

¹⁶ *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A)

¹⁷ At 690B.

¹⁸ At 690D – E.

¹⁹ *Maize Board v Tiger Oats Ltd and Others* 2002 (5) SA 365 (SCA)

²⁰ *JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA)

²¹ *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA)

²² Par 40 and 42.

²³ *Supra*.

²⁴ *Radio Islam v Chairperson, Council of the Independent Broadcasting Authority, and Another* 1999 (3) SA 897 (W)

²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA)

²⁶ At par 18.

²⁷ See Founding Affidavit par 25

²⁸ See *Tecmed Africa (Pty) Ltd v The Minister of Health* 2012 JDR 0821 (SCA), following *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA).

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date of this judgment is deemed to be 7 May 2024.

Appearances:

Appearance for Applicant:	ADV MJ GUMBI SC ADV F MOHAMED
Instructed by:	TS LAW INCORPORATED
Appearance for Respondents:	ADV G FOURIE SC ADV M MARONGO
Instructed by:	LEBEA INC ATTORNEYS
Date of hearing:	26 April 2024
Date of Judgment:	7 May 2024