



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 7204/2021

In the matter between:

**EFL SOUTH AFRICA NPC
trading as “EDUCATION SOUTH AFRICA”**

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL OF HOME AFFAIRS

Second Respondent

THE IMMIGRATION ADVISORY BOARD

Third Respondent

**THE DEPUTY DIRECTOR-GENERAL:
IMMIGRATION SERVICES**

Fourth Respondent

**THE MINISTER OF HIGHER EDUCATION
AND TRAINING**

Fifth Respondent

**THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF HIGHER EDUCATION AND TRAINING**

Sixth Respondent

**THE COUNCIL FOR QUALITY ASSURANCE
IN GENERAL AND FURTHER EDUCATION
AND TRAINING**

Seventh Respondent

THE COUNCIL ON HIGHER EDUCATION

Eight Respondent

**THE QUALITY COUNCIL FOR TRADES
AND OCCUPATIONS**

Ninth Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS & COOPERATION**

Tenth Respondent

**THE ACTING DIRECTOR-GENERAL
OF THE DEPARTMENT OF INTERNATIONAL
RELATIONS & COOPERATION**

Eleventh Respondent

REASONS FOR THE ORDER OF 2 DECEMBER 2021

KUSEVITSKY J

History of this application

[1] On 16 November 2021, this matter was set down on the semi-urgent roll for hearing. On the day, junior counsel for the Respondents advised that their senior counsel was in London and sought a postponement until he was available. The matter stood down in order for the parties to firstly, take instructions as to whether Ms Adikari would seek the postponement or proceed to argue the matter. The parties were also urged to try and settle the matter.

[2] When the matter resumed, the parties advised that they were unable to settle the matter and that Ms Adikari would argue the application. The parties agreed that given the complexity of the matter, as well as timeframes and constitutional issues raised in the application, that this Court could give an Order in terms of Part A of the relief sought, with Part B standing over for later determination.

[3] After the matter was ventilated, the parties provided a draft order due to the urgency of the matter, which order was made an Order of Court on 2 December 2021. The Order reads as follows:

“HAVING READ THE PAPERS FILED OF RECORD AND AFTER HEARING COUNSEL FOR THE APPLICANT AND THE 1ST TO 6TH RESPONDENTS, IT IS ORDERED THAT:

“1. Pending the final determination:

- 1.1 The Fifth and Sixth Respondents will renew and/or extend the provisional registration of the Applicant and its members, provided they comply with the terms stipulated in their existing letters of provisional registration;
- 1.2 The First, Second and Fourth Respondents will consider the study visa applications of prospective students of the Applicant and its members on their merits and accept that the Applicant and its members qualify as “*learning institutions*” for the purposes of the Immigration Regulations for so long as they remain registered with the Department of Higher Education and Training;
- 1.3 The First, Second and Fourth Respondents must bring this order to the attention of adjudicators within the Department of Home Affairs responsible for the adjudication of study visas; and
- 1.4 the Tenth and Eleventh Respondents must ensure that this order be brought to the attention of the officials at South African embassies, consulates and other foreign offices responsible for visa-related matters.

2. Costs to stand over for later determination.”

[4] It is common cause that the parties did not proceed with PART B of the application and that for all intents and purposes, at least as far as this court was concerned, that was the end of the matter.

[5] Then on 28 December 2023, the Applicant brought an urgent application, ostensibly on the same basis as was argued in 2021. The submissions made to the urgent duty Judge was that the parties were “still awaiting adjudication of the previous matter”. That was to say, this matter. The matter was postponed to 24 January 2024 and a timetable set for the further conduct of the matter. In the meantime, the parties’ legal representatives were called to address this Court on the matter and the parties’ assertion that they were ‘still awaiting judgment’. When asked as to what had occurred from the time that the order was made in 2021 to the time that the urgent application had been brought in 2023, the legal representative for the Applicant stated that they had ‘forgotten about the matter’. Similarly, the State Attorney advised that they had archived the file and that they too had ‘forgotten about the matter’. This very important aspect was, conveniently and deceptively, not conveyed to the presiding officers that subsequently dealt with the matter. Rather, the parties attempted to lay the blame for their tardiness at the foot of this court. So too could the parties not explain why they would request reasons for a draft in which they prepared, and in any event, they could not present a notice indicating where and when their “Request for Reasons”, if so sought, were in fact filed. It was not.

[6] It is as a result of the diabolical handling of the matter by the respective attorneys concerned that I now attend to the reasons for the order granted on 2 December 2021.

The relief sought

[7] The Applicant sought the following orders in the notice of motion:

“2. That the Honourable Court direct:

2.1 the Fifth and Sixth Respondents (Department of Higher Education) to renew and extend the provisional registration of the Applicant and its members as private colleges, provided they comply with the terms stipulated in their existing letters of provisional registration; and

2.2 the First, Second and Fourth Respondents (Department of Home Affairs) to consider study visa applications of prospective students of the Applicant and its members on their merits and to accept that Applicant and its members qualify as ‘*learning institutions*’ for the purposes of the Immigration Regulations for so long as they remain registered with the Department of Higher Education and Training.

3. In the alternative to paragraph 2 above, and in the event that the Honourable Court declines to grant such relief, then and in that event the Applicant will seek declarations of constitutional invalidity of:

3.1 The Skills Development Act, 97 of 1998, to the extent that it fails to provide for the registration of private skills development providers, such as the Applicant and its members, in fulfilment of the constitutional imperative contained in section 29 (3) of the Constitution and of the corresponding right of the Applicant and its members to such registration;

3.2 The definition of ‘*learning institution*’ in the Immigration Regulations (published in GNR.413 of 22 may 2014: Government Gazette No. 37679), to the extent that it excludes constitutionally recognized independent educational institutions provided for in section 29 (3) of the Constitution, such as the applicant and its members; and/or

- 3.3 Conditionally upon the upholding by the above Honourable Court of the relief in paragraph 3.1 above, the definition of '*learning institution*' in the Immigration Regulations, to the extent that it excludes institutions such as the Applicant and its members who all entitled to registration under a constitutionally compliant Skills Development Act.
4. That the Honourable Court direct that until the aforesaid defects all corrected by the legislature, in the case of the Skills Development Act, and First Respondent, in the case of the Immigration Regulations, effect is to be given to the terms of the Notice of Motion in respect of the Applicant and its members, and in particular the provisions of paragraph 2 hereof.
5. The Honourable Court direct that:
- 5.1 the First, Second and Fourth Respondents ensure that any order made pursuant to this application be brought to the attention of adjudicators within the Department of Home Affairs responsible for the adjudication of study visas; and
- 5.2 the Tenth and Eleventh Respondents ensure that any order made pursuant to this application be brought to the attention of the officials at South African embassies, consulates and other foreign offices responsible for visa-related matters.
6. In the event that the substantive relief in paragraphs 2 to 4 above cannot be finally determined before 31 December 2021, then and in such event the Applicant will set the matter down for hearing on an urgent basis and seek an order that:
- 6.1 Paragraphs 2.1 and 2.2 above shall operate as interim order pending the final determination of this application; and

6.2 The directions contained in paragraph 5 above shall apply *mutatis mutandis* to the order for such interim relief.”

[8] From the relief sought in the notice of motion, it is clear that an order was granted in terms of the relief sought in paragraphs 2.1 and 2.2 of the Notice of Motion as read with paragraphs 5.1 and 5.2 which deals with the service of the Order to the relevant officials.

Factual background

[9] The Applicant is a non-profit organization which has as its members, a number of institutions providing tuition in English as a foreign language to foreign students from around the world who are desirous of learning English in an English-speaking environment. Applicant’s members operate in the Edu-tourism industry, teaching English as a foreign language (“EFL”). According to the founding affidavit, the EFL industry is global and highly competitive. The Applicant’s members compete with similar institutions in a number of countries such as Australia and New Zealand who also offer the opportunity for foreign students to learn English in an English-speaking environment.

[10] The courses offered by the Applicant and its members ranges for periods from two weeks to one year and prospective students require a study visa to enable them to remain in South Africa long enough to complete their EFL courses. Each student resides in South Africa for the duration of the EFL course. The Applicant states that the industry brings in hundreds of millions of Rand in foreign investment into the local economy each year.

[11] Typically, prospective students are able to travel to South Africa on a visitor’s visa, which could last up to 6 months in order to participate in the EFL courses presented by the Applicant’s members. In the majority of cases, these visas are not of a sufficient length for students to complete their courses and it is therefore not possible for most prospective students to travel to South Africa on a visitor’s visa. Applicant argues that it is thus imperative for the continued functioning of the Applicant’s members that prospective students can obtain study visa’s which permit

longer stays in South Africa in order that such students have sufficient time to complete these EFL courses.

[12] Since 1994, the Applicant's members had operated as EFL service providers, with students able to obtain study visas at Applicant member institutions, until the promulgation of Regulations under the Immigration Act, 13 of 2002, in May 2014, which for the first time defined the term "*learning institutions*" for the purposes of the Immigration Act.

The Immigration Act and Regulations

[13] Section 13 of the Immigration Act provides as follows:

"13 Study visa

(1) A study visa may be issued, in the prescribed manner, to a foreigner intending to study in the Republic for a period not less than the period of study, by the Director-General: Provided that such foreigner complies with the prescribed requirements.

(2) The holder of a study visa may conduct certain work as prescribed."

[14] Section 39 of the Immigration Act provides as follows:

"39 Learning institutions

(1) No learning institution shall knowingly provide training or instruction to—

(a) an illegal foreigner;

(b) a foreigner whose status does not authorize him or her to receive such training or instruction by such person; or

(c) a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.

(2) If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such premises, unless *prima facie* evidence to the contrary is adduced.”

[15] The term ‘*learning institutions*’ is not defined in the Immigration Act, but is defined in the Regulations as follows:

“‘**learning institution**’ means—

- (a) an institution of higher education established in terms of the Higher Education Act, 1997 (Act No. 101 of 1997); or
- (b) a college established in terms of the Further Education and Training Colleges Act, 2006 (Act No. 16 of 2006) but does not include—
 - (i) a school offering further education and training programmes under the South African Schools Act, 1996 (Act No. 84 of 1996); or
 - (ii) a college under the authority of a government department other than the Department of Higher Education and Training; or
- (c) a school contemplated in section 1 of the South African Schools Act, 1996 (Act No. 84 of 1996). “

[16] According to the founding affidavit, it was this new definition which led the Applicant¹ bringing an application (“the first application²”) on behalf of its then

¹ In its previous form as a voluntary organisation. Now it is a non-profit company

² Under case number 12484/2016

members, who are now members of the Applicant. The first application comprised two parts; the first being for urgent interdictory relief and the second being a review. Before that Part A could be heard, the parties entered into a settlement agreement (“the Settlement Order”), which ostensibly forms the basis of this application.

[17] In the relief sought, the Applicant sought an order directing the Respondents to, amongst other things, consider, deem and treat the members of the Applicant to be “*learning institutions*” as defined in Regulation 1 of the Immigration Regulations³ when foreign applicants apply for study visas in terms of section 13 of the Immigration Act in order to study at Applicant’s member institutions. That Order, it was contended, was implemented and given effect to and the provisional registration which Applicant and its members obtained from the Department of Higher Education and Training (“DHET”) remains in force, however ends on 31 December 2021.

The legislative conundrum – The Lacuna

[18] The Applicant states that its members have long had difficulties in obtaining study visas for prospective students, since the member institutions do not fall neatly within any of the categories established under the legislative framework. This meant that the Department of Home Affairs did not accept that its members fell within the definition of ‘*learning institutions*’ as that term is defined in the Immigration Regulations and therefore prospective students were not able to apply for study visas on the strength of their enrolment with Applicant’s members.

[19] Prior to the promulgation of the Immigration Regulations in 2014, the Applicant and its members had no difficulty in conducting their business on the basis that their prospective students were able to, and in fact did, obtain study visas to study in South Africa. However, after the amendment, and which evidence formed the basis of the first application, the Applicant and its members argued that it was not possible for any of the members to be accredited under any of the sub-

³ Published in Government Notice R413 in Government Gazette 37679 of 22 May 2014

frameworks provided for in section 7 of the National Qualifications Framework Act, 67 of 2008 (“NQF Act”).

[20] The NQF Act applies to education programmes or learning programmes that lead to qualifications or part-qualifications within South Africa by *inter alia* education institutions and skills development providers⁴. Various definitions in the NQF Act is of relevance. Firstly, the definition of an “*Education Institution*” which means an education institution that is established, declared or registered by law; “*Learning*” which means the acquisition of knowledge, understanding, values, skill, competence or experience; and “*Skills Development Provider*”, which means a skills development provider contemplated in section 17 of the Skills Development Act, 97 of 1998 (“the SDA”).

[21] The SDA does not provide for registration of skills development providers with the Department of Higher Education and Training. It is this omission, the Applicant claims, and which is ostensibly recognized by the State Respondents, which prevents the Applicant and its members from obtaining the necessary registration with the DHET which would give effect not only give effect to the constitutional right arising from section 29(3) of the Constitution, but it would also lead the way to obtaining recognition as a learning institution for the purposes of the Immigration Regulations.

The first application

[22] In the founding affidavit of the first application, the Applicant sets out the steps that it and its members had taken to effect compliance with the legislative framework with the object of obtaining registration with the Department of Higher Education and Training. Many had applied and had in fact been accredited as service providers under SETA.⁵

[23] However, the SETA’s which fall under and have their powers delegated to them by the Ninth Respondent, The Quality Council for Trades and Occupations

⁴ Section 3(1) of the NQF Act

⁵ With either the Services SETA or the Education, Training and Development Practices SETA

("QCTO"), are not recognised as learning institutions for the purpose of the Immigration Regulations. In summary, after amendments were promulgated which came into effect in May 2014, the insertion of the definition precluded the Applicant and its members from qualifying as learning institutions since the Department of Home Affairs did not accept that accreditation with SETA fell within the ambit of the Immigration Regulations. According to the Applicant, it is this *lacuna* in the regulations, coupled with the omission in the Skills Development Act, to provide a mechanism for the registration of private skills development providers which gave rise to the present application. Put differently, the practical effect of the amendments is that the Department of Higher Education and Training refuses to register the Applicant and its members while the Department of Home Affairs is of the view that the Applicant and its members were not learning institutions *inter alia* because they were not registered with the DHET.

[24] The inability of the Applicant's members to obtain registration with the DHET and to obtain study visas for prospective students from the Department of Home Affairs, led the Applicant to engage extensively with officials of those two departments to find a resolution. It seems that from the correspondence, both departments had different views as to what status the Applicant and its members had.

[25] In correspondence by a Dr Lloyd on 2 February 2016, he stated *inter alia* that:

- 25.1 The DHET was a government department which oversees and regulates the higher education and training space which includes all post-school education and training;
- 25.2 It does not accredit institutions but will register private higher education and training institutions and will register private colleges once they have been accredited by one of the Quality Councils ("QC");
- 25.3 The Applicant and its members would be considered institutions which provide language courses for foreign students, in South Africa and may

be accredited by one of the QC's depending on the level of the programme which they deliver;

- 25.4 There are three quality councils within the National Quality Framework. Its chief purpose is to oversee the design, implementation and certification of Occupational Qualifications, including trades on the Occupational Qualifications Sub-Framework ("OQSF"). They are the Council On Higher Education or CHE; the Quality Council for Trades and Occupations of South Africa ("QCTO") and Umalusi.

[26] The proposal to the Applicant and its members was that it either approach the QCTO for accreditation status as an institutional-type which is not a school⁶, or that it requests accreditation from the QCTO for a part qualification.

[27] The Respondents in the first application also proposed that, to the extent that it could bridge this *lacuna*, that it was also possible to register a new qualification in terms of the Occupational Qualifications Sub-framework. The QCTO would be responsible for designing and developing occupational standards and submitting them to the SAQA for registration. Thus to the extent that an appropriate qualification encompassing the teaching of English as a foreign language – which is the business of the Applicant and its members – does not exist on either the GFET sub-framework or the OQSF, it was objectively possible for either Umalusi or the QCTO to develop such a qualification, subject to the provisions of the NQF Act or the Skills Development Act. This qualification may consist of part-qualifications; or consist of a number of subjects. A qualification on the OQSF must comply with the requirements set by the QCTO. Once the qualification of the GFET sub-framework is developed, it can then be submitted to Umalusi for registration on the NQF.

⁶ The view was that the Applicant and its members were clearly not schools under the auspices of the Department of Basic Education but rather learning centres or community education and training colleges ("CETs"). All CETs and higher education institutions and skills development providers fall within the ambit of the DHET Minister's mandate. Eduschools are adult learning places or learning institutions, formerly known as Technical and Vocational Educational and Training Colleges or TVET colleges or Community Education and Training Colleges (CETs) or Universities and Universities of Technology and Skills Development Institutes and Skills Development providers. The Applicant and its members would therefore be classified under one of these aforementioned types and not generally called learning institutions.

Similarly, a qualification on the OQSF may be submitted to the QCTO for registration on the NQF.

[28] The DHET was therefore of the view that the Applicant and its members could obtain registration with the Department under the CET Act if they could obtain accreditation with the QCTO and become registered as private colleges. This approach was also ostensibly endorsed by the DHA. In its answering affidavit in the first application, they stated as follows:⁷

“I also reiterate and confirm the following averments made by the DHET:...

I submit that it is not impossible for EDUSA to comply with the statutorily determined regime for the delivery of education and learning services. As demonstrated above it is objectively possible for EDUSA to take the necessary steps together with Umalusi and/or the QCTO to register an appropriate qualification which covers what its members teach. Once this is done, its members will then be able to register as private colleges and they will then fall within the definition of Learning institutions as contemplated by the immigration regulations.”

The Settlement Agreement

[29] Importantly, the Department of Home Affairs further indicated that the definition of ‘*learning institution*’ which was inserted into the Immigration Regulations in 2014, was expressly “... *opted for on the basis that the definition of a ‘learning institution’ accords with what is recognized as such by the Department of Higher Education and Training. Accordingly, the Department of Home Affairs sought to align its Regulations with what’s DHET defines as a learning institution.*”

[30] Thus, according to Applicant, they believed given the above, that accreditation with the QCTO would resolve the difficulties that it and its members were facing in terms of compliance.

⁷ Paragraph 38 of the answering affidavit in the first application

[31] The matter however was not argued and instead, the parties entered into a settlement agreement before Steyn J on 8 November 2016. In terms of the Settlement Order, it was agreed by the Applicant EDUSA, the DHA and the DHET, *inter alia* that: EDUSA's member institutions, a list of which was appended to the Court Order, would apply to be "*learning institutions*" as defined in Regulation 1 of the Regulations, which applications would be determined within two weeks of submission, excluding the dates between 15 December 2016 and 15 January 2017; The Minister of Higher Education and Training shall endeavour to facilitate the prompt consideration of any application made by the Applicant's members institutions for qualification as a 'learning institution'; Upon provisional registration as a 'learning institution' and provided that the applications comply with all the relevant criteria as determined by the Minister of Home Affairs, the Minister of Home Affairs shall, pursuant to section 31(2) of the Immigration Act, permit foreign students to enter South Africa and study at the Applicant's member institutions for a period not exceeding eighteen months of study per foreign student ("the dispensation"); This dispensation shall not come into effect before 15 January 2017.

[32] Thus in terms of the settlement agreement, the Applicant avers that it is clear that the settlement agreement was concluded by the parties to the first application on the premise that the Applicant and its members could qualify to become 'learning institutions' for the purposes of the Immigration Regulations, which in turn required registration with the DHET.

[33] The Applicant states that it was quite clear that the settlement agreement was concluded by the parties to the first application on the premise that the Applicant and its members could qualify to become 'learning institutions' for the purposes of the Immigration Regulations, which in turn required registration with the DHET.

[34] The Applicant also referenced a 2016 communiqué entitled "*The Registration and Accreditation of Private Education and Training Providers Offering Qualifications and Part-Qualifications on the Occupational Qualifications Sub-Framework*", jointly issued by the Department of Higher Education and Training, the South African Qualifications Authority, the Quality Council for Trades and

Occupations, the Council on Quality Assurance in General and Further Education and Training and the Council on Higher Education. The communiqué states, as indicated in its title page, that it refers to private education and training providers that offer qualifications and part-qualifications on the Occupational Qualifications Sub-Framework ('OQSF').

[35] The communiqué referenced section 29(3) of the Constitution⁸ which states that [e]veryone has the right to establish and maintain, at their own expense, independent educational institutions that –

(a) do not discriminate on the basis of race;

(b) are registered with the State; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

[36] This means that, in this case, the training providers must be registered with the Department of Higher Education and Training. Furthermore, clause 2.2.4 thereof states that the Skills Development Act, 97 of 1998 in its current form does not make provision for the registration of private education and training providers who offer qualifications and part-qualifications residing on the Occupational Qualifications Sub-Framework ("OQSF"), as contemplated in section 29(3) of the Constitution. Such providers are at present only required by the Skills Development Act to be accredited by the Quality Council for Trades and Occupations ("QCTO") and to seek accreditation for their qualifications and/or part-qualifications from the QCTO (or a body to whom the QCTO has delegated the quality assurance function). The QCTO remains responsible and accountable for the outcomes of delegated quality assurance functions.

[37] The communiqué further provides that private education and training providers may only be registered for qualification and/or part-qualifications which

⁸ Act 108 of 1996

are registered on the NQF and must lodge an application for registration with DHET in the prescribed manner.

Events pursuant to the Settlement Agreement

[38] After the agreed Settlement Order, the parties met in a meeting on 24 November 2016, the purpose of which was to discuss the implementation of the Settlement Order. The Applicant and its members structured their courses as a result in order to comply with the QCTO requirements under the Skills Development Act and in so doing the Department of Home Affairs was able to treat the Applicant and its members as learning institutions and to issue study visas to the students.

[39] In terms of the Settlement Order, it was agreed by the Applicant, the DHA and the DHET, among other things, that Applicant's member institutions, a list of which was appended to the Court Order, would apply to be "*learning institutions*" as defined in regulation 1 of the Regulations, which applications would be determined within two weeks of submission, excluding the dates between 15 December 2016 and 15 January 2017.

[40] Following the meeting, the Applicant contends that the DHET provided it and its members with assistance to obtain first, accreditation with the QCTO, and then provisional registration with the DHET itself on the basis discussed and agreed at the aforesaid meeting. The members of EDUSA were subsequently provided with the necessary accreditation by the QCTO in terms of the agreements and Order of Court, which accreditation remains valid until 2023. On the strength of these accreditations, the members were also provisionally registered as learning institutions by the DHET and those students who were able to travel, also received the relevant visas on the strength of this from the DHA throughout this period.

[41] The Applicant argues that it is obvious that the settlement was concluded by the parties to the first application on the premise that the Applicant and its members could qualify to become "*learning institutions*" for the purposes of the Immigration Regulations, which in turn required registration with the DHET, and was explicitly

carried out not on the basis that the Applicant and its members had to comply with the requirements of Umalusi, but rather that it obtained accreditation with the QCTO.

[42] On 17 August 2018, and following the process set out above, the Applicant was provisionally registered with the DHET as a private college in terms of section 31(3) of the CET Act and regulation 12(4)(b) of the Regulations for the Registration of Private Further Education and Training Colleges, 2007 to offer NQF level 2 qualifications. Together with the certificate of registration, the DHET provided the Applicant with a letter concerning its provisional registration.

[43] The letter states *inter alia* that:

43.1 The Applicant had been provisionally registered as a private college under section 31(3) of the Continuing Education and Training Act ("CET Act"), No. 16 of 2006 as amended and Regulation⁹ 12(4) under the name "*EFL South Africa NPC*";

43.2 The Applicant's registration was stated to have been in terms of section 37 of the CET Act and Regulation 12(4)(c). It included the provision that:

43.2.1 The provisional registration was to endure for a period of 3 years until 31 December 2021;

43.2.2 The Applicant's is provisionally registered to offer the following qualification that is registered on the National Qualifications Framework : "*Foundation Learning Competence*", NQF Level 2 and ID 88895 on the Sub-Framework *OQSF*;

43.2.3 "*5.2 In this regard, the provisional registration decision is based on the accreditation outcome as reflected in the QCTO accreditation report dated 01 August 2018*".

⁹ Regulations for the Registration of Private Further Education and Training Colleges, 2007

43.3 Certificates for the registered qualification offered by EDUSA were to be issued by the QCTO.

43.4 The accreditation report of the QCTO confirmed that Applicant's accreditation was to endure until 31 July 2023 and that "...[i]n order to ensure the EFL South Africa NPC continues to meet the requirements for registration in terms of Regulation 18(a), it must secure re-accreditation before the accreditation expiry date."

[44] Regulation 18 of the regulations promulgated under the CET Act provides that:

"18. Maintenance of registration.—In order to maintain its registration, a private college must—

(a) continue to fulfil the requirements of the Act;

(b) discharge the responsibilities of a private college in terms of these regulations and the Act;

(c) comply with any condition imposed by the registrar in terms of section 37 or 38 of the Act;

(d) notify the registrar of any change, including, but not limited to, a change in the name or in any of the sites;

(e) comply with any reasonable process arranged by the registrar after consultations with the private college for the purpose of monitoring compliance with the requirements of the Act and conditions of registration; and

(f) report immediately to the registrar about the following:

(i) reduction or loss of any physical resources necessary for the proper conduct of a programme;

(ii) reduction or loss of any supporting service of a programme;

(iii) any significant reduction in the financial or personnel resources needed to sustain a programme; or

(iv) failure to meet a commitment made to the registrar in the process of registration or as a result of monitoring or review.”

[45] The aforementioned letter of confirmation of the Applicant's provisional registration thus made it explicit that continued accreditation with the QCTO, on the terms set out and confirmed in the letter, would enable the Applicant and its members to secure continued registration with the DHET.

[46] Having followed the processes agreed upon between the parties following settlement of the first application, EDUSA obtained provisional registration, and since then the DHA has issued study visas to prospective students, who have come to South Africa to study at EDUSA's member institutions.

Events which precipitated the current application

[47] During September 2018, the Office of the Chief State Law Adviser issued correspondence to the Director General of the DHET in response to its request for a legal opinion regarding the registration of private skills development providers (“the September 2018 opinion”). The opinion addressed various issues. Suffice to say that, *inter alia*, the Chief State Law Adviser opined that after, reviewing the provisions of the Skills Development Act, it concluded that although section 29(3) of the Constitution requires registration of independent educational institutions, this registration may only be effected through legislation that provides for the procedure and requirements for registration; and the provisions of the Skills Development Act do

not empower the Minister to make regulations regarding the registration of private skills development providers.

[48] Pursuant to its conclusion, the Chief State Law Advisor recommended that the Skills Development Act be amended to require the registration of private skills development providers and to provide for the requirements and procedure for such registration.

[49] In December 2019, a follow-up opinion was provided. This opinion addressed the following:

- 49.1 The proper interpretation of the CET Act (*“Issue D”*);
- 49.2 Whether the registrar can rely on section 43(5) of the CET Act as a legal basis for registering private skills development providers or whether it is legally possible to register private skills development providers as private colleges in terms of section 43(5) of the CET Act or in terms of section 3(3) of the National Qualifications Amendment Act 12 of 2019 (*“the NQF Amendment Act”*) (*“Issue E”*).
- 49.3 The legal implications of section 3(3) of the NQF Amendment Act regarding the registration of private skills development providers in the light of the fact that both the CET Act and the Higher Education Act 101 of 1997 in their current form, read together with the regulations, only provide for the registration of private colleges and private higher education institutions and not skills development providers (*“Issue F”*);
- 49.4 Since the new definition of “skills development provider” in section 1(h) of the NQF Amendment Act does not differentiate between a public and a private skills development provider and the SDA does not make any exception, does it mean that a public higher education institution that has been identified by the Minister to offer trade and occupational learning programmes that leads to a qualification or part qualification

on the trade and occupation sub-framework, must also be registered? (*Issue G*);

49.5 What are the implications, if any, of the new amendments to the Immigration Regulations, 2014 on the Department? (*Issue H*);

49.6 Whether there is a risk of litigation against the Department to compel the Department to register skills development providers despite the fact that currently the CET Act and the Higher Education Act do not provide for the registration of skills development providers and the fact that in terms of the Immigration Regulations, skills development providers are not considered education institutions (*Issue I*);

49.7 The legal status of the Joint Communiqué of 2016 (*Issue J*).

[50] It bears mention that *Issue I* is the exact same basis upon which the Applicant contends that it was forced to launch the present application on behalf of its members. In respect of *Issue D*, the Chief State Law Advisor, after canvassing the relevant case law and legislative provisions, explained that the “import of section 43(5) of the CET Act is that, a registered or provisionally registered private college that wishes to offer qualifications registered on the sub-framework for Trades and Occupations, may apply to the QCTO for accreditation as a skills development provider.”

[51] In respect of *Issue E*, the Chief State Law Advisor, after canvassing the relevant legislative provisions, opined that –

“Section 43(5) does not provide for the registration of private skills development providers because the CET Act does not deal with skills development providers but deals *inter alia* with colleges and their registration. However, “the CET Act does not prohibit the registration of a private skills development provider as a private college. In other words, a private skills development provider may register as a private college provided it meets the requirements of section 30 of the CET Act”.

[52] However, in order for section 43(5) of the CET to apply, once a private skills development provider is registered as a private college or is provisionally so registered, the private college may, in order to offer qualification on the Sub-Framework for Trades and Occupations, apply to the QCTO for accreditation as a skills development provider. They thus opine that subject to compliance with the requirements for registration, it is legally possible to register private skills development providers as private colleges for the purposes of section 43(5) of the CET Act.

[53] The Applicant averred that, whilst CET did not prohibit the registration of a private skills development provider, the aforementioned had the effect that a provider had to, by implication in terms of section 30 of the CET Act, comply with the requirements of Umalusi. This, of course, the Applicant and its members could not do, since they do not offer courses that are compatible to bring it within the auspices of the Act.

[54] Furthermore, registration in terms of section 3(3) of the NQF Amendment Act was also not an option and could not be relied upon to register private skills development as private colleges or as private skills development providers since that section had not yet come into operation.

[55] In January 2020, a further communiqué was issued, replacing and revoking the communiqué of 2016. Since this was not a review application, I refrain from dealing with the reasons advanced for the Respondents change of view with regard to the status of the Applicant and its members. Suffice to say that the communiqué acknowledged that the Department of Higher Education and Training had been confronted with various legislative challenges regarding the registration of Skills Development Providers which had far-reaching legal and financial implications on the registration process. The communiqué was only directed to SDP's who were currently accredited in terms of the Skills Development Act to offer qualification or part-qualification on the OQSF.

[56] The communiqué of 2020, in replacing and revoking the communiqué of 2016, therefore stated that the implications of the DHET's change of stance were that:

- “4.1 SDPs are no longer required to lodge applications for registration with Department as private colleges or private higher education institutions as contemplated in the Joint Communiqué 1 of 2016.”*
- 4.2 SDPs who are currently accredited by the Quality Council for Trades and occupations (QCTO) or its delegated Quality Assurance Partners (QAPs) and registered as examination centres (where applicable) may continue to operate as before for as long as they still meet their accreditation requirements and / or examination centre registration requirements;*
- ...*
- ...*
- 4.5 No SDP will be penalised or adversely affected in its operations as a result of not having lodged an application for registration as per the Joint Communiqué 1 of 2016 and;*
- 4.6 SDPs who want to offer qualifications or part-qualifications on the general and further education and training sub-framework or the higher education qualifications sub-framework, may, if they meet the prescribed requirements, approach the Department to be registered as a private college or private high education institution in terms of the CET Act of High Education Act”*

[57] The effect of this communiqué appeared to exclude the Applicant and its members who had obtained accreditation under the Quality Council for Trades and Occupations (“QCTO”) on the Occupational Qualifications Sub-Framework (“OQSF”) from being registered as private colleges since it is common cause that neither the Applicant nor its members can meet the requirements of Umalusi.

Subsequent events

[58] The Applicant and the DHET engaged in email correspondence on 24 February 2020 wherein *inter alia* the DHET confirmed that, in the light of the

communiqué of 2020, QCTO - accredited institutes would not be able to register with the DHET in future, unless they offer Umalusi accredited qualifications.

[59] Thus the effect of this change of stance is that, with the publication of the communiqué of 2020 and the decision that the DHET would no longer permit registration of private colleges that are accredited with the QCTO, Applicant and its members would no longer be able to obtain study visas for their students once the current provisional registration lapses at the end of December 2021.

[60] The Applicant contends that if it and its members are unable to obtain further registration after the end of December 2021 the effects would be catastrophic. It argues that despite the DHET's apparent change of heart, it has had no difficulty allowing the current provisional registrations, which it claims to be unlawful, notwithstanding the fact that these were effected in terms of Court Orders, to continue in place since February 2020. The Applicant also argues that the Respondents have neither applied to have the court orders and settlement agreements set aside in view of their changed stance as set out in the 2020 communiqué.

[61] Even as recently as 9 September 2021, DHET has continued to reflect that the Applicant and its members as provisionally registered, this notwithstanding the stance that they have adopted and the threats of non – renewal of registrations. The Applicant argues that given the DHET's stance, when the provisional registrations of Applicant and its members come to an end on 31 December 2021, they will not be renewed, with the result that the Applicant and its members will be unable to continue with their business operations.

[62] During December 2021 and in an attempt to avoid further litigation, correspondence was sent to the DHET again seeking clarity on *inter alia* the status of the contemplated amendment of the SDA; confirmation that such amendments would permit the Applicant and its members to be registered based on its course under the OQSF; further confirmation that the DHET would continue to permit, allow and extend the provisional registration of the Applicant and its members; and that the Applicant and its members be permitted sufficient time to register once the amendments are brought into effect.

[63] On 20 January 2021, the DHET responded by stating *inter alia* the following:

- 63.1 The Applicant and its members were obliged to comply with the requirements of Umalusi in terms of section 30 of the CET Act;
- 63.2 The laws as it stands makes no provision for the registration of any type of institution save those prescribed; and
- 63.3 Suggested it was the fault of the Applicant and its members for not complying with the requirements of Umalusi following the settlement order of 2016.

[64] The Applicant contends that the response of the DHET failed to acknowledge that the Applicant acted on the advice of the DHET and DHA following the settlement order, and that in consequence, had accredited themselves with the QCTO, registered as private colleges and thereby been provisionally registered by the DHET under the CET Act. It being an NPC, they then sought authority from its members to pursue the current application during March 2021.

Submissions by the Applicant

[65] In the founding papers, the Applicant and its members hinged their case on a legitimate expectation, alternatively a constitutional challenge. In its heads of argument however and during its submissions to Court, the primary arguments advanced was that there was an existing court order which provides for the relief sought and that the Respondents have taken no steps to have that Court Order set aside. According to its heads of argument, the relief which is sought is directed first and foremost at compliance with the existing court order. It contends that a finding in favour of the Applicant on this basis would be dispositive of the application.

[66] However attractive this proposition is, that is not the substantive relief that was sought in the Applicant's notice of motion. There, the basis of the case advanced was that, pursuant to the Steyn Order of 2016, the Applicant and its members had a

legitimate expectation that the procedures that they were instructed to follow by the DHA and DHET in order to obtain the requisite registration which would permit prospective students to apply for and be granted study visas were, in fact, correct; that the DHET will consider further applications of the Applicant and its members for provisional registration on the basis set out in the existing letters of provisional registration; and that the DHA will consider the study visa applications of prospective students of the Applicant and its members on their merits and accepting that the Applicant and its members qualify as 'learning institutions' for the purposes of the Immigration Regulations for so long as they remain registered with the Department of Higher Education and Training.

[67] The legitimate expectation, as advanced in the notice of motion, arises from: the 2016 communiqué; the settlement order; the discussions, advice and assistance given to the Applicant after the settlement was concluded; the subsequent provisional registration of Applicant and its members by the DHET; and the representations by the DHA, through the granting of study visas to prospective students, that the registration of the Applicant and its members with the DHET satisfied the requirements of the Immigration Act and Regulations, including, *inter alia* that the Applicant and its members were 'learning institutions' who satisfied the requirements of Regulation 12.

[68] The Respondents contend that the Applicant approached this Court on the basis that it was entitled to relief consequent upon a substantive legitimate expectation, alternatively as relief arising from its constitutional challenges. It is common cause that the Constitutional challenge was not argued. The Respondents contend that nowhere in the founding affidavit does the Applicant assert that it is entitled to any of the relief sought on the basis that this is provided for in the provisions of the 2016 Order. They aver that the new line of argument first emerged in the Applicant's replying papers and heads of argument.

[69] In argument, the Respondents contended that the Applicant's purported right to substantive relief from a legitimate expectation was without merit. They aver that any reliance on the doctrine of legitimate expectation presupposes that the expectation qualifies as legitimate. Relying on the formulation as advanced in *South*

African Veterinary Council v Szymanski 2003 (4) SA 42 (SCA)¹⁰, which provides the following: That the representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications; The expectation must have been induced by the decision maker; The expectation must be reasonable; and, The representation must be one which is competent and lawful for the decision-maker to make. The Respondents argue that none of the purported representations that the Applicant relies on meets any of these criteria.

[70] I was not in agreement with these submissions. Firstly, it is common cause that the Applicant and its members had been in lengthy discussions over a period of a number of years to address the apparent *lacuna* that emerged after the promulgations to the Immigration Act. These amendments caused the existence of the Applicant's and its members to fall foul of the regulations. The Department of High Education itself suggested a process by which the Applicant's could be provisionally registered as a means to secure visas for its students to study whilst attending to the issues required to be addressed in order to secure full registration. The Respondents cannot now renege on previous agreements and court orders to say that a party is only able to rely on a legitimate expectation when it is lawful. It was precisely because of unilateral changes to the regulations that caused the Applicant and its members to now be non-compliant with those regulations. The conduct of the Respondents over the years as is evident from the correspondence most certainly in my view would have induced the Applicant and its members reasonably expect that the Respondents would address the concerns raised and deficits caused by the amended regulations. The Respondents cannot now after the fact say that any conduct is unlawful. They themselves agreed to provisionally register them as *inter alia* compliant with regulation 12 in that if they retained their accreditation with the QCTO, that they would be entitled to the continuation of their provisional registration. I am also in agreement with the Applicant's contention that any administrative action¹¹ which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair. The Respondents conduct now pursuant to the Settlement agreement, in my view, has materially adversely affected the rights and legitimate expectations of the Applicant and its members, and it is for these reasons that the

¹⁰ at para 19

¹¹ In terms of section 3(1) of PAJA

Order was granted. Lastly, whilst the application was not decided on a contempt of court basis, I am non the less in agreement that the Respondents, in any event, had done nothing to amend the Settlement agreement by order of court dated 8 November 2016. A party, more especially a government institution, is not entitled in circumstances where an order by agreement was taken, to unilaterally decide to promulgate new communiques which goes against or is contrary to the very terms agreed to in a court order. The correct mechanism is to apply to have that court order varied or set aside and afford the parties so affected the necessary opportunity to respond thereto in accordance with the sacrosanct principle of *audi alteram partem*.

DS KUSEVITSKY
JUDGE OF THE HIGH COURT