

LOM Business Solutions/ASS

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 12942/09

2010-02-19

DELIVERED WHICHEVER IS NOT AVAILABLE	
(1) REPORTABLE	<input checked="" type="checkbox"/> YES/NO
(2) OF INTEREST TO OTHER JUDGES	<input checked="" type="checkbox"/> YES/NO
(3) REVISED	<input checked="" type="checkbox"/>
DATE	19/5/10
	<i>[Signature]</i>
	SIGNATURE

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In the matter between

ASSOCIATION OF TEST PUBLISHERS OF
SOUTH AFRICA AND ANOTHER
SAVALLE AND HOLDSWORTH SOUTH AFRICA
(PTY) LIMITED t/as SHL SOUTH AFRICA

Chung
20/5/10

1st Applicant

2nd Applicant

and

THE CHAIR PERSON OF THE PROFESSIONAL
BOARD OF PSYCHOLOGY

Respondent

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J U D G M E N T

BERTELSMANN J:

INTRODUCTION:

The respondent is the chairperson of the Professional Board for Psychology. The respondent is a Professional Board established in terms of section 15 of the Health Professions Act, Act 56 of 1974 (hereinafter referred to as "the Act").

The respondent is tasked with the control of the profession of psychology, with keeping a register of practitioners, to consult and liaise with other professional boards and relevant authorities, to assist in the promotion of the health of the population of the Republic on a national basis, to regulate healthcare providers, and consistent with national policy determined by the Minister, to control and to exercise authority in all matters affecting the education and training of health practitioners, to promote liaison in the field of education and training both in the Republic and elsewhere and generally to look after and into the health of the profession of psychology and to promote the same.

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The respondent employs a registrar who is also its chief executive officer, one Advocate B M Mkhize. The respondent has a duty to keep members of the psychology profession abreast of developments that may affect them in their professional capacity.

The respondent is a board whose functions are coordinated in terms of section 3(a) of the Act by the Health Professions Council of South Africa. The Council is an umbrella body that must protect, regulate and control the interests and activities of all professional health practitioners in South Africa. This task is exercised *inter alia* by the functions set out in sections 3(a) to 3(q) and section 4 of the Act. Section 3(j) determines that the Council must "... serve and protect the public in matters involving the rendering of health services by persons practising a health profession." The general powers of the Council listed in section 4 include the delegation of its powers to a professional board or committee. In terms of section 17 of the Act no person may practice a profession registerable in

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terms of the Act unless she or he is registered in terms of the Act in the appropriate category. Section 17 reads as follows:

“Registration a pre-requisite for practising.

- (1) No person shall be entitled to practice within the Republic-

(a) any health profession registerable in terms of this Act; or

(b) except in so far as it is authorised by legislation regulating healthcare providers and sections 33, 34 and 39 of this Act, any health profession, the practice of which mainly consists of -

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(i) the physical or mental examination of persons;

(ii) the diagnosis, treatment or prevention of physical or mental defects, illnesses or deficiencies in humankind;

(iii) the giving of advice in regard to such defects, illnesses or deficiencies; or

(iv) the prescribing or providing of medicine if in connection with such defects, illnesses or deficiencies,

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unless he or she is registered in terms of this Act.”

The scope of the professional registered health practitioners' practice may be and is defined by regulations published in terms of section 33(1) of the Act. This section reads as follows:

“Definition of scope of other health professions registereable in terms of this Act and registration of certain persons.

- 10 - (1) The Minister may, on the recommendation of the council and the relevant professional board, by regulation define the scope of any health profession registerable in terms of this Act by specifying the acts which shall for the purposes of the application of this Act be deemed to be acts pertaining to that profession: Provided that such regulations shall not be made unless any professional board established in terms of section 15 in respect of any profession which may in the opinion of the Minister be affected by such regulation, has been given an opportunity of submitting, through the council, representations as to the definition of the scope of the profession in question: Provided further that if there is a difference of opinion between the council and such professional board as to the definition of the scope of the profession concerned, the council shall mention this fact in its recommendation.
- 20 (2) When a professional board has been established under section 15 in respect of any health profession, the professional board shall, subject to such restrictions in respect of his or her professional activities as it may determine, register in respect of such profession, the name of any person who -
- (a)(i) was engaged in the practice of such profession in the Republic or in a territory which formerly formed

part of the Republic for a continuous period of not less than five years immediately prior to the date referred to in paragraph (c).

- (ii) Is dependent, wholly or mainly, for his or her livelihood on the practice of such profession; and
- (iii) submits a certificate to the professional board stating that he or she is of a good character and

(b)

10 (c) submits to the professional board an application in the prescribed form containing proof to the satisfaction of the professional board of the facts referred to in subparagraphs (i) and (ii) of paragraph (a), within six months (or such longer period as the professional board may allow,) after the date on which the scope of such profession was defined by the Minister in regulations contemplated in subsection (1).”

No health practitioner may engage in the practice of a profession unless he or she is registered in terms of the Act. Section 39 contains a criminal sanction for any transgression of the bounds of the registered and determined activity. Section 39 is worded as follows:

20 **“Prohibition of performance of certain acts by unregistered persons deemed to pertain to health professions registerable in terms of this act.”**

- (1) No person shall perform any act deemed to be an act pertaining to any health profession as may be prescribed under this Act unless he or she -

- (a) Is registered in terms of this Act and in respect of such profession;
- (b) (i) Is registered in terms of this Act in respect of any other profession referred to in section 33 to which such Act is also deemed to pertain; or
- (ii) practices a health profession in respect of which the registrar in terms of this Act keeps a register and such act is deemed to be an act which also pertains to such profession....”

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A transgression of this section attracts a criminal sanction in section 39 (2)

Section 39 is reinforced by section 59 of the Act which denies any registered person any remuneration for the performance of acts which are reserved for registered health practitioners. Section 59 is worded as follows:

59. Limitations in respect of unregistered persons.

- (1) No remuneration shall be recoverable in respect of any act specially pertaining to the profession of a registered person when performed by a person who is not registered under this Act to perform such act.”

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On 16 September 2008 the Minister published Regulations, presumably after consultation with the Council and the Board, to define the scope of the profession of psychology. In the light of the disputes between the parties it is necessary to quote the following portions of these Regulations.

In the definition section

“psychology”; is defined as ‘means the profession of a person registered under the Act as a psychologist, psychometrist, registered counsellor, psycho technician or in any other category of registration as may be established by the board;”

Scope of the profession:

(1) “The following act shall be deemed to be an act especially pertaining to the profession of psychology:

- (a) ...

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(b) ...

(c) ...

(d) ...

(e) ...

(f) The use of any psychological questionnaire, test, prescribed techniques, instrument, apparatus, device or similar method for the determination of intellectual abilities, aptitude, personality make-up, personality functioning, temperament, psycho physiological functioning, psycho pathology or personnel career selection, and for this purpose the Board will publish a Board Notice listing the tests which are classified by the Board for use by registered psychologists.”

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...

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Any person who wishes to perform any of the acts prescribed in regulations shall apply in the prescribed manner to the Board for registration as a psychologist and submit proof of having complied with the prescribed requirements for such registration.”

After the Regulations had been published the respondent's Registrar and CEO published a notice on the letterhead of the Health Professions Council of South Africa with a subheading indicating that it emanated from the respondent. This notice was published on 10 November 2008 and reads:

10 **“IMPORTANT NOTICE TO ALL TEST DEVELOPERS AND DISTRIBUTORS.**

Dear Sirs,

THE USE OF UNREGISTERED PERSONS TO RENDER PSHYCHOLOGICAL TESTS.

The use of a psychometric measuring devices, (sic) tests, questionnaires, techniques or instrument (sic) that assesses (sic) intellectual or cognitive ability of functioning, aptitude, interest, personality make-up or personality functioning in patients is constituted as being a psychological act. This, in view of possible
20 harm and management implications of persons who may be adversely affected by test outcomes, requires appropriate professional qualifications, skills and experience.

This serves as a notice that with effect from the date of promulgation of the amended scope of the profession of psychology (16 September 2008), (sic) is not permissible to use

unregistered persons to render psychological services including the administration of tests, instruments or techniques.

The Regulations relating to the scope of the profession of psychology as published in the government gazette (sic) no 31433 (government notice R393) dated 16 September 2008 gave effect to the repeal of the regulations published under government notices R1862, R1863 and R1864 of 16 September 1977 respectively.

Signed by Advocate B M Mhkize

10 Registrar/CEO.”

This notice was not addressed to psychologists, it will be noted, but to test developers and distributors. The parties are *ad idem* that test developers and distributors train persons who are neither qualified as psychologists nor as psychometrists to take down tests that do not involve the analysis of projective or clinical tests to evaluate emotional, psychological or cognitive processes or functioning. The applicants perceived this notice as reflecting a decision of the respondent taken before 10 November 2008 that, and I quote from the founding affidavit,:

20 13.5.1 “.... in terms of the Regulations it is not permissible to use unregistered persons to render the administration of tests, instruments or techniques;

13.5.2 that in terms of the Regulations the use of a psychometric measuring device, test, questionnaire, technique or instrument that assesses intellectual or cognitive ability or functioning, aptitude, interest,

personality make-up or personality functioning in patients is constituted as being a psychological act especially pertaining to the profession of psychology;

- 13.5.3 That a notice must be published and distributed to all test developers and distributors in the form and with the content as appears from annexure "FA1" to the founding affidavit."

Annexure FA1 is the notice that I have already referred to above.

The notice was seen to be that of the respondent. Applicants
10 regarded the notice as a direct threat to their continued existence and as fundamentally incorrect and in conflict with the general meaning and effect of the Regulations. On 25 November 2008 the applicants' attorneys addressed a letter to the respondent in which they underlined:

"5. Section 33(1) of the Health Professions Act, 56 of 1974, as amended Act by 29 of 2007 (hereinafter referred to as 'the Act') provides that the Minister may by regulation define the scope of any health profession registerable in terms of the Act by specifying the acts which shall for the purposes of the application of the Act be deemed to be acts pertaining to that profession. In terms of the
20 Regulations promulgated on 16 September 2008 the Minister specified the acts which shall be deemed to be acts pertaining to the profession of psychology. In terms of Regulation 2(f) one of the acts pertaining to the profession of psychology is specified as (and then the Regulation is quoted that I have referred to above).

6. It is clear that Regulation 2(f) does not stipulate that **the use** of a

psychometric measuring device, test, questionnaire etc. is reserved for a registered psychologist as stated in paragraph 1 of your notice. Firstly, Regulation 2(f) deals with **psychological** as opposed to **psychometric** questionnaires, tests, techniques or instruments. Secondly, Regulation 2(f) makes no reference to a '*psychometric measuring device*'. Thirdly, Regulation 2(f) is aimed at **the use of** (a psychological questionnaire, test, prescribed technique or instrument etc) **for the determination of** (intellectual abilities, aptitude, personality, make-up etc)

10 7. ... Accordingly an unregistered person may use a test technique or instrument for any purpose other than for the determination of the matters specified in Regulation 2(f).

8. The **administration** of tests, instruments or techniques does not fall within the ambit of Regulation 2 (f) ..."

A retraction of the notice was demanded, failing which a review of the respondent's decision to publish the notice was threatened. No answer was forthcoming to this letter. On 15 December 2008 applicant's attorney sent a further letter annexing the first letter, which letter again failed to elicit any response. The respondent maintained its silence until the
20 review application was launched in March 2009.

The Respondent is an organ of State. Its functionaries and officials are remunerated from the public purse. As an organ of State the respondent is obliged to honour the constitutional imperative of the basic values and principles governing public administration as set out in chapter 10 of the Constitution, particularly in section 195(1)(a), to and including

(e), quite apart from the duty that rests upon the respondent to apply fair administrative action which is equally determined by the Constitution. Section 195 of the Constitution decrees that an organ of state and its functionaries must act transparently, efficiently, cost effectively and in accordance with the foundational values of the Constitution.

The failure to answer applicant's letter was not only rude and impolite but it fell short of the above principles of fair administrative action. Our Courts have over the past years repeatedly and in increasing measure, and with increasing urgency, warned that public administrators,
10 public officials and organs of state are obliged to deal politely and efficiently with members of the public and the litigants who have concerns with their actions. I refer to a few of these judgments only. There are more. The first is the *Law Society of South Africa and Others v The Road Accident Fund and another* 2009 1 SA 206 (C) on page 214, paragraph 21:

20 “[21] In normal circumstances the costs of an application for interim relief would be reserved for the determination on the return day. The circumstances of this case are not normal. Firstly, the RAF is a public body dealing with public funds. It is mandated in terms of section 195 of the Constitution to maintain a high standard of professional ethics and to respond to people's needs and to foster transparency by providing the public with timely, accessible and accurate information. The RAF appears to have withheld information from the members of the public, including claimants, by having kept its decision of 30 October 2007 secret.

It in fact held out to the 1st and 2nd applicants that no decision had been made. The inference is irresistible that in implementing the DPS (Direct Payment System) in the manner it has done, it endeavoured to thwart any attempt to have the lawfulness of the direct payment system considered by a Court before it was implemented.”

The next is *Mlatsheni v Road Accident Fund* 2009 2 SA 401 (E) at paragraph [17]:

10 “[17] It is expected of organs of state that they behave honourably – that they treat the members of the public with whom they deal with dignity, honesty, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity, as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind are able to. That places the defendant in a position of great responsibility: its control of the purse strings places it in a position of immense
20 power in relation to the victims of road accidents, many of whom, it is well-known, are poor and ‘lacking in protective and assertive armour’. In this case, the employee who gave Mr Mvulana his instructions has abused his or her position of power.

[18] For this reason and because of the increase in similar approaches to matters by employees of the defendant in this

Division, I consider it necessary to order that a copy of this judgment be served upon the chairperson of the board of the defendant so that appropriate action can be taken and instructions issued to prevent further abuses in future. It is also necessary to state that, in my view, if this type of conduct continues, the time may well have arrived for orders of costs *de bonis propriis* to be awarded against employees of the defendant who give instructions that have the effect of frivolously frustrating legitimate claims."

- 10 The third is *Van Niekerk v Pretoria City Council* 1997 3 SA 839 (T) by Cameron J (as he then was) at 850 A:

20 "In my view, section 23 entails that public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State, including municipal authorities, to a new regimen of openness and fair dealing with the public. That the disclosure of the report may be inconvenient and even embarrassing to the respondent may be accepted; and under the common-law regime of discovery and privilege its resistance to disclosure may for this reason have been well warranted. That does not justify attenuating the impact of p.23. On the contrary: it is precisely for that reason that p.23 has

conferred upon the applicant the right nevertheless to obtain it.”

Lastly, *Kiliko and others v Minister of Home Affairs and others* 2006 4 SA 114 (C) at 126A:

“... the provisions of section 195 of the Constitution, to the effect that the public administration must be governed by the democratic values and principles that are enshrined in the Constitution and, *inter alia*, include the promotion of efficient, economical and effective use of resources ... and responsiveness to people’s needs ... would be served thereby. The Department, by having
10 failed since 2000 to introduce adequate and effective measures to address a gradually worsening situation, is primarily and materially responsible for the lack of reasonably adequate facilities essential for an expeditious handling of applications for asylum seeker permits. The delays caused by such lack of facilities have, in my view, undoubtedly resulted in the violation of the fundamental rights of asylum seekers under the Constitution and also under the
20 Refugees Act.”

The respondent’s failure to react to the applicants’ concerns was downright misleading in the light of the fact that the respondent denies
20 that it took any decision to interpret the regulations and denies that it is responsible for the notice. The respondent was therefore in duty bound to react speedily, openly, correctly, fully, honestly and politely to the applicants’ concerns and to clear up the misconception under which the applicants laboured. Defendant’s counsel suggested in argument that applicants were entitled to no more than an attorney’s letter denying

liability. This assertion demonstrates just how far respondent's conduct falls short of the standards of transparency and honest engagement with members of the public demanded by the Constitution. Had the respondent reacted immediately to the applicants' concerns this entire application might have been avoided. The respondent's arrogant approach to the public was compounded by the fact that counsel was instructed to defend its unacceptable attitude to the members of the profession who it was created to serve.

THE PARTIES:

- 10 The 1st applicant is the Association of Test Publishers of South Africa, a voluntary association established in terms of a written constitution in terms whereof it is empowered to institute proceedings in its own name. The offices and principal place of business of the 1st applicant are situated at 121 Boshoff Street, New Muckleneuk, Pretoria, Gauteng.

The 2nd applicant is Saville and Holdsworth South Africa (Pty) Limited, t/a SHL South Africa, a company duly registered and incorporated in terms of the provisions of the Companies Act, 1973 with registration no 96/010931/07. The 2nd applicant's principal place of business is situated at 121 Boshoff Street, New Muckleneuk, Pretoria,
20 Gauteng. The 2nd applicant is a member of the 1st applicant (the Association).

The 2nd applicant conducts business in objective assessment and evaluation in human resources management, develops, publishes and sells occupational and psychometric assessment instruments and material and trains persons in the effective use of the instruments. The 2nd

applicant employs about 50 full-time and 35 part-time employees, not all of whom are qualified psychologists.

The respondent is the chairperson of the Professional Board for Psychology who is cited *nomine officio* in her capacity as chairperson of the Professional Board for Psychology. I have already set out in the introduction what the respondent's functions and nature are.

THE RELIEF SOUGHT:

Applicants, still under the impression that the notice emanated from the respondent, launched a review to have the decision perceived to be
10 underlying the notice and the notice itself set aside. In addition, a declarator interpreting Regulation 2(f) was sought in prayers 4 and 5, reading as follows:

“Declaring that the statement made by the respondent in its notice dated 10 November 2008, annexure 'FA1' to the application, that
'the use of psychometric measuring devices, tests, questionnaires, techniques or instruments that assesses intellectual or cognitive ability or functioning, aptitude, interest, personality make-up or personality functioning in patients is constituted as being a psychological act' is not correct and
20 constitutes a misrepresentation of the meaning and effect of the regulations published in Government Notice No R993 in Government Gazette no 31433, dated 16 September 2008.

5. Declaring that the statement by the respondent in the notice dated 10 November 2008, annexure 'FA1' to the application that *'it is not permissible to use unregistered persons to render the*

administration of tests, instruments or techniques' is incorrect and constitutes a misrepresentation of the meaning and effect of the Regulations published in Government Notice no R993, in Government Gazette no 31433, dated 16 September 2008."

The respondent filed voluminous papers pertaining to its deliberations on the questions of the definition of the profession of psychology and related matters and filed further papers after applicants opined that it had not provided all relevant documents. Only after these steps had been taken did the respondent disclose in the chairperson's answering affidavit that it
10 had not taken any decision at all, nor had it authorised the controversial notice. The Registrar and Chief Executive Officer had published it off his own bat. The respondent does, however, agree with its contents and regards the interpretation of the Regulations as correct.

It is clear that the applicants were ambushed by this late disclosure. No explanation has been offered for it and no apology has been tendered for the unnecessary, costly and needless waste of many man-hours of professional time and the filing of hundreds of pages that could have been avoided by an immediate, courteous response to the applicants' first letter setting the record straight.

20 Applicant abandoned the review once the answering affidavit was filed, but reserved its right to present argument on the costs order that should be made in this respect. This latter aspect will be dealt with below.

THE APPLICANTS' *LOCUS STANDI*:

The respondent challenged the applicants' *locus standi* to launch the review application and the application for a declaratory order on the basis

that the applicants' interest in the issue was purely commercial and monetary only while the 1st applicant had no more than a representative interest. While there may be some doubt whether the 1st applicant would be able to launch these proceedings on its own, the 2nd applicant is affected by the contested notice to an extent that exceeds mere financial involvement. It conducts evaluations through employees of whom not all are registered psychologists and psychometrists. Apart from training people in the use of its tests, a transgression of the restrictions placed upon the right to conduct tests may attract a criminal prosecution. The
10 2nd applicant, its trainees and its employees might possibly face not only the loss of their livelihood but also criminal sanctions if the notice correctly reflects the current state of affairs regarding the tests under discussion. Under those circumstances the 2nd applicant has a direct and legal interest in the outcome of the proceedings. The attack on the applicant's *locus standi* must, therefore, fail.

THE INTERPRETATION OF THE NOTICE AND REGULATIONS:

The relief sought in the prayers quoted above and in the proposed amendments contained in the notice of amendment dated 25 January 2010, is aimed at obtaining a ruling that Regulation 2(f)
20 permits the administration or taking down the relevant tests by unqualified persons, provided that the latter do not evaluate the results. In this connection, Mr Maritz SC, on behalf of the applicants, emphasised that the prohibited action was the use of the tests concerned for the determination of intellectual abilities, psycho pathology etcetera. The Regulation was, therefore, not intended to cover the mere administration

of the test to obtain results that must be interpreted by qualified psychologists once the tests have been finalised.

Mr Smalberger SC, on behalf of the respondent, argued that any application of the tests amounted to a use thereof and was, therefore, taboo for unregistered persons. The literal meaning of the contested text, properly interpreted and read with Regulation 5, appears to lend strong support to Mr Maritz's argument. Were the respondent's contention to prevail, only psychologists would be empowered to administer or take down tests for later evaluation of the results. It is unlikely that the
10 primarily mechanical function of the recording of test results should be reserved for psychologists.

Were this the only issue to be decided in respect of the Regulations the Court would be strongly inclined to adopt the applicant's stance. This result would lead to the conclusion that the notice is wrong and unwarranted.

There is another aspect to Regulation 2(f) though, that neither party addressed in argument until it was raised by the Court. Regulation 2(f) envisages the publication of a Board Notice which will list the tests that may be applied only by psychologists. If that part of the regulation is
20 considered, it follows from the wording thereof that not all tests will be proscribed for unregistered persons. Only those listed in the notice will. The list has, however, not yet been published. Consequently Regulation 2(f) is inchoate and at present inoperative, unless and until the intended list is compiled and promulgated. In this respect reference is made to *Pharmaceutical Manufacturers Association of South Africa and Another:*

In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC). It follows, therefore, that any final pronouncement upon the correct interpretation of the Regulation and the Notice would be premature and so much hot air. The notice was published prematurely and has no force, effect or binding character in the absence of an official Board Notice containing the list of the tests reserved for psychologists only.

The applicants are, therefore, not entitled to a declaratory order as envisaged in the notice of motion as the Regulation is not operative at the moment, but under the rubric of further and alternative relief they are certainly entitled to a finding that the notice published by the CEO and Registrar is void and of no force and effect because it was published prematurely. It is in any event void in as much as it seeks to interpret Regulation 2(f), which Regulation requires a Board Notice rather than a mere communication by the CEO or Registrar to attain validity.

In the light of the fact that the respondent was largely responsible for what has now proved to be litigation that was entirely unnecessary, it is only fair that it should be ordered to pay the applicant's costs.

A warning must be issued, however, that this Court will have to give serious consideration in the future to hold functionaries of organs of State personally liable, rather than the overburdened public purse filled by the taxpayer, for costs of needless litigation that is the result of their ineptitude, their arrogance or their deliberate or grossly negligent failure to comply with their duties as servants of the State and, therefore, their duty to serve every member of the public in a courteous, transparent and

efficient fashion, which in this case the respondent and its functionaries patently failed to do.

The following order is made:

1. The notice published on 10 November 2008 under the hand of the Respondent's Registrar and Chief Executive Officer, addressed to test developers and distributors, is declared to be void and of no force and effect.
2. The respondent is ordered to pay the applicant's costs including the costs of two counsel.