

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING**

Case No: HC-MD-CIV-MOT-REV-2020/00337

In the matter between:

|  |                                 |
|--|---------------------------------|
| <b>THE CHAIRPERSON OF THE COUNCIL FOR THE<br/>NAMIBIA QUALIFICATIONS AUTHORITY</b> | <b>1<sup>ST</sup> APPLICANT</b> |
| <b>THE COUNCIL OF THE NAMIBIA QUALIFICATINS<br/>AUTHORITY</b>                      | <b>2<sup>ND</sup> APPLICANT</b> |
| <b>NAMIBIA QUALIFICATIONS AUTHORITY</b>  | <b>3<sup>RD</sup> APPLICANT</b> |

and

|   |                                  |
|---|----------------------------------|
| <b>SHADONAI BEAUTY SCHOOL CC</b>                                      | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>THE MINISTER OF HIGHER EDUCATION<br/>TECHNOLOGY AND INNOVATION</b> | <b>2<sup>ND</sup> RESPONDENT</b> |

**Neutral citation:** *The Chairperson of the Council for the Namibia Qualifications Authority v Shadonai Beauty School* (HC-MD-CIV-MOT-REV-2020/00337) [2021] NAHCMD 530 (12 November 2021)

**Coram:** MASUKU J  
**Heard:** 20 October 2021  
**Delivered:** 12 November 2021

**Flynote:** Interlocutory application – Filing of Supplementary affidavits – Exceptional circumstances to exist for the court to exercise its discretion

**Summary:** The parties in this matter are embroiled in an application for review. In that application the parties have exchanged their pleadings. The respondents therein take issue with the fact that the applicants have failed to establish the necessary *locus standi* in their papers of opposition. This being drawn to the attention of the applicants, they now seek to remedy that omission through this application. The respondents seek to file a supplementary affidavit which will address the issue raised.

*Held:* that the allegation of authority is mandatory and the omission thereof can be fatal. Even if that omission is contained in the answering / or opposing papers.

*Held* that: Exceptional circumstances should exist for a party to be allowed to file a supplementary affidavit.

*Held* further that: There exists no exceptional circumstances for the court to consider in the exercise of its discretion.

*Held:* that an oversight and incorrect legal advice cannot be equated to exceptional circumstances.

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## ORDER

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1. The Application for leave to file a supplementary affidavit in the main review application under Case Number HC-MD-CIV-MOT-REV-2020/00337 is hereby refused.
2. The Applicants are ordered to pay the costs of this application, the one paying and the other to be absolved, consequent upon the employment of one instructing and one instructed counsel.
3. The costs mentioned in paragraph 2 above, are subject to the provisions of Rule 32(11).

4. The matter is postponed to 2 December 2021 for directions regarding the further conduct of the matter.
5. The parties are ordered to file a status report suggesting the future conduct of the matter.

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## RULING

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MASUKU, J

### Introduction

[1] This court is seized with an application for leave to file a supplementary answering affidavit. The supplementary affidavit sought to be filed seeks to establish the authority of the respondent to oppose to the application filed by the applicant in the main application.

[2] This matter emanates from a review application before this court in which the parties have already exchanged their papers. The 1<sup>st</sup> respondent in its answering papers has taken issue with the lack of averments necessary to establish *locus standi* in the answering affidavit and the applicants now seeks to rectify its omission with this current application.

### The Parties

[3] For ease of reference I will refer to the parties as the applicants (respondents in the main application) and the respondents (the applicants in the main application.)

[4] The 1<sup>st</sup> Applicant is the Chairperson of the Council for Namibia Qualifications Authority, appointed as such in terms of section 5 of the Namibia Qualifications Authority Act, No.29 of 1996.

[5] The 2<sup>nd</sup> Second Applicant is the Council of the Namibia Qualifications Authority, ('the Council'), appointed as such in terms of Section 5 of the Namibia Qualifications Authority Act, No. 29 of 1996.

[6] The 3<sup>rd</sup> Applicant is Namibia Qualifications Authority, a juristic person duly established in terms of the Namibia Qualifications Authority Act No.29 of 1996.

[7] The 1<sup>st</sup> Respondent is Shadonai Beauty School CC, a close corporation registered in terms of the Close Corporation Act, No. 26 of 1988.

[8] The 2<sup>nd</sup> Respondent is the Minister of Higher Education, Technology and Innovation, duly appointed in terms of the Namibian Constitution, and is cited herein for the interest she may hold in the matter.

#### The applicants' case

[9] The applicants contends that the failure to provide this court with the resolution from the Council authorising the deponent of the affidavit to depose to it on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent was an oversight on their part. It is the applicants' case that they were advised from the onset that the allegation regarding authority to oppose proceedings may not be of significance due to the fact that the courts only require such proof of authority insofar as it pertains to the institution and prosecution of a matter and not with regards to the defence or opposition of a matter.

[10] It is only because the respondents have taken issue with the omission that the applicants deem it necessary to err on the side of caution and have therefor brought this application to enable the applicants to file a supplementary affidavit to rectify the defect alleged.

#### The Respondent's case

[11] The Respondents have raised a point in law. This relates to the non-compliance with rule 32. The respondents contend that the applicants have failed to comply with rule 32(4) in that they failed to first seek directions from the Honourable Court prior to the institution of this present application. They contend that compliance

with the rule in question is peremptory and non-compliance therewith renders the application liable to being struck from the roll, with costs.

[12] The respondents take issue further with rule 32(9) engagement in that one can glean from the rule 32(10) report that the parties did not meet and merely had an exchange of two letters. They contend that this non-compliance should result in the matter being struck from the roll, with costs.

[13] On the merits of the matter the respondents' position is this: the issue raised by the applicants in this application was never raised by the respondents by way of reply in the main application. The respondents raised an exception to the effect that if the allegations of authority contained in the answering affidavit are accepted as being factually accurate, then in the circumstances, the deponent to the answering affidavit in the main application has not made sufficient allegations to address the issue *locus standi*.

[14] The respondents have raised a *Stipp*<sup>1</sup> exception, and not a typical factual *locus standi* objection where complaints are raised in relation to the lack of a resolution. The respondents contend the applicants by way of the supplementary affidavit seek to address a matter that does not arise from the replying affidavit. In turn they seek to provide this court with a resolution authorising the opposition of the review application whereas the exception raised relates only to the sufficiency of the allegations made in the answering affidavit.

[15] It is their case that the applicants cannot supplement missing allegations but that they are rather entitled to supplement missing information and only in exceptional circumstances.

### Determination

[16] The parties in their arguments extensively referred this court to the matter of *Standard Bank Namibia Ltd v Nekwaya*<sup>2</sup> The principle enunciated in that matter is this:

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<sup>1</sup> *Stipp and Another v Shade Centre and Others* (SA 29 of 2006) [2007] NASC 2 (18 October 2007)

<sup>2</sup> *Standard Bank Namibia Limited v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089) [2020] NAHCMD 122 (26 March 2020).

[11] It is a matter of note that the applicant did not address this issue at all in its founding affidavit and thus could not, in reply, place proof of the authority as no authority whatsoever, was alleged. It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the applicant did not make out a case for the authority in the founding papers, nor did or could it do so in reply as that opportunity never came.

[12] It is also trite that in application proceedings, three sets of affidavits are permitted – the founding, answering and replying affidavits. In this regard, the learned authors, Herbststein & Van Winsen, say, “The ordinary rule is that three sets of affidavits are allowed, i.e. supporting affidavits, answering and replying affidavits. The court may in its discretion permit the filing of further affidavits.”

[13] There may be exceptional cases where a party is required for one reason or the other, to file a further affidavit in addition to the conventional three sets. This may only be done with the leave of court having been sought and obtained’.

[17] The court, in *Nekwaya*, proceeded to say the following, at paragraph [18]:

‘Authorisation of proceedings is a serious matter, and is not just an idle incantation required for fastidious reasons. The court must know, before it lends its processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof, that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.’

[18] There is no doubt that the allegation of authority is a serious one. Contrary to the aforementioned case in this instance case, the allegation of authority was omitted by the applicants in the opposing papers. The fact that the allegation is to appear in an opposing affidavit, does not render it less important to make.

[19] The applicants are of the view that this is a mere technical objection which in turn seeks to strike out the answering affidavit to the main application. I do not agree with this submission. This is so because it makes no sense to me that despite knowing the implications that the omission may result in, which in itself comes with dire consequences, the applicants take a very simplistic approach in the redress of its omission.

[20] In the matter of *Rally for Democracy and Progress v Electoral Commission of Namibia and Others*<sup>3</sup> the court held that:

‘...a court will not reject the additional affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits. If there is an explanation that negatives *mala fides* or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should not incline towards allowing the affidavits to be filed. But there must be a proper and satisfactory explanation as to why it was not done earlier and what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.’

[21] I find it necessary to closely look at the reasons proffered by the applicant in this regard. They are as follows:

‘5.3.1 On hindsight it appears that we have had an oversight in not providing this honourable court with the necessary resolution from the Council authorising to depose to the affidavit on behalf of the Chairperson, the Council and the NQA itself.

5.3.2 I was advised (*sic*) at the time that it may not be of significance due to the fact that the courts normally require such proof of authority insofar as it pertains to the institution and prosecution of a matter, and not with regards to the defence of a matter.

5.5.5 In any event, due to the fact that the first respondent herein has taken issue with regards to the authority in question, we have opted, on legal advice, to err on the side of caution and to approach the honourable court with the current application and to provide the necessary authority.’

[22] From the aforementioned reasons furnished by the applicant, in my view, there is proper and satisfactory explanation advanced by the applicants for the defect. It must be recalled that the court must be satisfied that exceptional circumstances exist in order to enable it to exercise its discretion in the applicants’ favour to allow the applicants to file a supplementary affidavit. An oversight and incorrect legal advice cannot, on the most benevolent interpretations, be construed as amounting to exceptional circumstances.

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<sup>3</sup> *Rally for Democracy and Progress v Electoral Commission of Namibia and Others* (SA-2011/12) 2012 NASC 21 (25 October 2012)

### Conclusion

[23] In consideration of the issues discussed above, together with this Court's findings, I am of the considered view that the application should not succeed. I am not persuaded that the applicants have made out a case on the papers, to require the court to exercise its discretion to grant the relief prayed for in the notice of motion.

### Costs

[24] There exist no circumstances why the ordinary rule on costs should not be followed. Costs will accordingly follow the event. These costs are to be capped in terms of Rule 32(11).

### Order

[25] It is because of the reasons above that the following order is fit to issue in the circumstances:

1. The Application for leave to file a supplementary affidavit in the main review application under Case Number HC-MD-CIV-MOT-REV-2020/00337 is hereby refused.
2. The Applicants are ordered to pay the costs of this application, the one paying and the other to be absolved, consequent upon the employment of one instructing and one instructed counsel.
3. The costs mentioned in paragraph 2 above, are subject to the provisions of Rule 32(11).
4. The matter is postponed to 2 December 2021 for directions regarding the further conduct of the matter.



5. The parties are ordered to file a status report suggesting the future conduct of the matter.

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T. S. Masuku  
Judge

## APPEARANCES

APPLICANT : A. Boesak  
Instructed by Shikongo Law Chambers

RESPONDENT: T. Chibwana  
Instructed by AngulaCo Inc