

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00443

In the matter between:

SHADONAI BEAUTY SCHOOL

APPLICANT

and

CHAIRPERSON OF THE COUNCIL

FOR THE NAMIBIA QUALIFICATIONS AUTHORITY

FIRST

RESPONDENT

COUNCIL OF THE NAMIBIA QUALIFICATIONS AUTHORITY

SECOND

RESPONDENT

NAMIBIA QUALIFICATIONS AUTHORITY

THIRD RESPONDENT

MINISTER OF HIGHER EDUCATION,

TECHNOLOGY AND INNOVATION

FOURTH RESPONDENT

Neutral citation: *Shadonai Beauty School v Chairperson of the Council for the Namibia Qualifications Authority* (HC-MD-CIV-MOT-GEN-2022/00443) NAHCMD NC 302 (7 June 2023)

Coram: Schimming-Chase J

Heard: 8 May 2023

Delivered: 7 June 2023

Flynote: Costs – Where court is called upon to adjudicate only on costs – No hard-and-fast rule whether court should consider the merits – Each case to be decided on its own facts – Relevant legal principles relating to the court’s discretion in awarding costs restated.

Summary: During 2014, Shadonai made application to the Namibia Qualifications Authority (NQA) for reaccreditation of its school. On 11 April 2018, the NQA refused the application. On 17 April 2018, Shadonai sought a reconsideration of the decision to refuse the application. On 22 May 2018, the CEO of the NQA confirmed the refusal of 11 April 2018. Shadonai lodged an appeal to the Minister of Higher Education, and on 10 July 2020, the Minister ordered Shadonai to reapply to the NQA. Shadonai then brought a review application in the High Court, and the parties subsequently settled the review, agreeing that the NQA would withdraw its decisions of 11 April 2018 and 22 May 2018. On 15 August 2022, the agreement was made an order of court.

On 23 August 2022, Shadonai, via its legal practitioners sought a determination of the reaccreditation application. On 24 August 2022 NQA responded and advised that its new council recently took office and was in the process of considering all matters, further that a decision would be forthcoming. On 23 September 2022, Shadonai instituted the present application compelling an answer from the NQA. Although NQA opposed the application, its legal practitioner transmitted further correspondences to Shadonai, reiterating that a new council would be appointed and that its application for reaccreditation would be considered *de novo* on 22 November 2022. Shadonai’s legal practitioners did not respond to any of the correspondences. By 30 November 2022, NQA communicated a decision favourable to Shadonai. The present application was withdrawn by agreement. However the parties could not agree on costs. The matter was heard on the question of costs only.

Shadonai argued that the NQA was lackadaisical in its approach and consideration of the application, and as a result, it could not operate its business. The NQA argued that it had on separate occasions attempted to amicably resolve the dispute, to obviate the need of the application, and Shadonai, ignoring such attempts persisted in its application, even setting the matter down on the residual roll, after it had become opposed.

Held, the court already indemnified Shadonai for its costs in having to pursue the application to review the decisions of 11 April 2018 and 22 May 2018.

Held, it cannot be disputed that NQA as a public authority had delayed taking and communicating a decision to Shadonai, which caused financial prejudice. Shadonai was not unjustified in launching the application. However, NQA satisfied the court that the delay was not caused vexatiously, and that it had communicated their predicament to Shadonai at the outset to curtail costs. In these circumstances and in the court's discretion, it would be fitting for each party to pay its own costs.

ORDER

1. Each party shall bear its own costs.
 2. The matter is finalised, and removed from the roll.
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JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] The applicant, Shadonai Beauty School CC ("Shadonai"), is a close corporation duly registered and incorporated in terms of the applicable provisions of the Close Corporation Act 26 of 1988. It trades as a beauty school, providing courses and diplomas in various areas of the aesthetics profession. It was first accredited as an educational institution by the Namibia Qualifications Authority ("NQA") (the third respondent) duly established in terms of the Namibia Qualifications Act 29 of 1996 ("the Act").

[2] The first respondent is the Chairperson of the Council for the NQA duly appointed as such in terms of the Act. The second respondent is the Council of the NQA duly constituted as such in terms of the Act. The fourth respondent is the Minister of Higher

Education, Technology and Innovation, duly appointed as such in terms of Article 32(3) (*bb*) of the Namibian Constitution, and line Minister, cited herein for any interest that she may have in the outcome of the matter.

[3] Shadonai launched a mandamus application during September 2022 against the respondents. The relief sought was an order directing the Council of the NQA to consider and decide its application for re-accreditation in respect of some of its course offerings in terms of s 13(1) of the Act, read with regulations 12 and 13 of the Regulations for the Accreditation of Persons, Institutions or Organisations, published in terms of the Act. In addition, Shadonai prayed for an order directing the Council of the NQA to inform Shadonai of its decision within seven days.

[4] On 18 October 2022, the NQA opposed the application. On 30 November 2022, the NQA provided the decision on the re-accreditation application in favour of Shadonai, after the exchange of pleadings. On 13 December 2022, the parties consented to withdraw the application, save that they did not agree on costs.

[5] The issue for determination relates to costs only. Both parties, respectively represented by Mr Doeseb and Ms Janser, submit that the costs of the application should be paid by the other party.

Applicable legal principles

[6] I summarise at the outset, the principles applicable to the determination of costs. The purpose of an award of costs to a successful litigant is inter alia, to indemnify that litigant for the actual expense to which he or she has been put through in having been unjustly compelled to initiate or defend litigation.¹ The basic rule is that subject to express enactments to the contrary, all costs are in the discretion of the court. Even the general rule, namely that costs follow the event, is subject to this overriding principle. This discretion must be exercised judicially upon a consideration of the facts of each case. In essence it is a matter of fairness to both sides, and 'judicially' means 'not arbitrarily'.²

¹ LAWSA Second Edition, Volume 3 Part 2: Civil Procedure and Costs para 289.

² LAWSA Second Edition, Volume 3 Part 2: Civil Procedure and Costs para 291; and the authorities collected there.

[7] In *Ongombe Farmers Association v Tjiuro and Others*,³ Heathcote AJ held that:

‘Where all the factual and legal issues have not been determined, but the parties nevertheless want the court to determine the issue of costs, the court does so by exercising discretion. It will suffice to refer to *Channel Life Namibia Limited v Finance in Education (Pty) Ltd* 2004 NR 125 (HC) where Damaseb J (as he then was) discussed the relevant case law where a court must determine costs without the merits having been decided. In essence, he made two pertinent points: firstly, there can be no hard and fast rule that a court must never determine the merits to decide the costs. Sometimes it may be necessary to do so, and on other occasions, not; secondly, a factor which should be taken into consideration is that all parties should, as soon as possible, take steps to curtail costs.’⁴

Background facts

[8] In this instance, it is necessary to delve into the facts of the present application that was withdrawn by agreement.

[9] During 2014, Shadonai made application to the NQA for re-accreditation of its school and courses, in terms of s 13(1) of the Act. On 11 April 2018, the Council of the NQA refused the re-accreditation and communicated its decision to Shadonai. On 17 April 2018, Shadonai in writing requested NQA to reconsider its decision of 11 April 2018, and on 22 May 2018, the CEO of the NQA confirmed the refusal.

[10] Shadonai subsequently lodged an appeal, and on 10 July 2020, the Minister directed Shadonai to reapply to the NQA.

[11] Shadonai then launched a review of the appeal finding under case number HC-MD-CIV-MOT-REV-2020/00337, and the parties settled the review, agreeing that the decisions of the NQA Council dated 11 April 2018 and 22 May 2018 be withdrawn. The agreement was made an order of court on 15 August 2022, and NQA was ordered to pay Shadonai’s taxed costs.

³ *Ongombe Farmers Association v Tjiuro and Others* [2011] NAHC 194 (6 July 2011) para 18.

⁴ See also *Erf Sixty-Six, Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others* 2012 (1) NR 393 (HC) para 10.

[12] On 23 August 2022, Shadonai via its legal practitioners wrote to the legal practitioners of the NQA, requesting a new decision on the re-accreditation application made in 2014. NQA was informed that failing to provide same will result in Shadonai instituting urgent proceedings.

[13] On 24 August 2022, the legal practitioners for the NQA responded to Shadonai's legal practitioners. It was specifically stated in this correspondence that the new Council for the NQA recently took office and that they were in the process of familiarising themselves with all pending matters. Shadonai was also informed that its application for re-accreditation would have to be considered de novo because the previous decision was withdrawn, and the Council's decision would be communicated in due course. Further, that the institution of urgent legal proceedings would be premature if not malicious and vexatious.

[14] Shadonai's legal practitioners did not respond to this letter. Instead, and one month later on 23 September 2022, Shadonai instituted the present mandamus application. The NQA opposed the application on 18 October 2022 and delivered answering papers on 7 November 2022. Shadonai delivered replying papers on 28 November 2022. On 15 December 2022, a joint status report was filed recording that NQA rendered a favourable decision on 30 November 2022 resulting in a withdrawal by agreement of the application.

[15] It is necessary to mention that NQA's legal practitioners transmitted further correspondence to Shadonai's legal practitioners after it instituted the application. After receiving no response to the letter dated 24 August 2022, NQA's lawyers transmitted further correspondence to Shadonai's legal practitioners on 28 September 2022. Apart from reiterating NQA's stance made on 24 August 2022, it was made clear that:

'...As previously conveyed, our client's Council was recently inducted and attended to procedural and administrative matter as part of their induction only on 15 September 2022.

Our instructions are further to advise that the first meeting of the NQA Council's accreditation, Assessment and Audit Committee is scheduled only for the 20th of October 2022 during which recommendations will be made for consideration at the NQA Council meeting scheduled for 22nd November 2022 whereafter a decision will be communicated to your client as well as other

applicants whose applications are currently pending.'

[16] A request was made for Shadonai to withdraw the application and await the decision of the NQA Council given the timelines set out in the correspondence. No reply was received. A further request was made for feedback from NQA's legal practitioners on 18 October 2022, 21 October 2022, 26 October 2022, 27 October 2022 and 2 November 2022. Again, no responses were forthcoming.

Parties' submissions

[17] The gravamen of Shadonai's argument in support of costs in its favour is premised on the NQA's inordinate delay to provide its decision within a reasonable timeframe. Mr Doeseb argued that the application for re-accreditation was made to the NQA during 2014 already. The decision refusing the application was made after a protracted period of time had lapsed, i.e. on 11 April 2018 and 22 May 2018, respectively, and on 15 August 2022, the NQA agreed to withdraw its respective decisions of 11 April 2018 and 22 May 2018.

[18] Mr Doeseb argued that the above notwithstanding, the NQA furthermore failed and/or neglected to subsequently make and/or provide its new decision to Shadonai within a reasonable timeframe considering the long history of the matter. It was submitted that the NQA's lackadaisical approach in bringing the matter to an end by providing its decision timeously and/or within a reasonable timeframe is the root cause of complaint. Therefore, but for the existence of the NQA's lackadaisical approach, the necessity to bring the present application would not have occurred.

[19] It was submitted further that Shadonai's core business is that of a beauty school providing diplomas at NQF Levels 5-7, and that it has not been able to enroll students since its accreditation lapsed in August 2014. On the other hand, the NQA is the decision-maker vested with the public power of accrediting institutions. In light of the foregoing, it was incumbent on the NQA to provide its new decision timeously and without any further undue delay, instead of leaving Shadonai in a protracted state of suspense, bearing in mind that the awaited decision was not only crucial but also central to the continuity of Shadonai's core business.

[20] As a result, counsel argued, Shadonai has shown 'very sound reasons' as to why the NQA is not entitled to an order as to costs. In fact, it was submitted that the NQA's actions warranted a punitive costs order. Reliance was placed on the decision in *Longer v Minister of Safety and Security*⁵ where Masuku issued a stern and warranted rebuke on the conduct of the decision maker that had delayed for almost 25 years to make a decision. The following was stated:

[3] Persons in this Republic, both natural and juristic, are entitled, when they have registered grievances, against public officials or the exercise of public power by those officials, to be given an answer in relation to their grievances, without undue delay and at worst, within a reasonable time. The fact that the decision-maker, may be of the view that the grievance is not meritorious, should not detract from the duty on the part of public officials to give reasons for the decision in good time. This serves, among other things, to enable the recipient of the decision to decide on further steps to take, if any. As a result of the inordinate delay in this matter, the applicant has been placed on pause mode, his rights frozen by the office of the Minister of Safety and Security for the past 24 years. This is simply unacceptable. It should not be repeated at all.'

[21] Ms Janser for NQA premised her argument on the actions of the NQA after the Minister ordered Shadonai to reapply for re-accreditation. She highlighted that the NQA set out their position very clearly to Shadonai, both before and after the application was launched. Shadonai was informed that a new council had to be appointed to deal with all pending matters including the application of Shadonai, and that Shadonai's application had to be considered de novo. Counsel pointed to two letters dated 24 August 2022 and 28 September 2022 where it was indicated, inter alia, that the application would be considered on 22 November 2022, and in the end, a decision favourable to Shadonai was communicated on 30 November 2022.

[22] Counsel also pointed to the series of letters addressed to Shadonai's legal practitioners which were not responded to at all, and submitted that it was clear that that litigation at that stage was premature and unnecessary. It was her argument that at that stage already, their office gave a timeframe within which Shadonai's application would be considered, namely 22 November 2022. Shadonai's legal practitioners instead elected to ignore all of NQA's letters and various follow-up emails resulting in the NQA having no

⁵ *Longer v Minister of Safety and Security* (HC-MD-CIV-MOT-REV-2018/00229 [2019] NAHCMD 411 (11 October 2019)).

other options but to file their notice of intention to oppose and answering papers. This was followed by a replying affidavit which counsel submitted was entirely unnecessary in the circumstances.

[23] Counsel argued that despite the aforementioned letters, Shadonai surprisingly, and without regard to the notice of intention to oppose filed of record, proceeded to set the application down for hearing on 11 November 2022. The matter was subsequently removed from the roll due to same having become opposed. It was premature and unreasonable, in the circumstances for Shadonai to lodge an application against the NQA when Shadonai was already assured that a decision was forthcoming.

[24] Counsel argued that Shadonai's application was accordingly frivolous and vexatious and constituted a gross abuse of the process of the court. This is further buttressed by the fact that the NQA made a decision in the reaccreditation application culminating in the withdrawal of the application. It was submitted that it was apparent from NQA's correspondence that it never refused to take a decision, but merely pleaded for patience on the part of Shadonai.

[25] Serving before court is the equivalent of a 'he-said-she-said' argument by each party for an order of costs in their respective favours.

Discussion

[26] The conduct of the NQA when the initial reaccreditation application was launched is clearly unacceptable. However, and for purposes of determining costs for this application, it is necessary to consider NQA's conduct after Shadonai was directed by the Minister to reapply.

[27] During this period, the correspondences reveal that NQA was sitting without a duly appointed Council and informed Shadonai of this fact. NQA also provided Shadonai with dates when the re-accreditation application would be considered by the NQA Council. This information was provided before an answering affidavit was delivered. Yet for reasons which Mr Doeseb could not explain, there was simply no response to a number of correspondences that set out the proposed time frames and sought a response so as not

to engage in additional legal costs. There appears to have been no attempt whatsoever to engage NQA, and this conduct of the legal practitioners concerned is also to be deprecated. It is after all, part of the ethical conduct of a legal practitioner to timeously respond to correspondence.⁶

[28] It is also apparent, if regard is had to the order of court dated 15 August 2022, that the court indemnified Shadonai for its costs in having to pursue the application to review the decisions of 11 April 2018 and 22 May 2018. While the court can appreciate the full conspectus of the events as they transpired, it seems evident and clear that the parties reached a compromise of the events since 2014, when the initial application for re-accreditation was submitted, until 15 August 2022, when the court accepted the settlement between the parties, and made their agreement an order of court.

[29] To my mind, it would have been reasonable for Shadonai to at least consider the attempts made to curtail costs, given the explanation by the NQA. While the efforts by the NQA to amicably resolve the matter is commendable, a full appreciation of the facts and timelines does not bode well for the NQA either. The case cited by Mr Doeseb is also somewhat extreme for his proposition, given that the delay in *Longer* was over 20 years. That said, I am not convinced that Shadonai was acting frivolously and vexatiously by instituting this application to compel the NQA to deliver its determination. However, after being informed by NQA that Shadonai's application would be heard on 22 November 2022, my view is that Shadonai's persistence in pursuing the relief, and failing to respond to correspondence was ill-considered. I also do not believe that NQA, given its situation that it was at pains to explain, was vexatious either.

[30] To my mind, both parties carry some blame here, and this lack of effective communication leads me to conclude that for purposes of the current application before court, each party should pay its own legal costs.

[31] It is in light of the foregoing that I refuse to exercise my discretion in favour of either party. And in the circumstances, the following order is made:

⁶ EAL Lewis *Legal Ethics-A Guide to Professional Conduct for South African Attorneys* at p86 para 14.2; *Incorporated Law Society, TVL v Bothma* 1962 (4) SA 177 (T) at 179B.

1. Each party shall bear its own costs.
2. The matter is finalised, and removed from the roll.

EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT:

D Doeseb
of AngulaCo.,
Windhoek

FIRST TO THIRD RESPONDENTS:

J Janser
of Shikongo Law Chambers,
Windhoek