

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00367

In the matter between:

NAMIBIA TRAINING AUTHORITY

APPLICANT

and

**THE MINISTER OF HIGHER EDUCATION, TECHNOLOGY
AND INNOVATION**

RESPONDENT

Neutral Citation: *Namibia Training Authority v The Minister of Higher Education,
Technology and Innovation* (HC-MD-CIV-MOT-GEN-2022/00367)
[2023] NAHCMD 185 (13 April 2023)

Coram: SIBEYA J

Heard: 31 March 2023

Delivered: 13 April 2023

Flynote: *Declarator* – Requirements for a declaratory order restated – Although found to have an existing or contingent interest in the relief sought, the application found to constitute an abstract and academic point and not appropriate for a *declarator*.

Summary: The applicant seeks a *declarator* from the court that on a proper and purposive interpretation of the Vocational Education and Training Act 1 of 2008 ('the Act'), the applicant is empowered and/or mandated to utilise the VET levy funds for *inter alia*, the construction of new vocational training centres and/or the expansion of existing vocational training centres, or that the provisions of the Act do not prohibit the applicant from doing so.

The application was launched after it was established that there is no consensus amongst the members of the Board of Directors on whether or not the applicant is entitled to utilise the VET levy funds for the construction of new vocational training centres (VTCs). The application is unopposed.

Held: The court has a duty, even in the absence of an opposition, to determine the propriety of the application and to guard against dishing out orders for the mere asking.

Held that: The impasse said to exist amongst the members of the Board of Directors of the applicant can be resolved among themselves at a duly convened and constituted meeting of the Board and, therefore, if the matter can be resolved among the members of the applicant without the aid of the *declarator* sought, then this application is strictly speaking abstract and academic. No duty rests on the court to adjudicate abstract and academic matters.

Held further that: the applicant's application falls to be dismissed for raising an abstract and academic issue.

ORDER

1. The applicant's application for declaratory relief is dismissed.
 2. There is no order as to costs.
 3. The matter is regarded as finalised and removed from the roll.
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JUDGMENT

SIBEYA, J:

Introduction

[1] The court is seized with an application for declaratory relief wherein the applicant seeks an order to utilise the Vocational Training Education levy funds. The application is unopposed.

The parties and representation

[2] The applicant is the Namibia Training Authority (NTA), a juristic person established in terms of s 4 of the Vocational Education and Training Act 1 of 2008 hereinafter referred to as 'the Act', with its principal place of business situated at NTA Village, Rand Street, Windhoek.

[3] The respondent is the Minister of Higher Education, Technology and Innovation, duly appointed as such according to the laws of the Republic, with her address of service at care of the Office of the Government Attorney, 2nd floor, Sanlam Centre,

Independence Avenue, Windhoek. No relief is sought against the respondent who is cited merely for the interest that she may have in the matter in her official capacity.

[4] Although the respondent filed a notice to oppose the application, she failed to file answering papers and was subsequently barred from filing papers in opposition. As a result, the matter was heard unopposed. Notably though, the court still retains a duty to determine whether the relief sought should be granted or not.

[5] The applicant is represented by Mr Boonzaier, while Mr Muhongo, a member of the Society of Advocates, appeared as *amicus curiae*.

Background

[6] When the matter appeared on the residual roll, the court formed the view that it required to hear arguments on the relief sought. It is on this premise that the applicant filed heads of argument and Mr Boonzaier argued the application. The court appreciates both the written and oral arguments advanced by counsel.

[7] After considering the documents filed of record, the court held the view that the matter is of such great importance that it required to be adequately adjudicated and further that the ultimate decision to be delivered may guide future similarly placed applications. As a result, the court opined that this is a case befitting of seeking the assistance of counsel to act as *amicus curiae*.

[8] The Constitutional Court of South Africa in *Institute for Security Studies In Re S v Basson*¹ remarked that *amicus* is heard where:

‘the person will offer submissions on law or relevant facts which will assist the Court in a way in which the Court would otherwise not have been assisted... In the exercise of its discretion whether or not to admit a person as an *amicus* this Court will have regard to the

¹ *Institute for Security Studies In Re S v Basson* (CCT30/03B) [2005] ZACC 4; 2006 (6) SA 195 (CC) (9 September 2005), paras 6 to 7.

principles that govern the admission of an *amicus*. These principles are whether the submissions sought to be advanced are relevant to the issues before the Court, will be useful to the Court and are different from those of the other parties.’

[9] It is at the backdrop of the above that the court invited *amicus curiae*. The court, particularly, extends its gratitude to Mr Muhongo, who on short notice agreed to act as *amicus curiae*. His written and oral arguments together with those of Mr Boonzaier were of considerable assistance to the court.

The relief sought

[10] The applicant approached the court seeking the following order:

‘1 Declaring that applicant is in terms of the provisions of the Vocational Education and Training Act, Act 1 of 2008 empowered to – in its discretion – utilise VET levy funds (as defined in the Vocational Education and Training Act, Act 1 of 2008) for amongst others, the funding and construction of new Vocational Training Centres and expansion of existing Vocational Training Centres as defined in the Vocational educational and Training Act, Act 1of 2008.

2 ... further and/or alternative relief’

[11] Plainly, the applicant seeks a *declarator* from the court that on a proper and purposive interpretation of the Act, the applicant is empowered and/or mandated to utilise the VET levy funds for *inter alia*, the construction of new vocational training centres and/or the expansion of existing vocational training centres, or that the provisions of the Act do not prohibit the applicant from doing so.

[12] The applicant relies on s 16(d) of the High Court Act² in its quest to establish the jurisdiction of the court in this matter. Section 16(d) provides that:

² High Court Act 16 of 1990.

'The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power –

...

(d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[13] This court has a duty, even in the absence of an opposition, to determine the propriety of the application and guard against dishing out orders for the mere asking. The central question in this application, therefore, is whether or not this is an appropriate matter where the court should issue the declaratory order sought.

Applicant's case

[14] Mr Tomas Nekongo, the Company Secretary of the applicant, who deposed to the founding affidavit, stated, *inter alia*, that there is an impasse among the Board of Directors of the applicant as there is no consensus amongst the members of the Board on whether or not the applicant is entitled to utilise the VET levy funds for the construction of new vocational training centres (VTCs).

[15] Due to the divergent views of the Board members, the Board at its meeting of 13 July 2021 resolved to launch this application. The minutes of the Board meeting of 13 July 2021 reveal that:

'The Board noted the opinions expressed by two members of NTFC (past and present) who are lawyers, that the NTA is not mandated to use VET levy funds for construction of new VTCs, and expansion of existing VTCs, as well as a divergent external legal opinion indicating that the NTA is mandated to construct VTCs. The Board further noted that having divergent views on the matter was concerning and posed a risk to Board members in terms of executing

their duties, and that it was necessary for a competent court to be approached to provide clarity on the matter.'

[16] The applicant has the following operating public VTCs:

- (a) Valombola VTC (Ongwediva);
- (b) Eenhana VTC (Eenhana);
- (c) Nakayale VTC (Outapi);
- (d) Okakarara VTC (Okakarara);
- (e) Rundu VTC (Rundu);
- (f) Zambezi VTC (Katima Mulilo);
- (g) Gobabis VTC (Gobabis).

[17] The following VTCs are not yet operational but are being constructed following the approval of such construction by the Board at its meeting of September 2016:

- (a) Kunene VTC (Khorixas);
- (b) Nkurenkuru VTC (Nkurenkuru);
- (c) Keetmanshoop VTC (Keetmanshoop).

[18] Mr Nekongo deposes further that the National Training Fund Council meeting of 17 August 2021 resolved to convene a special meeting where the legal authority of the applicant to construct and manage new VTCs would be discussed. At the special council meeting, two members opined that the applicant is not mandated to utilise levy funds for construction of new VTCs and expansion of existing VTCs, as same is not specifically provided for in the Act. The said two divergent views were concerning to the Board and this led the Board to approach this court for the declaration sought. Mr Nekongo further states that:

'31. The applicant has been advised that it is only authorised to act in terms of its rights defined and conferred by law and any conduct beyond its statutory powers is *ultra vires* the Act, and if found to be unlawful could attract a legal challenge.'

[19] Mr Nekongo concludes the founding affidavit by stating that the applicant, in view of its clear mandate, commenced constructing VTCs in order to advance the object of the Act. He states further that the *declarator* sought will settle the question of whether or not the VET levy funds can be used for construction and expansion of VTCs. He rests his affidavit with a submission that the applicant should be allowed to use the VET levy funds for the construction of new and expansion of existing VTCs.

Arguments

[20] Mr Boonzaier argued that the court has a wide discretion in determining whether to issue a *declarator* or not. He argued that in order to avoid lawlessness, the applicant approached the court to decide whether it is in law permitted to utilise the VET levy funds to construct new VTCs and expand existing VTCs. He argued that broadly speaking, the provision of funding of Vocational Education and Training include the use of VET levy funds for the construction of new VTCs. This is necessary in order to achieve the objects of the Act, after all the function of the applicant is to provide the funding of vocational training and education, it was argued.

[21] Mr Muhongo, on the other hand, raised the point that the applicant's case seeks the adjudication and determination of an abstract and academic issue. He argued that there is no live dispute or controversy that calls on the court to engage its decisional machinery to resolve the alleged impasse. On that basis, he called for the dismissal of the applicant's application.

[22] Mr Boonzaier was not to be outdone. He argued contrariwise that this is a matter befitting of a *declarator* to be granted by the court. He argued that the applicant is a juristic person interested in the existing and contingent right or obligation and which intends to be on the right side of the law at all times and further that the applicant made out a case appropriate enough for a *declarator* to be issued. Mr Boonzaier laid great

store on the Supreme Court decision of *Southern Engineering and Another v Council of the Municipality of Windhoek*,³ where O'Regan AJA at para 48 remarked as follows:

'[48] The grant of declaratory relief is a discretionary matter. Ordinarily, a court will only grant declaratory relief when two conditions are met. First, the court must be satisfied that the person seeking declaratory relief is a person interested in an existing, future or contingent right or obligation and secondly the court must consider it appropriate to grant declaratory relief in the circumstances of the case.'

Analysis

[23] There are no qualms regarding the two-legged test to be satisfied for the court to issue a declaratory order as set out in the *Southern Engineering* decision (*supra*). I did not understand Mr Muhongo to say the contrary either.

[24] Masuku AJ, as he then was, in the *New African Methodist Episcopal Church in the Republic of Namibia and Another v Kooper and Others*,⁴ had occasion to discuss declaratory orders and stated as follows at para 41 to 42:

'[41] ... The main question to be determined is the nature of a *declarator* and the circumstances in which the court exercises its jurisdiction to grant same. In *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*⁵ Didcott J said the following:

"I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones."

³ *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC) para 48.

⁴ *New African Methodist Episcopal Church in the Republic of Namibia and Another v Kooper and Others* 2015 (3) NR 705 (HC) para 41 to 42.

⁵ *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at 525 – B.

[42] In *Daniel v Attorney-General and Others; Peter v Attorney-General and Others*⁶ Geier J stated the following:

“The court approaches the question of a *declarator* in two stages. First, is the applicant a person interested in any existing, future or contingent right or obligation. Secondly, and only if satisfied at the first stage, the court decides whether the case is a proper one in which to exercise its discretion.”

[25] Strydom CJ in the Supreme Court decision of *Mahe Construction (Pty) Ltd v Seasonaire*,⁷ while discussing declaratory orders remarked that:

‘... the requirements for a declaratory order were discussed in the case of *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A).

With reference to s 19(1)(a)(iii) of the Supreme Court Act of South Africa, which is similar to our s 16(d) of the High Court Act 16 of 1990, Corbett CJ said the following at 14F-I, namely:

“Generally speaking the Courts will not, in terms of s 19(1)(a)(iii), deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see *Ex parte Nell* 1963 (1) SA 754 (A) at 759H-760B). But because it is not the function of the Court to act as adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (*Nell's case* at 760B-C). In *Nell's case supra* at 759A-B, Steyn CJ referred with approval to the following statement by Watermeyer JA in *Durban City Council v Association of Building Societies* 1942 AD 27 at 32, with reference to the identically worded s 102 of the General Law Amendment Act 46 of 1935:

⁶ *Daniel v Attorney-General and Others; Peter v Attorney-General and Others* 2011 (1) NR 330 (HC) at 337C.

⁷ *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC) at 410 – 411.

The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and, then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”

[26] At the outset I point out that I hold the view that the applicant satisfies the first requirement, in that it is interested in the existing or contingent right or obligation which forms the subject of this application. It is the second requirement that calls for closer scrutiny.

[27] Can it be said that this is an appropriate matter in which the discretion of the court should be exercised to grant the order sought or not? To answer the question, I find it compelling to point out that it is apparent from the applicant’s application that already in 2016, the applicant decided to construct three Vocational Training Centres in pursuance of the objects of the Act. It is noted that the said decision impacts on the present application. It is the applicant’s case that two members of the Board of Directors, who are lawyers, hold a view that is contrary to that of the other members and a legal opinion was obtained on the issue whether the VET levy funds can be utilised for contracting new VTCs and expand existing VTCs. The divergence of views led to the launching of this application.

[28] Section 9 of the Act provides that the applicant shall have a Board of Directors consisting of eleven members from different designated institutions. Section 17(5) on the other hand provides that a decision by the majority of the members present at a meeting of the Board constitutes the decision of the Board and in the event of equality of votes then the member presiding at the meeting shall have a casting vote.

[29] It is deduced from the above provisions that the legislature empowered the members of the Board to engage in detailed and meaningful discussions and to debate and to disagree where warranted, in order to achieve the objectives of the Act. Divergence of views in a corporate institution is healthy and goes to show that the

Board members are not sitting idle or are 'yes persons' for lack of a better word. It demonstrates that the members are engaging their mental faculties in an attempt to effectively carry out their functions as provided for by the legislation. Where there is no unanimity amongst the members of the Board, legislation, more often than not, the Act being no exception, provides for steps to resolve the impasse.

[30] Members of the Board are appointed to take decisions, determine policies and procedures, exercise control over the institution and comply with the functions set out in the enabling legislation without fear, favour or compromise. Some decisions may be concerning but may be necessary to be taken for the enhancement of the institution in accordance with the object of the Act. In the process, divergent views should be welcomed, considered and resolved in one way or the other as provided for by the legislation.

[31] In the present matter, out of eleven members of the Board, the divergent views of the two members (lawyers) brought about this application. This court is not privy to the basis of the divergent views expressed by the said two members save for the averment that the utilisation of the VET levy funds by the applicant is not provided for in the Act. It is, therefore, a mammoth task to determine the credibility of the said views by merely scratching the surface without a comprehensive source of the divergent view.

[32] The applicant, says in the founding affidavit that it seeks a *declarator* to utilise the VET levy funds to construct new VTCs and to expand existing VTCs to further the objectives of the Act, while at the same time stating that it has already commenced to construct three VTCs. This statement is telling that the applicant intends to utilise the VET levy funds for the purpose sought but requires the approval of the court. What the applicant seeks is synonymous with a legal opinion sought from court. Even if capable of doing so, it is not the function of courts to dish out legal opinions left, right and centre.

[33] The applicant cries foul regarding the impasse existing within the members of the Board. I hold the view that the impasse said to exist among the members of the Board

of the applicant can be resolved with ease among themselves at a duly convened and constituted meeting in a boardroom. It, therefore, follows that if this matter can be resolved among the members of the applicant without the aid of the *declarator* sought, then this application is strictly speaking abstract and academic. No duty rests on this court nor does it have energy to adjudicate abstract and academic matters.

Conclusion

[34] This application appears to be capable of a ready answer. Interesting as the application may be, it is my considered view that, in the exercise of my discretion, the application for the declaratory order that the applicant is entitled to utilise the VET levy funds for the construction of VTCs and expansion of existing VTCs does not satisfy the second leg which requires the matter to be appropriate for a *declarator* to be issued. Considering the findings and conclusions made above, I opine that the applicant's application falls to be dismissed for constituting an abstract and academic issue in nature.

Costs

[35] Considering that there is no opposition in this matter, there shall be no order as to costs.

Order

[36] In the result, it is ordered that:

1. The applicant's application for declaratory relief is dismissed.
2. There is no order as to costs.
3. The matter is regarded as finalised and removed from the roll.

O S Sibeya
Judge

APPEARANCES

APPLICANT: M Boonzaier
Instructed by Kopplinger Boltman

RESPONDENT: None

AMICUS CURIAE: T Muhongo