

SOUTH AFRICA / JUDGMENT

Mentornet (Pty) Ltd v Council on Higher Education and Others (82728/2016) [2018] ZAGPPHC 420 (15 June 2018) [2018] ZAGPPHC 420

COURT

North Gauteng High Court, Pretoria

BEFORE

P.A. Meyer

CASE / FILE NUMBER

82728/2016

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HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case

no: 82728/2016

15/6/2018

In

the matter between:

MENTORNET
(PTY)LTD
Applicant
and
COUNCIL
ON HIGHER
EDUCATION
First Respondent

CHAIRPERSON:

HIGHER EDUCATION QUALITY
COMMITTEE
N.O.
Second Respondent

DIRECTOR-GENERAL: DEPARTMENT OF
EDUCATION
AND TRAINING
N.O.
Third Respondent
MINISTER OF
EDUCATION AND TRAINING N.O.
Fourth Respondent
Case
Summary: Application
to review and set aside a decision not to accredit two new higher
education programmes, viz. an Advanced Diploma in

Education:

Recognition of Prior
Learning and a Bachelors
of Education: Occupational Learning, submitted by a private institution
for
accreditation. Application dismissed with costs.

JUDGMENT

MEYER J

- [1] The applicant, Mentornet (Pty) Ltd (Mentornet), seeks to review and set aside the decision not to accredit two new higher education programmes, viz. an Advanced Diploma in Education: Recognition of Prior Learning (the diploma) and a Bachelors of Education: Occupational Learning (the B.Ed. degree), submitted for accreditation. The relief is sought against the first respondent, the council on higher education (the CHE), the second respondent, the chairperson: higher education quality committee N.O. (the HEQC), the third respondent, the director-general: Department of Education and Training N.O., and the fourth respondent, the minister of education and training N.O. (the minister), individually or jointly.
- [2] The application has its genesis in the decision of the CHE to refuse accreditation of the diploma that is said to deal with the theory behind the process of the management and assessment of prior learning and of the B.Ed degree, which is said to deal with the theory of occupational learning. Mentornet lodged the two applications for accreditation together with supporting documentation during October 2014. At its meeting on 3 June to 2 July 2015, the accreditation committee (the AC), which is a sub- committee of the CHE's HEQC, met to assess the applications for accreditation. The AC recommended to the HEQC that neither programme be accredited. The HEQC noted this recommendation at its meeting on 2 September 2015.

- [3] On 9 September 2015, the CHE communicated the AC's recommendations not to accredit the two programmes to Mentornet, together with brief reasons for that recommendation. The record of proceedings of the HEQC meeting on 2 September 2015 was also furnished to Mentornet. The CHE afforded Mentornet until 14 October 2015 to submit any representations on those recommendations. Mentornet submitted its representations to the CHE on 14 September 2015. It also submitted further representations on 16 October 2015.
- [4] At its meeting on 17 to 18 May 2016, the AC considered the representations and its own recommendations and it resolved to adhere to its recommendations that neither programme should be accredited. The HEQC, at its meeting on 7 July 2016, considered Mentornet's applications for accreditation, including the AC's recommendations, Mentornet's representations and prof. Francis Faller's reports on the representations, and then took the decision not to accredit the diploma and the B.Ed. degree. Hence, the present review application in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
- [5] Mentornet filed the review application on 1 November 2016. Extensive records of both the diploma and B.E.d degree accreditation proceedings were delivered during December 2016. Mentornet's supplementary founding affidavit followed on 17 February
2017. The answering affidavit of the CHE and of the chairperson of the HEQC (the chairperson) was filed on 18 April 2017. The answering affidavit comprehensively deals with the applicable statutory framework, the process that was followed, the reasons for the refusals to accredit in each instance as well as with Mentornet's grounds of review raised in its founding and supplementary affidavits. Prof. Robert Sieborger was appointed to evaluate Mentornet's B.Ed accreditation application and prof. Faller to evaluate the diploma accreditation application. Both professors are said to be leaders in the field of higher education programmes in education. The evaluation reports of both prof. Sieborger and of prof. Faller furnished comprehensive reasons for their respective recommendations that the diploma and the B.Ed degree not be accredited, and they formed part of the answering affidavit. Mentornet's replying affidavit was filed on 30 May 2017.
- [6] The National Qualifications Framework Act 67 of 2008 (the NQF Act) provides for the establishment of a National Qualifications Framework (the NQF), which is a system approved by the minister for the classification, registration, publication and articulation of quality-assured national qualifications. The NQF comprises three coordinated qualifications sub-frameworks, one of which is the Higher Education Qualifications Sub- Framework (the HEQSF). The CHE is, in terms s 7(2) of the Higher Education Act 101 of 1997 (the HE Act), responsible for the implementation of the HEQSF. In terms of s5(3) of the NQF Act, the South African Qualifications Authority (SAQA), contemplated in chapter 4 of the NQF Act, and Quality Councils (QC's), contemplated in chapter 5 of the NQF Act, must ensure that South African qualifications meet appropriate criteria determined by the minister in terms of s 8 of the NQF Act, that are internationally comparable and are of an acceptable quality. The CHE is, in terms of s 25 of the NQF Act, the QC for higher education, it being one of the

sub-frameworks provided for in s 7 of the NQF Act. The programme accreditation function entails the evaluation of higher education programmes by academic peers in accordance with the HEQC's Criteria for Programme Accreditation, which stipulates the minimum requirements for programme input, process, output and review. The CHE's evaluators are trained to assess applications for programme accreditation subject to the CHE's criteria for programme accreditation, the SAQA guidelines and the HEQSF.

- [7] At the hearing of the review application before me, counsel appearing for Mentornet on the one side and for CHE and the chairperson on the other, were *ad idem* that the review application had become academic, at least once the answering affidavit had been filed. Mentornet will have to apply afresh for accreditation of the diploma and Bachelors degree. Fresh applications are required in the light of the grounds upon which the decisions were taken not to accredit the two programmes. When a programme application is submitted to the CHE, the directorate first assesses the qualification designator and the programme in order *inter alia* to appoint the appropriate evaluator and to determine which minimum requirements and criteria are applicable to the application. Mentornet had sought accreditation for the diploma and B.Ed degree as higher 'education' programmes. The CHE, therefore, appointed evaluators who are leaders in the field of higher education programmes in 'education' and the requirements and criteria applicable to such higher education programmes were used against which to evaluate Mentornet's programmes. Mentornet, however, wishes its programmes not to be evaluated against the requirements and criteria applicable to higher education programmes in education. It accordingly needs to submit fresh applications for accreditation that do not require the application of those requirements and criteria. This was correctly conceded by its counsel. The only remaining issue is one of costs.
- [8] Mentornet argues that it did not obtain the full reasons for the refusal to accredit its diploma and B.Ed degree programmes until such time as the answering affidavit was filed. According to Mentornet it then nevertheless persisted in its application once the answering affidavit had been filed in order to recover its costs of the application from the respondents. The CHE and the Chairperson, on the other hand, contend that the review application is still-born, it is an attempt at appealing the CHE's decisions not to accredit Mentornet's programmes in circumstances where there is no appeal to this court (see for example *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Limited and another* 2003 (6) SA 407 (SCA) paras 52-53; *JH v Health Professional Council of South Africa and others* 2016
- (2) SA 93 (WCC) para 23) and it cannot be said that the CHE acted arbitrarily, capriciously or irrationally. The CHE and the chairperson argue that they are the successful litigants and that there is no reason why the general rule that costs should follow the event should not be applied in this case.

- [9] I agree with those submissions of the CHE and the chairperson and I consider Mentornet's submissions in support of their claim for costs to be unmeritorious. It is indeed so that cursory reasons were furnished to Mentornet when the AC's recommendations were initially communicated to it and also when the final decision of the HEQC not to accredit the diploma and degree programmes were communicated to it. But, Mentornet was advised from the outset, in respect of the diploma, that it 'has not submitted a convincing case that the conceptualization, design and structure of the programme meets the purpose, characteristics and requirements of a teacher education programme' and that '[t]he Advanced Diploma in Education nomenclature as specified in MRTEQ is for qualifications relating to teaching practice'. And, in respect of the B.Ed degree that '[t]he programme Bachelors of Education: Occupational Learning is not a recognized initial teacher education qualification' and 'does not comply with the Policy document of the Minimum Requirements for Teacher Education Qualification (MRTEQ 2015)'. Furthermore, and insofar as Mentornet considered the records of the proceedings that were produced during December 2016 to be incomplete since the evaluation reports of professors Sieborger and Faller were not included, it ought to have invoked the appropriate remedy provided for discovery in terms of r 35 of the Uniform Rules of Court so as to procure such additional documents as it deemed necessary for the purposes of preparing its supplementary founding affidavit. (See *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 228A.)
- [10] A review under PAJA constitutes a constitutional issue. (See *Niekara Harrielall v University of KwaZulu - Natal*
- [2017] ZACC 38 paras 17-19.) It is a well-established rule that unsuccessful litigants who have sought, in good faith, to vindicate constitutional rights, should not have costs awarded against them, but each party should bear its own costs. However, the general rule does not find application if the proceedings are frivolous or vexatious, or in any other way manifestly inappropriate (see *Affordable Medicines Trust and others v Minister of Health and others* [2005] ZACC 3; 2006
- (3) SA 247 (CC) para 138 and *Biowatch Trust v Registrar, Genetic Resources and others* 2009
- (6) SA 232 (CC) paras 21-25.), or if litigation was undertaken not to assert constitutional rights but rather to assert a commercial interest (see *MEG for Local Government, Environmental Affairs and Development Planning, Western Cape & another v Hans Ulrich Plotz NO & another* (495/2017) [2017] ZASCA 175 (1 December 2017) para 33).
- [11] The review application has the effect of being vexatious and has put the CHE and the Chairperson to unnecessary trouble and expense, which they ought not to bear. (See *In Re Alluvial Creek* 1929 CPD 532 at 535.) Furthermore, it became manifestly inappropriate for Mentornet to proceed with the review application once the comprehensive records of the

proceedings had been produced during December 2016. I am also unable to hold that the litigation was undertaken to assert constitutional rights. It was undertaken rather to assert a commercial interest of Mentornet.

[12] In the result the following order is made:

The application is dismissed with costs.

P.A. MEYER

JUDGE OF THE HIGH COURT

Date of hearing:

7 June 2018

Date of

judgment:

15 June 2018

Applicant's Counsel:

Adv J. Minaar

Instructed by:

Peet Delport Attorneys , Val De Grace

1st and 2nd Respondents' Counsel: Adv CC Bester

Instructed by:

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