REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2024/00052

In the matter between:

SAVO NUTS PRIVATE SCHOOL	**FIRST APPLICANT**
SHINGIRAI MBUZI	**SECOND APPLICANT**
SELMA NDAPEWA ITANA	**THIRD APPLICANT**

and

MINISTER OF EDUCATION, ART AND CULTURE	**FIRST RESPONDENT**
NATIONAL EXAMINATION, ASSEMENT AND CERTIFICATION BOARD	**SECOND RESPONDENT**
MALPRACTICE COMMITTEE OF THE NATIONAL EXAMINATION, ASSESSMENT AND CERTIFICATION BOARD	**THIRD RESPONDENT**
ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA	**FOURTH RESPONDENT**

Neutral citation: *Savo Nuts Private School v Minister of Education, Art and Culture* (HC-MD-CIV-MOT-GEN-2024/00052) [2024] NAHCMD 175 (17 April 2024)

Coram: MILLER AJ

Heard: **19 February 2024**

Delivered: **27 February 2024**
Reasons: **17 April 2024**

Flynote: Civil law- *Audi alteram partem principle* – Court may interfere in internal processes if *audi* has not been given to a person – The allegations that the applicants must answer to are broad and vague. The court of the view that the applicants must be provided with some of the requested documents in order to answer to the allegations and heard the matter on an urgent basis.

Summary: Applicant is a private school in the Ohangwena Region. During November 2023 examinations, certain perceived irregularities were noted especially the examinations of some of the grade 11 and 12 learners. An investigation was conducted. A report was submitted to the Ministry of Education, Art and Culture followed by a letter dated 25 January 2024 indicating that the applicant failed to comply with certain provisions and regulations of the Basic Education Act No. 3 of 2020 and that the applicant is informed and notified of the deregistration of the school as a full and part time NSSCO tuition and examination centre and as a full time NSSCA tuition and examination centre as from 1 March 2024. And that the owner and Board of the applicant is given 30 days to make a presentation in writing to the minister and if they fail to do so, the applicant will be deregistered.

The applicants responded by asking the respondents for certain information and documentation.

The applicant then approached the court on an urgent basis as the correspondence yielded no positive results as far as the applicant was concerned.

One of the questions that arises is to what extent, if at all, this court should at this stage intervene in an internal process which is incomplete.

Held that, A general rule as stated in our law is that courts are reluctant to intervene in internal matters until such time as the matters are finalised. The Supreme Court in the matter of *Namibia Premier League v The Namibia Football Association* Case SA 71/2019 endorsed this basic approach, however the court made it plain that in circumstances there may be exceptions to the general rule. These were set out in paragraph 22 of the judgment. One of the circumstances highlighted by the court as

warranting interference on internal processes is an apparent lack of the basic principle of *audi alteram partem*.

Held that, the allegations in the letter dated 25 January 2024 are broad and void of any in particularity in respect of the manner in which the said regulations are alleged to have been contravened.

Held that, it is a basic principle of the rule of *audi alteram partem*, that a person in the position of the applicant should not be confronted with bare allegations. There should be some particularity which will enable the applicants to meaningfully reply to what the so called charges against it is or are, as the case may be.

Held that, the applicant's quest for all information which it demanded goes beyond than what is essentially required in order to meaningfully respond to the allegations against it. It is in essence a demand for all the information and evidence of whatever source that are available.

Held that, it would be efficient for the purposes of the present proceedings that some documentation be made available to the applicants in order to respond. These will include and be confined to: The full investigation report compiled after 16 and 17 January 2024 investigations. Secondly, the full written recommendations by the second respondent. This document should provide sufficient particularity to the applicants to understand what the detail and nature of the allegations against them are, which will enable them to respond. That limited extent, the court will regard this as a matter where in the interest of natural justice and the right to reply, the court should intervene in internal affairs of the relevant ministry.

Held that, considering the aspect of a lack of proper *audi* and due to the pending enquiry, certain measures were put into place such as the failure to release results and other measures relating to the registration of leaners, the court condones the applicants' non-compliance with rule 73 of the rules of court and hears the matter on an urgent basis.

ORDER

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1. The applicants' non-compliance with the forms and service provided for in the Rules of this Honourable Court is hereby condoned and the matter is heard as an urgent application in terms of Rule 73 of the Rules of this court.

2. The respondents are ordered to provide the applicants with the following documents by no later than close of business day today:

   2.1. The full investigative report of the investigations conducted by the second respondent on 16 and 17 January 2024.

   2.2. The full written recommendations by the second respondent.

3. There is no order as to costs.

4. The matter is removed from the roll and regarded as finalised.

JUDGMENT

MILLER AJ:

[1] The first applicant conducts business as a private school in the Ohangwena Region in the Republic of Namibia. It is registered in terms of the Education Act No 3 of 2020. I will simply refer to this piece of legislation as forth as the Act. The second and third applicants are the members of the first applicant. Being registered in terms of the Act, it is incumbent upon the first applicant to comply with and follow the provisions of the Act and/or Regulations which inter alia, govern the manner in which examinations are to be conducted.

[2] The applicant effectively provides education to learners from grades 1 to 12. During the course of the examinations conducted during November 2023, certain perceived irregularities were noted, especially in relation to the examinations of some of the pupils in grades 11 and 12. As a result of these perceived irregularities, an investigation was conducted by the third respondent. The first applicant was

advised of the investigation and was requested to provide some information but apparently took no further part in the proceedings.

[3] Upon completion of the investigation a report was submitted to the Ministry of Education, Art and Culture cited in this matter as first respondent. This was followed by a letter dated 25 January 2024 penned by the first respondent, the relevant portions of the letter reads as follows:

'3. On 16-17 January 2024, an investigation was conducted at Savo Nuts Private School. The main findings revealed that:

3.1 Savo Nuts Private School has contravened and did not comply with the provisions of registration in terms of Section 76 (2) (c) (ii) of the Basic Education Act, 2020 (Act No. 3 of 2020) and Regulations 62 (2) (b) of the same Basic Education Act.

3.2 Savo Nuts Private School did not adhere to the rules and regulations for conducting and administration of the 2023 October/November National Examinations and compromised the integrity of 2023 National Examinations as per paragraph 1.6.1, 3.1.4 and 3.7.2 of the Handboek for Centre.

…

5. It is against this background that the owner and Board of Directors of Savo Nuts Private School are informed and notified about the intention to deregister the school as a full-time and part-time NSSCO tuition and examination centre as well as full-time NSSCAS tuition and examination centre, from on 1st of March 2024 as per Section 79(1)(b) of the Basic Education Act, 2020 (Act No. 3 of 2020).

6. The owner and Board of Directors of Savo Nuts Private School may within a period of 30 days from the date of receipt of this notification, make a presentation in writing to the minister in terms of Section 79 (2) of the Basic Education Act, 2020 (Act No. 3 of 2020).

7. Failure to make a presentation to the Minister, the full-time NSSCO and NSSCAS (Grade 10-12) tuition and examination centre as well as a part-time centre for NSSCO will be deregistered in terms of section 79(3) of the Basic Education Act, 2020 (Act No. 3 of 2020), from 01st March 2024.'

[4] The response of the applicants upon receipt of the letter was to engage into protracted correspondence with the respondents by way of email, as from the 5 February 2024. In essence the attitude of the applicants were a broad-based demand for information and documentation. These include inter alia and I quote 13.1 from the founding affidavit:

> ‘‘13. In the premises, we are instructed to demand from you:
>
> 13.1 All information and documentation relating to the specific suspected instances of malpractice;
>
> 13.2 Who specifically has been charged with malpractice, so our clients may also initiate their own internal investigation;
>
> 13.3 Why the alleged malpractice is only in respect of results for full time candidates and not part-time candidates;
>
> 13.4 The outcome of the investigation by the malpractice committee and any recommendations;
>
> 13.5 Should there be no outcome as of yet, we are instructed to demand the release of withheld results for the outstanding subjects before 14h00, 23 January 2024.’’

[5] The demand for the information was accompanied by various demands if I may call it that, to approach this court on an urgent basis that dates back to at least 5 February 2024. The protracted correspondence yielded no positive results as far as the applicant was concerned and it thereupon by way of notice of motion dated 15 February 2024 enrolled the matter before this court as an urgent application, scheduled for hearing on 16 February 2024, which was the following day. This undoubtedly placed the respondents in a difficult position to file answering papers within the limited time afforded. In the result this court was obliged to truncate the directions for filing of answering and replying affidavits. As is apparent from the summarised history of the matter which I set out in the preceding paragraphs, it is apparent that the court is confronted with the situation concerning internal remedies

which should be exhausted and will only come into finality one way or the other after the 1 March 2024.

[6] Two fundamental questions arise. The first is to what extent, if at all, this court should at this stage intervene in what is essentially an internal process which is incomplete. A general rule as stated in our law is that courts are reluctant to intervene in internal matters until such time as the matters are finalised. The Supreme Court in the matter of *Namibia Premier League v The Namibia Football Association* Case SA 71/2019 endorsed this basic approach. However the court made it plain that in circumstances there may be exceptions to the general rule. These were set out in paragraph 22 of the judgment. One of the circumstances highlighted by the court as warranting interference on internal processes is an apparent lack of the basic principle of *audi alteram partem*.

[7] It is apparent from the reading of paragraph 3.1 and 3.2 of the letter dated 25 January 2024, that the applicant is informed that it did not comply with certain regulations. The allegations are broad and *de*void of any particularity in what manner the said regulations are alleged to have been contravened. In my view, it is a basic principle of the rule of *Audi alteram partem*, a person in the position of the applicant should not be confronted with bare allegations. There should be some particularity which will enable the applicants to meaningfully reply to what the charges against it is or are, as the case may be.

[8] Having said that however, it is apparent to me that the applicant's request for all information which it demanded goes beyond what is essentially required in order to meaningfully respond to the allegations against it. It is in essence a demand for all the information and evidence of whatever source that is available. I am of the view that it would be sufficient for the purposes of the present proceedings that some documentation be made available to the applicants in order to respond. These will include and be confined to firstly, the full investigation report compiled after 16 and 17 January 2024 investigations; and secondly, the full written recommendations by the second respondent. These documents should provide sufficient particularity to the applicants to understand what the detail and nature of the allegations against them are and which will enable them to respond. To that limited extent I regard this as a matter where in the interest of natural justice and the right to reply I should

intervene in the internal affairs of the relevant ministry. I will in due course make an order to that effect.

[9] The second issue is that of urgency. It is a trite principle formally entrenched in our law that an applicant who approaches the court on an urgent basis, is expected to do so as soon as possible after it has become aware of any infringement of the right it seeks to protect. In this matter as I have indicated, the applicant has threatened to bring proceedings in February and eventually did so on 15 February 2024 and the return date being 16 February 2024, which was the following day. It is an ample argument that this matter may well have stumbled on the basis of a lack of urgency or self-created urgency. However, given what I have already said regarding the first aspect of the case being a lack of proper *audi alteram partem* and seeing that I have a discretion, I concluded that I should exercise my discretion in favour of granting the applicant some relief to alleviate my concerns. The further factor is that as a result of the pending enquiry, certain measures were put into place which include the failure to release results and other measures relating to the registration of leaners.

[10] I am satisfied particularly from the answering affidavit of respondent that these are temporary measures the fate of which will depend on the first respondent's decision. I am not satisfied that in the process there is any irreparable harm. Whatever harm may be done is of a temporary nature and will ultimately depend on what decision the minister makes. There may be room for further relief but it is premature at this stage to speculate and prejudge what decision the minister will make. In the result of the reasons, I have indicated the following order will be issued:

1. The applicants' non-compliance with the forms and service provided for in the Rules of this Honourable Court is hereby condoned and the matter is heard as an urgent application in terms of Rule 73 of the Rules of this court.

2. The respondents are ordered to provide the applicants with the following documents by no later than close of business day today:

2.1 The full investigative report of the investigations conducted by the second respondent on 16 and 17 January 2024.

2.2 The full written recommendations by the second respondent.

3 There is no order as to costs.

4 The matter is removed from the roll and regarded as finalised.

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PJ MILLER

Acting Judge

APPEARANCES:

APPLICANTS:	I Tomas Of Du Pisani Legal Practitioners, Windhoek
RESPONDENTS:	D Ndana Office of the Government Attorney, Windhoek