



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2023/00017

In the matter between:

TUUTALENI NAUKUSHU

APPLICANT

and

UNIVERSITY OF NAMIBIA

FIRST RESPONDENT

NAMIBIA SCHOOL OF BUSINESS

SECOND RESPONDENT

Neutral citation: *Naukushu v University of Namibia* (HC-MD-CIV-MOT-REV-2023/00017) [2024] NAHCMD 94 (8 March 2024)

Coram: CLAASEN J

Heard: 26 September 2023

Delivered: 8 March 2024

Flynote: Judicial Review – Administrative Action – Application for special examination on account of work – University refused the application on the basis of insufficient evidence – Applicant aggrieved by the University’s refusal and approached the court to set aside that decision and direct the University to arrange special examinations on a suitable date at no additional cost.

Summary: The applicant is a student at the University, studying for a postgraduate degree. During 2022, he applied to the University to grant him leave to write special examinations in all the modules that he missed in the normal examinations. He asserts that it was on account of a work related project out of the country.

Held – In judicial review proceedings it is the applicant that bears the burden of satisfying the court that good grounds, anchored in the common law and article 18 of the Namibian Constitution, exist to review the conduct complained of.

Held – It was a fallacy on the part of the applicant to believe that the university advertised online examinations for his postgraduate studies. A reasonable person would not have formed that specific expectation on the basis as contended by the applicant.

Held – The doctrine of *audi partem alteram* is flexible and content thereof may vary according to the nature of the power or discretion exercised and the circumstances of the case at hand. Having considered the case as presented, the court was hard pressed to find any merit in the contention that the applicant was not heard. The written application for a special examination was placed before the functionary, who in terms of the Regulations, had the power to decide the application for special examinations.

Held – It is up to the decision maker who knows what he or she desires to achieve to decide what information or facts to collect and what weight of importance to put on each piece of information or facts placed before it when deciding.

Held – It is for an applicant to make out a clear case and satisfy the court that good grounds exist to review the impugned decision. It is not for the court to try and decipher an applicant's case or his supporting documents.

ORDER

1. The application is dismissed with costs.
 2. The matter is regarded as finalised and removed from the roll.
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JUDGMENT

CLAASEN J:

Introduction

[1] The applicant is a student registered for a postgraduate degree in Business Administration at the Namibia School of Business that is affiliated to the University of Namibia (hereinafter referred to as 'UNAM'). Aggrieved by the refusal of UNAM to permit him to sit for special examinations and or special online examinations, he launched review proceedings against the respondents. The respondents opposed the proceedings.

[2] The relief sought by the applicant is as follows:

- a) Reviewing and setting aside the decision by the first and second respondents taken on 11 August 2022 to reject the applicant's application for special, alternatively, supplementary examinations for the modules in his post graduate degree;
- b) Reviewing and setting aside the decision of the first and second respondent taken on 13 August 2022 or any date thereafter in refusing to consider the applicant's request for an online special examination for the modules in his postgraduate degree;
- c) Directing the respondents to facilitate a special examination for the applicant for his missed examination modules at no additional cost to the applicant; and
- d) Directing the respondents to pay the cost of this application jointly and severally, the one paying the other to be absolved.

[3] It is trite that judicial reviews are directed at the legality, reasonableness and fairness of decisions or actions by public decision makers. In *Nolte v Minister of Environment, Forestry and Tourism*,¹ Parker J explains that the burden lies on applicant to satisfy the court that good grounds exist to review the conduct complained of.² These good grounds are grounds anchored in the common law³ and article 18 of the Namibian Constitution which embraces the common law principles⁴ and whose object 'is to ensure that acts and decisions of administrative bodies and officials are lawful, in the sense that they are fair and reasonable'.⁵

[4] Furthermore, in a judicial review the challenge ought to be about the process in which the decision was made and not the decision itself. The jurisdiction to determine the substantive issue is that of the authority as the court does not sit as an Appeal Court but merely reviews the manner in which the decision is made. In this regard the court in the *Nolte*⁶ matter referred to *Chief Constable of North Wales Police v Evans*⁷ wherein it was said that:

'It is important to remember in every case that the purpose [of review] ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.'

¹ *Nolte v Minister of Environment, Forestry and Tourism* (HC-MD-CIV-MOT-GEN-2022/00116) [2023] NAHCMD 361 (28 June 2023).

² *Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* 2008 (2) NR 753 (SC) para 15.

³ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS III, applied by the court in, for example, *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1991 NR 69 (HC); and *New Era Investment (Pty) Ltd v Roads Authority and Others* footnote 1.

⁴ *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 265e-f.

⁵ *Minister of Mines and Energy v Petroneft International* 2012 (2) NR 781 (SC) para 33.

⁶ *Supra*, at para 6.

⁷ *Chief Constable of North Wales Police v Evans* [1982] WLR 1155 at 1160 (per Lord Hailsham LC).

[5] It is common cause between the parties that the normal examinations for the course in which the applicant enrolled were scheduled for the period of 10 July 2022 through 31 July 2022. Special examinations for the course were scheduled as from 9 through 12 August 2022. Based on the UNAM Regulations,⁸ I understand special examinations to be examinations administered at a time other than the regular examinations and upon the existence and proof of special circumstances. The applicable section is covered in the General Regulation 7.21.18 as follows:

‘(1) The following circumstances may be considered for admission to a Special Examination:

(a) Illness or injury immediately preceding, or on the day of the examination provided that a medical certificate, specifying the nature and duration of the illness or injury, is submitted to the satisfaction of the Deputy Dean of the relevant faculty. (The Deputy Dean may on his/her discretion, reject any medical certificate);

(b) Domestic circumstances, such as serious illness, or death of a close relative at the time of , or immediately preceding the examination, and which in the opinion of the Deputy Dean, could adversely influence the achievement of the student concerned, provided that satisfactory proof of such circumstances shall be provided);

(c) An examination schedule that requires a candidate to write a paper in more than 2 consecutive examination sessions;

(d) Any other circumstances which, in the opinion of the Deputy Dean, justify the examination.’

[6] The essence of the applicant’s case is that he formally applied⁹ for a special examination on 27 June 2022. He gave the reason for his absence at the examination as being travel with work out of the country. He attached an award letter¹⁰ to his founding affidavit which conveys that his employer was the successful recipient of a tender to perform work in Zimbabwe. The said letter

⁸ University of Namibia General Information and Regulations Prospectus 2021.

⁹ Application for special examination annexed as annexure ‘TN5’ to founding affidavit.

¹⁰ Letter dated 20 April 2022 annexed as ‘TN2’ to founding affidavit.

indicates the project will be for 6 weeks, from 25 April to be completed on 15 July 2022.

[7] On the evening of 08 August 2022, the respondents informed all students that the special examinations were moved to the period of 15 through 19 August 2022. The papers also show that the applicant sent emails to other staff members at varying time periods.

[8] On 11 August 2022, the examinations officer informed the applicant that his application for special examinations was rejected. The refusal mentioned the reasons as lack of evidence and that the evidence that the applicant submitted was not acceptable according to the UNAM Regulations as approved by the Senate.

[9] It furthermore appears from the founding affidavit that the applicant applied on 13 August 2022 to be accommodated with online examinations on dates subsequent to 19 August 2022 due to his work outside the country. Thereafter, the applicant made follow-up calls but it was to no avail. The long and short of it is that he thereafter approached the court for relief.

[10] An integral component of the applicant's case is that the respondents advertised the program as an online course, 'inclusive of both studies and examination'. He stated that his work frequently requires him to travel out of the country. He asserts that since the postgraduate program was advertised as an online course it was reasonable and fair for the respondents to have approved his application for a special examination.

[11] As regards the specific grounds of review, they are not a model of clarity. I gathered that the applicant construes the situation as a failure by the respondents to provide proper reasons for his application on 11 August 2022. He labels the reasons as vague and unsubstantiated which is unjustifiable and unreasonable. According to the applicant, the respondents persisted in their stance of refusing to assist him in pursuing his application for a special examination and failed to take into account his views and position, which

amounts to a refusal of his right to be heard. Additionally, that their delay in the decision about his application for a special examination on 13 August 2022 is unreasonable and without a justifiable explanation.

[12] The Vice Chancellor of UNAM, Professor Kenneth Matengu, Professor Charles Makanyeza who was the acting Deputy Dean at the relevant faculty at the time and the examination officer Mr Lanard Drotsky set out the respondents' position in the opposing papers. The respondents categorically deny that the examinations in the course was advertised to take place on an online basis and deposed that the principal mode of teaching had always been face to face. An explanation was given that the institution phased in a proviso¹¹ for teaching to take place on line, but that was in respect of teaching and not examinations. It was done to conform to government directives to curb the spread of the COVID-19 pandemic at the time.

[13] The Vice Chancellor asserted that on 14 June 2022, the examinations officer sent an e-mail to all students, including the applicant, wherein it was made clear that there are no online examinations for the course.

[14] The respondents contends that the reason why the examinations officer only replied on 11 August 2022 was because the institution had to wait for the normal examination to take its course and the marks therein before it could be determined who are eligible to write supplementary or special examinations. He postulated the reason for the shifting of the dates for the special examination was because lecturers were still marking the normal examination scripts. Thus, final marks were not available on the time that was initially scheduled for special examinations.

[15] The respondents maintain that the functionary has a discretion which means that an application does not translate into an automatic approval. It was contended that the evidence given by the applicant at the time was simply insufficient to warrant an approval. It was pointed out that according to the timeline for the work project (as per the award letter) the applicant would have

¹¹ Covid-19 Safety Procedures for academic year 2022, Semester 1, issued 07 March 2022.

been able to sit for the special/supplementary examinations during 09-12 August 2022, as by then the project would have ended. He also emphasized that the applicant did not attach any supporting document to prove the reason for the absence from 16-19 August 2022, nor was there any indication as to when exactly the applicant would return to Namibia.

[16] The respondents deposed that, in any event, on 12 August 2022 all students who requested special examination on account of work was granted leave to do so. Instead of using that opportunity the applicant declined it and sought further indulgences for special online examinations during a period personalized to the applicant's preference. The latter is contrary to the policy of the University, nor could the University schedule special examinations for any date after 19 August 2022 as by then the classes for the second semester had to start.

[17] The sum-total of the respondents' stance was their refusal was sufficient, clear and valid. Furthermore that the decision-maker found that there were no circumstances proven to permit a special examination for the applicant. Thus the discretion was exercised judiciously. The respondents also maintain that the applicant was not deprived from his right to be heard nor did the institution treat the applicant in any unfair or unreasonable manner in his quest for a special examination.

[18] In dealing with the overarching question as to whether the applicant has discharged the burden on him, it is useful to start with the applicant's belief that the examinations for his postgraduate program course will be conducted online. His case was that he had an expectation that it will indeed be so. The starting point for that would be whether a reasonable expectation of a certain outcome, i.e. on-line examinations, was created.

[19] The respondents strongly denied that. Apart from articulating the general stance, the respondents also referred to the UNAM website which stated that

‘Classes are conducted online via Zoom and supported by our user-friendly E-learning platform. Summative assessments are conducted face to face.’

[20] The applicant referred to a certain document entitled ‘Covid-10 Safety Procedures for academic year 2022, Semester 1’ as the source for his impression. The applicant pinpointed to a certain paragraph which reads as follows: ‘B LEARNING AND TEACHING/EXAMINATION.’ The heading is noted, but cannot be interpreted without having regard to the rest of the content. The heading does not constitute a full sentence. A reading of the paragraph under the heading and the whole content of the document supports what the respondents have said, that the basic purpose was to set out COVID-19 safety protocols for the institution. At best for the applicant and at worst for the respondents the heading of paragraph B can create confusion, but there is no single sentence that conveys that the students can write ‘on-line examinations’. In the event that the applicant was confused by that heading, clarity was given in the e-mail of 14 June 2022 wherein it was made clear that there are no online examinations. Besides, in having regard to the General Examination Regulations, that does not provide for online examinations either.

[21] Against that background, I find it unreasonable for the applicant to have placed reliance on that thin thread. A reasonable person would not have formed that specific expectation merely on that. I am inclined to agree with the respondents that there was no advertisement that the postgraduate examinations for 2022 will be on-line. It was a fallacy on the part of the applicant.

[22] As regards the complaint that the respondents faltered in granting the applicant the right to be heard, it has to be said that the doctrine of *audi alteram partem* is flexible. The content thereof may vary according to the nature of the power or discretion exercised and the circumstances of the case at hand.¹² What a hearing entails and how a hearing may be afforded to an interested person depends, barring statutory prescriptions, largely on the facts and circumstances of the particular matter. Thus, an applicant need not always be

¹² *New Era Investment (Pty) Ltd v Roads Authority and Others* 2014 (2) NR 596 (HC).

given an oral hearing, but may be given an opportunity to deal with the matter in writing.¹³

[23] Having had regard to the papers herein, I am hard pressed to find merit in the applicant's contention that he was not heard in his quest for a special examination for the first semester of 2022. The papers show that ultimately the applicant was aggrieved that the respondents failed to take into account his views and position, which he construed as lack of *audi*, but that is not the case. What the applicant needed was for his application for a special examination to be considered by Deputy Dean for the faculty. Correspondence to other staff members, who did not have the requisite authority to make the decision, does not advance the applicant's case herein. His written application was placed before the said functionary, who in terms of the Regulations had the power to decide the matter. That was done indeed and the decision on that bears evidence of that.

[24] I turn now to the intermingled grounds that the reason by the respondents for refusing the special examination was vague, undetailed and amounts to an unreasonable and unfair response to the applicant. The refusal was phrased in the following terms:

'I regret to inform you that your application to sit for a special examination/s have been rejected by the NBS management due to:

1. Lack of evidence.
2. Evidence submitted not acceptable according to the UNAM Regulations approved by the Senate.'

[25] Undoubtedly an administrative body or official has to give reasons for their actions or decisions.¹⁴ The reasons must not be fanciful.¹⁵ My understanding of the reasons is that there was a shortfall or lack of evidence by the applicant and that the evidence did not meet the requirement as set out in its Regulations. Although the reasons were short and simple, it was crystal

¹³ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) 174 H.

¹⁴ *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC); *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC). 2006 (1) NR 377 at 385H.

¹⁵ *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 at 385H.

clear in its message, nor was it fanciful. On the face of this refusal letter I cannot see how it could be construed as vague or unsubstantiated.

[26] That takes me to the rest of the ground that it was unreasonable and unfair. A reading of the relevant UNAM Regulation leaves no doubt that it provides for an application to be specially considered by the Deputy Dean of the faculty and that it requires satisfactory proof of the relevant circumstance that makes it impossible for the student to write examinations in the normal course.

[27] The specific form by UNAM for applications of this nature, amongst others, requires a student to enter the reason for absence during the examination and specifically informs the applicant to 'attach proof' thereof. The information entered by the applicant was 'Travel with work out of the country.'

[28] The applicant's founding affidavit is silent as to what, if any, supporting documents he annexed to his application on the 11th of August 2022. It is also unclear whether the award letter, 'TN2' that indicates the duration of the work project to run from 25 April 2022 to be completed on 15 July 2022, accompanied the application for the special examination. Even if it did, it conveyed that the project was to be completed by 15 July 2022, and the normal examination period was to conclude only by 31 July 2022. I have earlier in the judgment referred to the gaps in the evidence, as pointed out by the decision maker, which left the application wanting.

[29] The applicant also appears to be oblivious that the exercise of a discretion by a decision maker entails the power to choose between the available options and to make a decision after having taken into account all the relevant information. The weight to be attached to each of the factors falls within the discretion of the decision maker.¹⁶ The applicable principles were explained in *Chico/Octagon Joint Venture Africa v Roads Authority*¹⁷ that it is up

¹⁶ *MEC for Environmental Affairs and Development Planning v Clairison's CC* (408/2012) [2013] ZASCA 82 (31 May 2013).

¹⁷ *Chico-Octagon JVA v Roads Authority* (HC-MD-CIV-MOT-GEN-2016-000210) [2016] NAHCMD 385 (8 December 2016).

to the decision maker who knows what he or she desires to achieve to decide what information or facts to collect and what weight of importance to put on each piece of information or facts placed before it when deciding. Furthermore it was held, in that same decision, that it would be unjustifiably presumptuous for anyone else, including the court, to prescribe to the decision maker what information to collect and what weight of importance and relevance to place on each piece of information collected. If it did that, the court would be overstretching without justification the court's power to control administrative decision making.

[30] Thus, the Deputy Dean reserved the right, within good reason, to refuse an application for the special examination if it does not satisfy the requirements or the student failed to attach sufficient proof of the special circumstances.

[31] I briefly turn to the relief prayed for and the ground of review pertaining to the date of 13 August 2022. The respondents' answering affidavit signaled that they were perplexed by the inclination of the student to want to 'be accommodated with a special online examination'. Not only did that mode of writing examination not exist in the respondents' policies, but the applicant was categorically informed on 14 June 2022 that there are no online examinations. It was not in dispute that the examinations officer indeed informed students on 14 June 2022 that there are no such thing as online examinations.

[32] The same e-mail *inter alia* specified the procedure for an application for special examination for students who are unable to sit for normal examinations. In short, it gave the institution's designated application with the instruction to return the form, with proof, to the examination officer. The record on e-Justice does not have such form purportedly made on 13 August 2022, or any date thereafter, nor has the applicant annexed the designated application form to this review application. What was annexed in relation to these allegations was a faintly printed e-mail without any application form.

[33] Moreover, there is a mismatch in the applicant's papers before this court in this regard. The notice of motion depicts that a decision was made on the

13th of August 2022, whereas the founding affidavit depicts that the applicant applied on 13 August 2022 to accommodate him to write online examinations on dates subsequent to the 19th of August 2022. The ground itself speaks about a delay in decision making. When or if such decision was made, is not clear from the applicant's case or papers.

[34] Suffice it to say it is for applicant to make out a clear case and satisfy the court that good grounds exist to review the impugned decision. It is not for this court to try and decipher the applicants' case or his supporting documents in his quest for extra procedural relief from the respondents. The upshot is thus that the applicants' case had no valid designated application for 'another' special examination made on 13 of August 2022, as he alleges in his affidavit, nor did he present a clear and congruent case in that regard.

[35] As for new grounds and evidence that surfaced in the replying affidavit, it cannot assist the applicant at such late juncture. An applicant cannot supplement his or her case in a replying affidavit, save for exceptional circumstances which I do not find. I subscribe to what was said in *Chico/Octagon Joint Venture Africa v Roads Authority*¹⁸ that all the grounds should have been set out in the founding affidavit because that is the case the applicant has brought to court and which the opposing parties have been called upon to meet, and not grounds put forth and sanitised by counsel in their submission from the bar or in their written submission or in the replying affidavits. That is in line with the general rule in motion proceedings that an applicant in motion proceedings must set out his cause of action and supporting evidence in the founding affidavit¹⁹.

[36] I conclude that the applicant has failed to discharge the burden placed on him. What remains is the matter of cost. There is no reason to depart from the principle that cost follows the event.

[37] In the result I make the following order:

¹⁸ *Supra*, para 10.

¹⁹ *Stipp v Shade Centre* 2007 (2) NR 627 at 634 F-J.

1. The application is dismissed with costs.
2. The matter is finalised and removed from the roll.

C Claasen
Judge

APPEARANCES:

APPLICANT:

N HALWEENDO
Halweendo Legal
Practitioners.,
Windhoek

FIRST AND SECOND RESPONDENT:

N K G KANGUEEHI
Of Kangueehi &
Kavendjii Inc., Windhoek