


**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2024-074009

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:
	
14 August 2024	

In the matter between:

CURRO HOLDINGS LIMITED TRADING AS CURRO  
NEW ROAD

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL, GAUTENG  
DEPARTMENT OF EDUCATION

First Respondent

GAUTENG DEPARTMENT OF EDUCATION

Second Respondent

HEAD OF DEPARTMENT: GAUTENG DEPARTMENT  
OF EDUCATION

Third Respondent

CHIEF DIRECTOR: EXAMINATION AND  
ASSESSMENT

Fourth Respondent

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## JUDGMENT

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Summary:

**Modiba J**

### Introduction

- [1] The Curro Holdings Limited (Curro) an order directing the Gauteng Department of Education (the Department) to submit Curro New Road's application for registration as an examination centre for the National Senior Certificate (NSC exam centre) for 2024 to the Chief Director: Examination and Assessment (Chief Director) forthwith and that the Chief Director considers it by 27 August 2024. In the alternative, Curro New Road seeks a mandamus that the respondents give effect to the undertakings made to it on 8 May 2024, to register Curro New Road as a NSC exam centre under the department pending the determination by the Chief Director of Curro New Road's application to be registered as a matric exam centre. If successful, it seeks a cost order on scale C.
- [2] Curro is the applicant. It is a corporate entity incorporated according to the company laws of the Republic of South Africa. Its registered office is in Durbanville, Western Cape. It operates several independent schools. Curro New Road is one of them. Curro New Road is registered with the department as an independent school. It operates from Halfway House, Midrand, Gauteng. It is convenient to simply refer to the applicant corporate entity as Curro. Other independent schools operated by Curro, namely Curro Clayville and Curro Jewel City, feature in this application. I distinguish these schools by their names.
- [3] The first respondent is the Member of the Executive Council, Gauteng Department of Education (MEC). The department is the second respondent. It is responsible for overseeing and regulating the basic education system in the

Gauteng Province in accordance with the South African Schools Act 84 of 1996. Unless otherwise specified, reference to statutory provisions in this judgment are to this Act.

- [4] The third respondent is Head of Department: Gauteng Department of Education (HOD). The Chief Director is the fourth respondent. The orders Curro seeks fall within his scope of official duties. The first, third and fourth respondents are cited in their official capacities.
- [5] The respondents oppose the application jointly. They have raised two points *in limine*, namely urgency and failure to comply with the requirements set out in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). They also oppose the application on the merits. They seek its dismissal with costs on scale C.
- [6] I firstly set out the background facts. Then, I deal with the points *in limine*, followed by the merits. I consider the issue of costs. I conclude the judgment with an order.

### **Background facts**

- [7] Some of the material facts are in dispute between the parties. For reasons I later explain, I resolve the dispute on the respondents' version according to the *Plascon Evans*<sup>1</sup> rule.
- [8] Curro New Road was established and started operating as an independent school in 2020. At the time, it was not duly registered with the department. It was only officially registered as a school on 6 September 2023 with effect from 2024. It is not registered as a NSC exam centre for 2024. Since its existence in 2020 until its effective registration date, it enrolled and promoted learners without following the department's applicable policies and guidelines.

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<sup>1</sup> See *Plascon Evans Paints Limited v Van Reibeek Paints (Pty) Limited* 1984 (3) SA 623 (A) and *Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Limited* 1949 (3) SA 1155 (T) AT 1163.

- [9] In terms of s46(1), no person may establish or maintain an independent school unless it is registered by the HOD. In terms of s46(2), failure to comply with the statutory requirement in s46(1) constitutes a criminal offence. It attracts liability for a fine or three months imprisonment.
- [10] The department conducted investigations into Curro New Road's failure to comply with s46(1) and waived its rights to institute criminal proceedings against the managers of Curro New Road in terms of s46(4). It acknowledged and condoned the promotion of learners at Curro New Road despite Curro New Road's failure to fully comply with the National Protocol Assessments of Grade R to 12. It has also condoned the late registration of Curro New Road's candidates for the 2024 NSC exams.
- [11] In addition to being registered with the department as an independent school, Curro is required to register with Umalusi for accreditation and certification purposes. It also had to apply to the department by October 2023 to be registered as a NSC exam centre for 2024. When applying for registration as an NSC exam centre, an independent school must also submit various documents, including health and fire compliance certificates, proof that its staff members are registered with the South African Council for Educators (SACE) and approved promotion schedules for grades 9 to 11.
- [12] Curro did not apply timeously for registration as a NSC exam centre for 2024. It only submitted the application in April 2024. Further, it is yet to register with Umalusi for accreditation and certification purposes. It is unclear how it will overcome the Umalusi accreditation hurdle. That is an irrelevant consideration for the purpose of this application because this court is not called upon to make a decision on Curro New Road's application for registration as a NSC exam centre.
- [13] Curro alleges at paragraph 41 and 45 of its founding affidavit, that at a meeting held on 8 May 2024, officials of the Department undertook to make a submission to the Chief Director in support of Curro being registered as a NSC

exam centre for 2024. If the application is not dealt with at the time of the 2024 October/November NSC exams, the department will establish and oversee a designated examination centre at Curro New Road to enable its NSC candidates to sit for the 2024 NSC examination there.

- [14] Curro further alleges that only at a subsequent meeting held on 10 June 2024 did the Department state that Curro New Road candidates should write their 2024 NSC exams at Curro Clayville. Curro Clayville is run and operated by Curro and is registered as a NSC exam centre for 2024.
- [15] The respondents deny the allegations set out in paragraphs 13 and 14 above. They assert that they have no knowledge of the alleged undertaking and deny that it was made. They allege that at a meeting between the parties held on 19 February 2024, the department advised Curro New Road to register its candidates under Curro Jewel City as they were included in its 2023 promotion schedules. Ms Sishuba, the principal for Curro New Road mentioned that Curro has a branch in Clayville. It is registered as a NSC exam centre. It will be able to bus candidates there. Ms Naidoo will send the 2025 NSC exam centre application link to Ms Sishuba to apply for registration.
- [16] Curro New Road denies these allegations. It alleges that Curro Clayville and Curro Jewel City were discussed as two possible venue but no agreement was reached. It also alleges that this meeting was held on 12 February 2024.
- [17] Curro attached to its replying affidavit what it contends are minutes of the meeting of 8 May 2024. However, these were never shared with the department prior to this application being instituted. They were also not attached to its founding papers. By only attaching them in reply, it deprived the respondents of an opportunity to deal with them. During oral argument, counsel for the respondent took issue with the purported minutes, contending that they are mere notes and fail to record attendees.

- [18] I note from correspondence exchanged between the parties after the meeting 8 May, attached to Curro's founding affidavit an undertaking to make a submission to the HOD in support of Curro New Road's application for registration as a NSC exam centre for 2024 is reflected. However, no record of such an undertaking in respect of which it seeks alternative relief in these proceedings is reflected. A letter Curro wrote to the Department on 7 June 2024, makes no reference to such an undertaking. Neither is a follow up email by Curro New Road's Ms Lategan to the department's Mr Williams dated 21 May 2024. An email by Ms Lategan to Mr William dated 8 May 2024 only records that a second submission will be made to the Chief Director on Friday in support of Curro New Road being a NSC exam.
- [19] Under these circumstances, William's bare denial is sufficient to raise a dispute of fact in respect to Curro's alleged basis for the alternative relief. What more should he say? He was at the 8 May meeting. The correspondence referenced above confirm his version.
- [20] To the extent Curro seeks to rely on the purported undertaking for the alternative relief, it was aware when it instituted this application that the respondents dispute the agreement allegedly reached at the 8 May meeting. Therefore, this present dispute was forceable. It is for that reason that I determine the application on Curro's undisputed version and the respondents' version.
- [21] The same cannot be said about the undertaking to support Curro New Road's late application for NSC exam centre registration for 2024. Interestingly, it is not the respondents' version that the HOD rejected the application before it was submitted late. They are only belatedly stating in this application that since it was submitted late, there is no proper application for consideration. By implication, the HOD is entitled to ignore it. This version is at odds with the correspondence referenced above. It is also inconsistent with Curro's version that the department requested further information on Curro New Road's application, which it also submitted and the department sent its officials on a

site visit to Curro New Road's premises. I therefore accept Curro New Road's version on this point.

### **Points in limine**

#### ***Urgency***

[22] Curro contends for urgent relief in terms of uniform rule 6(12). The urgency it relies on arose on 10 June when officials of the department allegedly reneged the agreement reached on 8 May 2024. I note that Curro took almost three weeks after the alleged urgency arose to institute this application. It has not offered any explanation for its delay in launching the application. Given the inordinate time it takes for an opposed application to be heard in the ordinary cause and given that the final NSC exams will take place in October/November this year, there is no doubt that if this application is not heard based on urgency, Curro will be denied substantive redress in due course.

[23] I therefore find that Curro meets the test for urgency.

### **PAJA requirements**

[24] The respondents contend that the application falls to be dismissed because Curro has failed to exhaust internal remedies. Curro contends that PAJA is not applicable because it is not seeking to review any decision. I disagree with Curro's contention. Relief under PAJA is not only confined to administrative review relief. It includes relief in relation to failure or refusal by an organ of state to make a decision.<sup>2</sup>

[25] The difficulty with this point in limine as raised by the respondents' is that no proper factual and legal basis is laid for it in its answering affidavits and heads of argument. They have not set out the internal remedies at Curro's disposal. It

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<sup>2</sup> See the definition of decision in s1 of PAJA.

is unclear from their papers whether such internal remedies exist and if so, what they are.

[26] I therefore find that a proper case is not made out for this point in *limine* to be upheld.

### **The merits**

[27] Curro seeks urgent final relief. To succeed, it must establish (a) a clear right, (a) threat to breach the right (c) no other remedy.

#### ***Clear right***

[28] Curro New Road submitted to the department an application to register as an examination centre for the 2024 NSC examination in April 2024. At the 8 May meeting, the department's officials undertook to make a second submission to the Chief Director in support of the application. Curro enjoy a right to a decision on Curro New Road's application based on the undertaking made at the 8 May 2024.

[29] Since it has failed to establish that an undertaking it relies on for the alternative remedy was made, it has equally not established a clear right to the alternative remedy.

#### ***Threat to breach the right***

[30] Curro New Road has successfully established that the department threatens to breach its right to have its application for registration determined as undertaken at the 8 May meeting.

[31] However, since it failed to establish the alleged right to the alternative relief, there can never be a threat to breach a non-existing right.



**No alternative remedy**

[32] Curro contends that it lacks an alternative remedy. It contends that having its 2024 NSC candidates write final exams at Curro Clayville is not a reasonable and ordinary remedy. Having found that it has not established the factual basis for the alternative remedy, this is an irrelevant consideration.

[33] Curro clearly lacks an alternative remedy in relation to the main relief. The HOD is the only repository of power to consider an application to register a NSC exam centre.

[34] For the above reasons, I find that Curro has made out a proper case for the main relief.

**Costs**

[35] I find no reason why costs, in the scale contended for by the parties, should not follow the cause.

[36] I therefore make the following order:

**Order**

An order is granted in terms of prayers 1, 2, 3 and 5 of the applicant's notice of motion dated 4 July 2024.

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**MODIBA J  
JUDGE OF THE HIGH COURT,  
JOHANNESBURG**

**Appearances**

**For the Applicant:** M Smith  
**Instructed by:** Cliffe Dekker Hofmeyer Inc

**For the Respondent:** S Tshungu  
**Instructed by:** The State Attorney, Johannesburg

**Date of hearing:** 6 August 2024

**Date of judgment:** 14 August 2024

***MODE OF DELIVERY:*** this judgment is handed down virtually on the MS Teams platform and transmitted to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery is deemed to be 10 am.