IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION **Case No. 454/08**

In the matter between

QUEENS COLLEGE BOYS HIGH SCHOOL **Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL, DEPT OF EDUCATION, EASTERN CAPE GOVERNMENT **First Respondent**

HEAD OF DEPT OF EDUCATION, EASTERN CAPE PROVINCE **Second Respondent**

AFIKO SILO AND TEN OTHERS **Third to Thirteenth Respondents**

JUDGMENT

Froneman J.

[1] During July and August 2007 the third to the ninth respondents, the twelfth respondent and the sons of the tenth, eleventh and thirteenth respondents ('the learners') made themselves guilty of misconduct whilst studying at the applicant ('the school'). The misconduct ranged from the use of intoxicating liquor and dagga and gross insubordination towards the headmaster of the school. Disciplinary hearings were held where the learners admitted their misconduct. The governing body of the school then

recommended their expulsion from the school, but the first respondent refused to accept that recommendation and referred their cases back for alternative sanctions. The school now seeks the review and setting aside of her decisions under the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). In turn the first and second respondents ('the department') brought a counter application for the review and setting aside of the disciplinary proceedings held by the school.

[2] The conclusion reached in this judgment is that there is no merit in the counter application for review of the disciplinary proceedings and that in respect of some of the learners, but not all of them, the department's decision not to confirm the recommended sanction of expulsion must be reviewed and set aside. But before dealing with the respective issues raised, the law, and the application of the law to the respective cases in order to provide the reasons for the conclusion arrived at, it is necessary to dispose of certain preliminary aspects.

[3] Six of the learners left the school at the end of 2007. The remaining five learners are all in grade 12 and are due to complete their school careers in about two months' time. After some debate in argument it was accepted by all parties that one of the issues raised on the papers, namely whether to refer the matters back to the department or to substitute my own decision for the department's in the event of a successful review and setting aside of any of the department's decisions, need not be determined in this judgment. This is, in my view, a sensible and practical arrangement. Any possible remaining live dispute between the school and the department may adequately be met by an order to review and

set aside those decisions of the department that do not comply with the provisions of the law, without referring any matters back to the department for further decisions in respect of any of the learners, or for me to substitute my own decision in respect of those matters.

The grounds of review

[4] Four instances of misconduct are at issue. The first relates to the consumption of liquor by six of the learners on a sporting derby day of the school with Selborne College, East London, on 28 July 2007. The second concerns the act of insubordination by one of the learners on 23 August 2007. The third concerns the consumption of liquor by one of the learners in Queenstown on 24 August 2007. The last concerns the smoking of dagga on 24 August 2007 by three learners. Each of these four matters was dealt with separately by the school and the department. On each occasion the formal process of an investigation, a disciplinary hearing, a recommendation by the school governing body and a final decision by the department was followed. Each final decision was given on the basis of the information forwarded to the department by the school. Separate reasons for the respective decisions were provided to the school by the department. Those reasons provide the basis for the applicant's grounds of review.

[5] In the founding papers the reasons given in respect of each decision are analyzed and then attacked for containing errors of law and fact; for being irrational, arbitrary and capricious; for indicating that the first respondent was acting beyond the scope of the applicable Act and regulations; for showing a failure by the first respondent to apply her mind properly; and for her having taken into account irrelevant considerations and

ignoring relevant ones. Finally, the applicant contends that "an analysis of the reasons for the decisions,... viewed cumulatively" confirmed an "institutional bias against approving recommendations of expulsion" which indicated that she had "abdicated her responsibility to apply her mind to the facts".

[6] The counter application for review seeks an order reviewing and setting aside the school's disciplinary proceedings on the basis of certain alleged formal procedural shortcomings, such as short notice to the learners and the failure to adhere to certain prescribed steps in the investigation and consideration of the matter.

[7] The department contends, in addition, that the applicant's review application is moot in that it does not raise a live justiciable issue.

The applicable law

[8] The governance of a public school is vested in its governing body (s. 16 (1) of the South African Schools Act 84 of 1996 ('the Act')). The governing body stands in a position of trust towards the school (s. 16 (2)). The professional management of the school must be undertaken by the school principal under the authority of the head of the relevant department of education (s. 16 (3)). The governing body of a public school must adopt a code of conduct for learners after consultation with learners, parents and educators of the school (s. 8 (1)). Such a code of conduct must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process (s. 8 (2)). The Minister of Education

may determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners (s. 8 (3)). A code of conduct must provide for a fair process in disciplinary proceedings in order to safeguard the interests of learners (s. 8 (5) (a)) and must also provide for support measures or structures for counselling a learner involved in disciplinary proceedings (s. 8 (5) (a)). A learner is obliged to comply with a school's code of conduct (s. 8 (4)).

[9] A learner at a public school may be expelled only by the head of the department of education in a province if found guilty of serious misconduct after fair disciplinary proceedings (s. 9 (2)). What behaviour of a learner constitutes serious misconduct must be determined by the Member of the Provincial Executive Council by notice in the *Provincial Gazette* (s. 9(3) (a)). A governing body of a school may make a recommendation to the departmental head of education in the province to expel a learner from the school (s. 9 (1C) (b)) and the head of department must consider the recommendation by the governing body and must decide whether or not to expel a learner within 14 days of receiving such a recommendation (s. 9 (1D)). Fair disciplinary proceedings to be followed in expulsion cases must be determined by notice in the *Provincial Gazette* (s. 9 (3) (b) and (c)).

[10] In the present case the necessary determinations for a fair disciplinary process in expulsion cases and what constitutes serious misconduct under s. 9 (3) of the Act have been made (Provincial Gazette, Eastern Cape Province, No. 415, 25 June 1999). It is not in dispute that the use or possession of intoxicating liquor or drugs, as well as gross

insubordination falls within this determination or definition of what constitutes serious misconduct (regulation 2.1 (b) and (c)). It is also common cause that the school's own code of conduct was approved by the department, conforms to statutory guidelines and makes it clear that the consumption or possession of intoxicating liquor or drugs may lead to expulsion.

[11] When a head of a department makes a decision under s. 9 (1D) whether or not to expel a learner she exercises a discretion which may only be set aside on review on the grounds set out in PAJA (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC), paras. [21] to [26]). She must, of course, in exercising her discretion, take into account the recommendations of the school's governing body, as well as other factors implicit in the provisions of the Act and regulations. She is required to act reasonably and to strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to her. A Court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances (*Bato Star Fishing*, above, para [49]). What will constitute a reasonable decision will depend on the circumstances of each case. In *Bato Star Fisheries*, above, O'Regan stated that the factors relevant to determining reasonableness (para. [45]):

"will include the nature of the decision, the nature of the competing interests involved and the impact the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

Elsewhere in that judgment, at para. [44], she states that an administrative decision will be reviewable if it is "one that a reasonable decision-maker could not reach".

[12] In contrast to the main application for review (which for convenience may be categorized as a particular instance of substantive 'rationality' review) the counter-application for review is grounded on allegations of procedural unfairness relating to the disciplinary hearing. In order for that application to succeed it too must fall within the requirements set in PAJA, particularly the provisions of ss. 3 (1) and 6 (2) (c).

[13] The department has also raised the issue of mootness as a reason for not determining the application. The concept of 'mootness' appears to have entered our legal language after the introduction of the Constitution and the advent of constitutional democracy. Prior to that, the issue of whether a court should still determine issues which have been practically resolved, was dealt with in the context of having to making costs orders in proceedings where the substantive merits had been resolved in some way or another. In those cases the merits of the original issue for decision played a role in the eventual costs decision, but normally only to the extent that the merits could be dealt with by the court on the available material before it without incurring further costs (for example, *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 700 E – 701D).

[14] In constitutional matters the Constitutional Court has held that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

at para. [18], note 18, with reference to amongst others *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599), para. [17]). The existing and live controversy may, in a particular case, relate to continuing policy and legality issues even if the immediate application of those issues to the facts of a case may have been resolved (compare *Mohamed and another v President of the RSA and others* 2001 (3) SA 893 (CC), para. [70]).

Application of the law to the facts

[15] It is perhaps convenient to deal with the counter-application for review and the issue of mootness first.

[16] When the recommendation for expulsion of the governing board came before the first respondent it included the record of the disciplinary proceedings. She determined, on her own version, that the disciplinary proceedings were fair and then went on and made a decision disallowing expulsion on other, non-procedural grounds. In my view that is the end of the matter for the first respondent as far as the propriety of the disciplinary procedure is concerned. If she was dissatisfied with the propriety of the procedure she should have made that determination when the matter came before her for a final decision and declined to order expulsion for that reason. Once she accepted the propriety of the procedure she was bound to determine the matter on substantive grounds (*Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA), para. [10]).

[17] A related reason why the counter-application must fail (which applies not only to the first respondent but also to those learners who belatedly sought to step onto the counter-application for review bandwagon) is that no actual decision which materially and adversely affected their rights or legitimate expectations was made at the disciplinary hearing: what resulted was a recommendation by the governing body of the school to the first respondent for her to make a decision. She made a decision in the learners' favour as far as expulsion is concerned. Logically the alleged procedural flaw may provide grounds for attacking her decision as unlawful administrative action under the provisions of PAJA, but it seems absurd that the learners would seek that result where a decision in their favour was made. I did not understand counsel for the department and those learners still at school to pursue the counter-application with any great vigour. The counter-application for review must therefore fail.

[18] In view of the practical arrangement, referred to in para. [3] above, that no consequential relief in the form of expulsion of those learners still at school is still being pursued, the only question to resolve as far as the mootness objection is concerned, is whether there is a live and justiciable issue that remains between the school and the department. Regrettably, I must conclude that there is. It lies in the inference the school seeks to draw from the reasons given for not following the school's expulsion recommendation, namely that it discloses an institutional bias against expulsion as a remedy for serious misconduct which is pervasive and continuing. If the school is correct that the first respondent has adopted such an inflexible attitude and policy and that it is likely to continue in future, it appears to me that there certainly is a live, continuing and

justiciable issue between the school and the department. I stated that this conclusion is regrettable - the reason for saying so is that the first prize in school matters under the Act is for learners, parents, educators and the State to accept responsibility for the organization and governance of public schools *in partnership* with each other, as stated in the preamble to the Act, and not in litigious opposition to each other.

[19] The misconduct of the learners fall into four groups, as stated in para. [4] above. For the sake of convenient reading I will repeat these four instances.

[20] On 28 July 2007 six of the learners consumed liquor when a sport derby was held against a traditional opponent of the school from East London. The minutes of the disciplinary hearing which resulted in the expulsion recommendation by the school's governing body accompanied the recommendation sent to the first respondent on 7 August 2008, together with the relevant particulars of the learners involved. The letter continues:

"It needs to be brought to your attention that this is the third major incident this year of its kind, the last being barely one week prior to this incident.
What compounds this situation is that the boys were in full school uniform, they brought the alcohol onto the campus and consumed same during an official school function."

The first respondent informed the school of her decision not to follow the expulsion recommendation in a letter dated 31 August 2008. This letter states that she weighed the personal circumstances of the learners, the serious misconduct and their right to education and, after careful consideration of these factors, decided not to approve expulsion. She referred the matter back to the school's governing body for consideration of an alternative sanction other than expulsion.

After being requested for full reasons she supplied the following on 7 November 2007:

"As indicated in my letter dated 31 August 2007, I have decided not to approve the recommendation for expulsion of the learners for the following reasons:
(i) The learners have a right to education as enshrined in Section 29 of the Constitution.
(ii) Expulsion of a learner is a very drastic step and must be taken as a last resort as it may infringe the right of the learners mentioned above.
(iii) The sanction imposed on the learner must not be punitive but must be intended to rehabilitate the learners.
(iv) Some of the learners were first time offenders and did not show any signs of behavioural problems at school.
(v) The incident occurred at an extra curricular activity and did not disrupt the education process nor did it endanger the safety of learners.
(vi) Lastly, I also took into consideration the grades in which these learners were doing.
(vii) There are other alternatives that can be considered herein such as counseling and parent involvement and the SOB did not indicate why such options have not been considered."

[21] Mr. Smuts, who appeared with Mr. Dugmore for the applicant, in argument submitted each of these reasons to a detailed and critical analysis in an attempt to show that they were individually either irrational, arbitrary and capricious; or that they went beyond the scope of the Act and regulations; or that they indicated that irrelevant considerations were taken into account and relevant ones ignored; and that they showed the first respondent did not properly apply her mind to the issue. He argued that learners over the age of sixteen years do not have a constitutional right to education; that neither the Act nor the regulations stipulate that expulsion may only be a last resort; that imposing a sanction for misconduct is necessarily punitive in nature; that not all the learners were first time offenders; that the code of conduct does not provide for expulsion only if the education process is disrupted or where other persons are endangered; nor does it prevent final year learners being expelled; and that the school is not a rehabilitation institution.

[22] It may be that, viewed individually, each of the reasons may be susceptible to the reading counsel ascribed to them, but in my judgment a less critical but nevertheless reasonable reading of the reasons, read in context and as a whole, amounts to no more than this.

The learners' rights or expectations to finish their schooling must be considered when deciding whether expulsion is appropriate. Expulsion is a sanction for serious misconduct, but not a mandatory one. Sanctions for misconduct must incorporate, as one of their objectives, the rehabilitation rather than the mere punishment for its own sake of learners. For some of the learners the fact that they were not first time offenders and had no behavioural problems were also taken into account. For those who were not first time offenders the other factors were still sufficient not to impose expulsion. The incident, although serious, was not as serious as it would have been had it occurred during school time and if the safety of learners had been endangered by it. Counselling and parent involvement are options that could also have been considered as sanction options.

Such a reading of the reasons does not, in my judgment, disclose irrationality or any of the many other ills ascribed to them by the applicant in its papers and during argument.

It must be remembered that it is not the court's task to decide whether the first respondent came to the correct or best conclusion on the material before her, but only whether her decision was a reasonable one with regard thereto. In my judgment, in

respect of this first group, it cannot be said that the first respondent's decision was one 'that a reasonable decision-maker could not reach'.

[23] The fact that it was a notionally reasonable decision does not mean that it was the best or wisest decision that could have been made. Barely four weeks after the first incident, on 23 August 2007, one of the learners defied a clear instruction from the headmaster in front of fellow learners and members of the public. A disciplinary hearing was held; the learner was found guilty of gross insubordination; and the school's governing body recommended expulsion to the first respondent. In the letter accompanying the record of proceedings, dated 24 August 2007, the following was stated:

"This is the first time that a boy at Queen's College has been found guilty of a charge as serious as this, in which he defied – repeatedly – to the point of absolute insolence and disrespect, the clear instruction from myself as Headmaster. This was done in public in front of Queenians and members of the public. [The learner] has a very poor track record at Queen's College. He has served three previous suspensions prior to the suspension leading to this Disciplinary Hearing. The Governing Body has had no hesitation but to apply to the Education authorities for his expulsion from the school.

...

The Governing Body of Queen's College sincerely hopes that the Education Department will uphold its decision in its attempt to retain some kind of law and order in the school."

[24] The first respondent only replied to this letter on 3 December 2007. She provided the following reasons for her decision not to confirm expulsion:

"After careful consideration of your recommendation for expulsion of the above learner, I have decided not to approve the expulsion of the learner. The reasons for my decision are as follows:
(i) The expulsion of a learner is a very drastic step which must be taken in extreme circumstances as it may infringe upon the learner's right to education [a]lthough the learner has been found guilty of serious misconduct. The offence committed does not warrant expulsion and expulsion is a very harsh sentence in the circumstances.
(ii) Secondly, the incident in question occurred in town and not on the school premises. It did not... disrupt the schooling process or risk the safety of other learners and educators.
(iii) Thirdly, although the learner does not have a clean disciplinary record, the offences committed thereon are also not of a very serious nature and as such the learner should be afforded another opportunity.
In the circumstances, I am referring the matter back to the SGB for them to consider an appropriate sanction other than expulsion. Further, my office must be advised of the sanction".

[25] The day after the incident of gross insubordination one of the learners was found drinking intoxicating liquor and three others were found smoking dagga at one of the school residences. Disciplinary hearings were held in respect of both these incidents on 4 September 2007; the learners were found guilty and the school's governing body recommended expulsion to the first respondent on 6 September 2007. It was made clear to her that the affected learners could continue with their examinations including, if necessary, the end of the year examinations as well.

[26] The first respondent declined to confirm the expulsion recommendation in respect of the learner found drinking alcohol, for the following reasons (given in a letter dated 3 December 2007):

"After careful consideration of your recommendation for expulsion of the above learner I have decided not to approve your recommendation. The reasons thereof are as follows:
(i) The incident in question did not happen during school hours nor in school premises or school activity. It did not disrupt the schooling process nor did it risk the safety of other learners.
(ii) The learner was under the influence of liquor in school campus. The sanction imposed on the learner must be rehabilitative and not intended to punish the learner. The expulsion of the learner is very harsh and drastic in the circumstances.
(iii) The learner has been involved in a use of alcohol before. The SGB has not in any way demonstrated any steps taken to assist the learner.
(iv) Other forms of sanction i.e. counseling and parent involvement are available and have not been taken into consideration herein. I have not been advised why these forms of sanction cannot work for the learner other than expulsion.
It is for the above reason that I have decided not to approve the expulsion of the learner.
The learner concerned must attend counseling sessions at his parents expense. My office as well as the school must be provided with proof that the learner is attending the counseling sessions."

[27] The first respondent provided the following reasons for not confirming the recommendation of expulsion in respect of the learners who were guilty of smoking dagga in a letter dated 21 November 2007:

"I have carefully considered the above recommendation for the expulsion of the above learners. I have decided not to approve the expulsion of the learners for the following reasons:
(i) I do not regard the misconduct concerned as serious misconduct in terms of Regulation 2 of the Regulations relating to the behaviour of learners at Public Schools.
(ii) Expulsion of a learner is a very drastic step which must be taken only in exceptional circumstances.

(iii) The behaviour did not in any way disrupt the learning and teaching at the school and did not in any way impugn on the safety of the learners.
(iv) I have also taken into consideration the right of the learners to education as enshrined in Section 29 of the Constitution.
It is for the above reasons that I have decided not to approve expulsion. In terms of Section 9 of Education Laws Amendment Act of 2005, I am referring the matter back to the School Governing Body for consideration of an alternative sanction other than expulsion. My office must be informed of the alternative sanction imposed on the learner."

[28] Each of these three sets of reasons was also subjected to soathingly critical scrutiny and analysis by applicant's counsel in argument. Once again I consider that the reasons given for the gross insubordination and further drinking incidents (paras. [24] and [26] above) may be capable of a more reasonable interpretation if read less critically, but the justification for a less critical reading is certainly less obvious in respect of these later incidents than it was for the first incident. Already in the letter to the first respondent she was made aware of disciplinary problems at the school, but it could reasonably be argued that her response to this first incident, urging less extreme measures of sanction, was still, at that stage, a reasonable response. In respect of the next three incidents, however, the same consideration becomes less coherent. She does not deal in express terms in her reasons in respect of these three incidents with what by now has become a pressing concern for the school and its governing body, namely their perception that the school's ethos of discipline and respect is being fatally undermined by her failure to support their expulsion recommendations in respect of serious misconduct. Her failure to do so is unexplained on the papers before me. If she was concerned that the school was giving insufficient consideration or attention to its statutory obligation under the provisions of s. 8 (5) (b) of the Act to provide for support measures or structures for counselling a learner in disciplinary proceedings, she could have asked the school for more information about

that before taking the final decisions in respect of the last three incidents. She did not do so.

[29] On 4 September 2007 the school's governing body wrote a letter to her in response to her decision not to follow its expulsion recommendation in respect of the first incident, expressing its unhappiness with the decision, stressing the importance of proper discipline and good behaviour at the school. The letter ends off:

"Parents at our school are not happy with the behaviour of boys bringing the school's good name and fine reputation into disrepute, and who repeatedly fail to comply with the school's Code of Conduct. The School Governing Body's hands are tied. It does not wish this school to sink into the quagmire, as with so many other educational institutions in our country, and it is sad that it appears that the Education Department is not too concerned.
The Governing Body of Queen's College would like to meet with you as a matter of urgency to discuss this issue. We look forward to a response from you as soon as possible."

No response to this request for a meeting ever came. The decisions not to recommend expulsion were only communicated to the school on 21 November 2007 in respect of the dagga incident and on 3 December 2007 in respect of the gross insubordination and second drinking incidents. This was almost three months after the first respondent received the expulsion recommendation from the school's governing body. In terms of the provisions of s. 9 (1D) of the Act she was obliged to make her decision within 14 days of receiving the recommendation.

[30] The first respondent's delay, her failure to respond to the school's request for a meeting, her failure to herself find out more from the school about their rehabilitation procedures for learners involved in disciplinary procedures, and her failure (both in the reasons given at the time as well as in the papers before me) to mention that she gave proper attention to the school's concern for the overall breakdown in discipline at the

school, justify the inference that she failed to take that legitimate factor into consideration; that she thereby failed to properly apply her mind to the expulsion recommendations of the school's governing body relating to the last three incidents; and that she thus failed to make a reasonable and rational decision in relation thereto. Those are sufficient grounds for review of those three decisions.

[31] In relation to the dagga incident there is an additional reason to review her decision. In her reasons for not accepting the expulsion recommendation she stated that she did not consider this misconduct as serious misconduct under the regulations. This conclusion justifies being described as irrational, or even worse. Clause 2 (b) of the regulations refers to use or possession of drugs as an instance of serious misconduct; s. 8A of the Act specifically makes regulated provision for the search and seizure of drugs at public schools and for random testing at schools; and the use or possession of dagga is a criminal offence.

Summary

[32] The school and the department have a reciprocal obligation under the Act to accept responsibility for the governance of public schools in partnership with each other. The maintenance of discipline through appropriate measures, including expulsion for instances of serious misconduct, is a legitimate aspect of that governance under the Act, the Regulations issued under it and the school's code of conduct (which is in accordance with national guidelines and was approved of by the department). Whilst it is legitimate under these provisions to expect public schools to consider rehabilitative options in

relation to disciplinary infractions (even serious ones), the responsible member for education must also always have due regard to the fact that expulsion from a school is also an appropriate option in cases of serious misconduct. A failure to give proper regard to this aspect and to have regard to the potential detrimental effect of a failure to order expulsion in a progressively worsening disciplinary situation may vitiate a decision not to order expulsion upon the recommendation of a school governing body to do so. In this judgment I find that in respect of the last three instances of serious misconduct the first respondent failed to give regard to these legitimate concerns and thus acted unlawfully. This amounts to substantial success in the main review application, but I do not consider that the circumstances of this case require any punitive costs order.

Order

[33] It is ordered that:

1. The first respondent's decisions not to accept the expulsion recommendations of the governing body of the applicant as set out in annexures "V", "Z" and "HH" are hereby reviewed and set aside;

2. The first and second respondents are ordered to pay the costs of the main review application, such costs to include the costs of two counsel;

3. The counter-application for review is dismissed with costs, such costs also to include the costs of two counsel.

J.C. Fronemen

Judge of the High Court.