IN THE EQUALITY COURT OF SOUTH AFRICA

HELD AT MODIMOLLE

CASE NO:EQ02/2021

In the matter between:

JOSEPH MAILULA APPLICANT

AND

LIMPOPO DEPARTMENT OF EDUCATION 1ST RESPONDENT

SCHOOL GOVERNING BODY OF EENHEID 2ND RESPONDENT

LAERSKOOL

JUDGMENT

For linguistic Edward Sapir, language is not just a vehicle for carrying out expressions of thoughts, perceptions, sentiments and values characteristic of a community, but is a representation of fundamental expression of social identity. He also believes that language helps in maintaining the feelings of cultural kingship.

Dr Gurmeet Kaur Gill once said:

> *"Supporting mother tongue literacy goes beyond preserving cultural connections and soft landing".*

In order to achieve what the above mentioned author's has said, comes in Mr J Mailula in his capacity as father of his minor child, who shall herein after referred to as the applicant throughout who approached court on the premise that Limpopo Department of Education and the School Governing Body of Eenheid Laerskool(herein after shall be referred to as the respondents) failed to choose Sepedi as a curriculum choice in 2022 and further failed not allocate resources for the Sepedi language at the school.

As a result he raised the issue of the Sepedi language being unfairly discriminated by the respondents. He further stated that he has suffered great indignity and unfair discrimination at hands of the SGB of Eenheid Laerskool and the Department of Education by denying his child right to be taught in his own language even though it is practically possible. The applicant had written several letters to the respondents highlighting the plight of Sepedi language at the school but all in vain.

The applicant was at all times represented by Mr R Lebelo of Lebelo Raseboye Attorneys.The respondents were represented by the Adv Mamitwa on the instructions of the Office of the State Attorney.

The court held the directive hearing on the 21.02.2022 .The respondents did not comply with the directives of the court and instead filled an application for recusal of the presiding officer which application was dismissed. As a result the respondents complied with the directives of the court. It was part of the directives that the

interrogations will be held in the presence of the court which was eventually held on the 26.10.2022.The following persons were interrogated as part of the directives:

-Khathustshelo Onica De-Deren -the HOD;

-Gerda Ruth Pringle-the principal of Eeenheid Laerskool;

-Laudu Malumbete-current SGB chairperson;

-Dumela Ntobikayis Mahlaba- Chief Director of Department of Education and

-Joseph Matome Mailula-the applicant in this matter.

The aforesaid witness took the prescribed oath when testifying during the interrogation.

It was an agreement by both parties that an assessor be appointed. Advocate Emmanuael Gaisa was appointed as an assessor in terms of section 22(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and he was duly sworn in.

At the end of the directive hearing, both parties were allowed to file their heads of arguments. This court is indebted to both legal representatives.

Both respondents opposed the application. The respondents raised two points *in limine* in that the applicant ought to have exhausted all the internal remedies prior to approaching court as a result the application were brought prematurely. The respondents further stated that the applicant failed to adhere to several consultative meetings and to prepare a written representation which he failed to do. However, the respondents' proceeded with the consultative meetings with the parents. The matter on the agenda was the possible introduction of Sepedi as a curriculum choice in

2022 .The meeting voted against the possible of introduction of Sepedi as aforesaid by the majority vote in August 2021.That was long after the application was launched. The respondents' contention is the decision of the meetings constitutes an Administrative decision which the applicant ought to have reviewed in terms of PAJA.The respondents further submitted that the applicant did not exhaust all the internal remedies. Since the applicant has failed to do so, the decision not to introduce Sepedi as a curriculum of choice in 2022 shall stand.

The second point was the court had failed to comply with the procedures as laid down by the promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000(Regulation) in respect of the dies.

It was the respondents' submission that the applicant's application be dismissed should the points *in limine* be upheld.

The applicant did reply to the respondents' point in limine in that the respondents' failed to elaborate or highlight which internal remedies the applicant has failed to exhaust and further stated that all internal remedies have been exhausted prior to the launching of the application.

The applicant went further to states that indeed there was a consultative meeting were parents who voted for the elevation of Sepedi as curriculum in 2022 were threatened with an increase of fees. These contentions are consistent with the respondents' allegations that there was a meeting whereby a resolution was taken by way of vote not to introduce Sepedi language as curriculum for that academic year. But the decision was taken in August 2022.That was long after the application had been filed this application.

The issue to be determined by this court is whether there was a decision which was taken by the respondents' and if so is that decision an administrative decision in terms of PAJA and whether the application was brought pre-maturely as the applicant had failed to exhaust all the internal remedies.

In the case of Minister of Education for the Western Cape & Western Cape Department of education v Beauvallon Secondary School & 34 Others which matter was heard in the Supreme Court of South on the 17 November 2014 and judgment delivered on the 9 December 2014 under case number 865/13 at par 11 the court said:

> "Courts are often called upon to decide whether or not a decision by a public official is administrative in nature that one is left to ponder to what extent PAJA has in fact muddied the waters rather than provide certainty on the issue. Various and correctly described as being 'extreme narrow and highly convoluted' and 'cumbersome', it embraces the concept of an action or decision taken by a public body, official or functionary of 'an administrative nature'. Conduct of that nature was described, in broad terms, by this court in Greys's marine as 'the conduct of the bureaucracy (whoever the bureaucrative functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with the direct and immediate consequences for individuals or groups of individuals'. And although administrative action excludes 'the executive powers or functions of the provincial Executive'-which clearly include the formulation of government policy –the implementation of policy is generally regarded as being administrative in nature. Moreover, a procedural requirement affording affected parties a hearing before a decision

> is taken (the purpose of which of course to ensure that there has been full and proper appraisal of the relevant facts and circumstances, including possible alternatives to the proposed action) is the hallmark of administrative action".

As I have already alluded above the respondents' decision to vote for or against the introduction of Sepedi as a curriculum in 2022 came long after the application was filled before this court. The according to the above case law, where there is no decision taken, there will be no review of the decision in terms of PAJA prior to filling the application.

The court finds the argument by the respondents that the applicant ought to have brought a review application under PAJA is misplaced and can't stand.

However, the respondents did not end there. It is the respondents' contention that the applicant did not exhaust all the internal remedies. The applicant rebutted the averments by saying he di .During the closing argument,it was submitted on behalf of the applicant that there are no provisions made for the applicant to exhaust the internal remedies.

It is not in dispute that what the applicant embarked upon about the introduction of Sepedi as a curriculum of choice in 2022 is an administrative action. The court noted that at that time, that is when the applicant embarked on this mission, he was a member of the School Governing Body. The court finds that then the Constitution of the Governing Body of Eenheid Primary kicks in as well as the Language Policy of the Department of Basic Education in line with section 4(1) of the Use of Official Language Act 12 of 2012.

I will begin with the Constitution of the Governing Body at paragraph 10 which states that:

> *"10.1 Should a dispute arise between any members of the governing body at any stage, the members agree to take part in a mediation process.*
>
> *10.2 The disputes will be referred to an impartial, neutral mediator agreed to by the both parties, who will work with the parties in an attempt to find a mutually acceptable solution to the dispute. The mediator has no authority to impose a solution on the parties.*
>
> *10.3 The parties agree first to strive to resolve the dispute in good faith by means of mediation before any other legal remedy is utilised".*

There is also a complaints mechanism developed in terms of the policy as aforesaid which states (at paragraph 11)that:

> *"11.1 Any person who is dissatisfied with a decision of the Department of basic Education regarding the use of official languages may lodge a complaint in writing to the Director –General of the Department of basic Education.*
>
> *11.2 Any complaint must be lodged in*
>
> *11.2.1 In writing; and*
>
> *11.2.2 Within one month of the complaint arising.*
>
> *11.6 The Director general will consider the complainant and respond in writing ,not later than one month after the complaint was lodged informing the complaint of the decision/outcome".*

In terms of the Language policy in the Department of basic Education dated the 14 July 1997 states that any interested learner, or governing body that is dissatisfied with any decision by the head of the provincial department of education, may appeal to the MEC within a period of 60 days.

The court will now zoom into the steps which the applicant took on his endeavours to have Sepedi as a curriculum for 2022, which is clearly enunciated in his correspondences as attached to Form 2.

The applicant as per attachment 4 addressed to the SGB recorded his concerned that the previous SGB assured him that Sepedi shall be used as a compulsory language. At that time he was not yet a member of the SGB. He later on became a member of language shall not materialise on the basis that he saw the post establishment to the exclusion of Sepedi teachers. He then intensified his mission from within.

There was no response on the email above as there parties were bickering about the agenda, lack of previous minutes and the place to hold meeting due to Covid-19 pandemic. The SGB was unable to meet. In the process, the applicant wrote an email to the Circuit manager and District Director whereby he aired various grievances and also advised that he approached the SGB to introduced Sepedi as a compulsory language. He further advised that :

> *"The response of the SGB to this matter is that the school can't afford Sepedi as a compulsory subject because the school is an English medium school. This reasoning by the SGB is disingenuous as offering Sepedi as a compulsory language and subject does not interfere with the schools language policy".*

That is the first time we heard of the SGB having responded .On paper as filed by the applicant there is no such response. This is confirmed by his assertions on the same letter when he said “it is virtually near impossible to get information out of the SGB. Now the court wonders upon which grounds the applicant said there was a response on the matter from the SGB as indicated above. He called upon the HOD to withdraw the powers bestowed on the SGB to make Sepedi a compulsory subject. This was corroborated by the contents of the letter marked annexure MS1 attached to the respondents answering affidavit. This just confirms the court’s finding that the SGB did not respond to the initial letter regarding the subject matter.

Prior to receiving any response from the District Director and Circuit manger, the applicant dispatched another email to the school, chairperson of the SGB and the circuit manager where he requested the demographics and statistics of the school in question in terms of language.

On the 7 June 2021 the applicant penned another letter in the form of an email, it is not clear to whom was the letter addressed to but it looks like it was addressed to the clerk of the this Court. I am holding that view because at the end there is a request to court to compel the SGB and the head of the Department to make Sepedi a compulsory subject at the school and further to have an equivalent number of teachers appointed. On the 8th day of June 2021, the SGB together with the applicant did discuss the issue .It was resolved that the applicant should follow the correct procedure, that is to make a submission to the SGB regarding Sepedi.

On the 9th day of June 2021 the applicant disregarded the resolution of the 8th day of June 2021 and filled this application before court.

When the respondents raised the point of none compliance with the policies in that the applicant failed to exhaust all the internal remedies, it was argued on applicant's behalf that nothing preclude a party who is not satisfied with a decision to approach court. It was further submitted that there was no provision for the internal remedies to be exhausted.

It is not in dispute that the applicant did not make use of the disputes guidelines as provided by the Constitution of the Governing Body of Eenheid Laerskool nor the language policy as provided by the Department of Basic Education.

The applicant was suspended as a member of the SGB on the 18 June 2021 whereas the application was filed on the 9 June 2021.The court finds that the applicant as at the time of filling the application he was bound by the Constitution of Governing Body to make use of the dispute resolution, that is to refer the matter to a mediator on the premise that he was a duly appointed member of the SGB.The applicant has failed to do so. Instead the applicant wrote several letters not only to the SGB but to the District Director, Circuit manager up to the Head of the Provincial Department of Education. Despite that engagement the applicant remained dissatisfied as still Sepedi was not introduced as a curriculum in 2022 or there were no any signs to do so on the part of the SGB or the Department of Basic Education.

It is also common cause that Sepedi is one of the official languages which is recognised by our Constitution and regulated by the language policy. In terms of the languages policy the applicant ought to have written a complainant to the Director – General of the Department of Education, not to the District Director or Circuit manager and Head of Department.

The court finds that the applicant failed to exhaust all the internal remedies available to him both as per the Constitution of the Governing Body and the language policy.

The court finds that the applicant failed dismally in following the correct processes and thus he failed to exhaust all the internal remedies applicable to him prior to approaching this court.

There will be no need to proceeds on the other point *in limine* and merits of the case as the respondents' point *in limine* is upheld.

The applicant submitted that the respondents be ordered to pay the costs on attorney and own client should an order be made in favour of the applicant.

The respondents' submitted that should the court make a finding in favour of the respondents the court should award costs on *de bonis propiis* against the applicant's legal representative.

In terms of section 48 of the Magistrates Court Act 32 of 1944,the court may as a result of trial of an action, grant such judgment as to costs including punitive costs as may be just. The awarding of costs is the discretion of the court. That discretion should be exercised judicially. Such cost order should be fair. The general rule is that the successful party is entitled to his cost. The court also has the power to deprive a successful party of a portion or all of his cost and in a proper case, to order him to pay a portion or all of the costs of the unsuccessful party.

There are circumstances in which a party maybe condemned to pay costs *de bonis propiis* even when litigating in a representative capacity. Such an order can also made against an attorney if he is mala fide, acts unprofessionally or is grossly negligent. It is trite that cost *de bonis propiis* are not lightly awarded.

The court finds that there will be no justifiable reason to grant cost on *de bonis bropriis* against the applicant's legal representative. The reasons advanced by the respondents for such an order does not warrant such an order.

On the 21.02.2022 the court made no order as to cost in the application and on the 24.08.2022 each party was ordered to pay its/his own costs.

The court did not make any pronouncements on the payment of costs by either party on the following dates; 27.06.2022 and 23.07.2022.

The court reserved an order of costs on the following dates; 25.05.2022 and 23/11/2022

The respondents were already ordered to pay the costs on the following dates, 05.11.2021 to pay the wasted costs on attorney and own clients and 21.04.2022 to pay the wasted costs and that orders shall stand.

The court will proceed to make the following orders:

1.Tha applicant's application is dismissed.

2.The applicant is ordered to pay the costs of the,21.02.2022, 25.05.2022 and 23.11.2022.

3.Each party to pay its/his costs of the 27.06.2022 and 23.07.2022.

Dated at Modimolle on this the 8th day of February 2023.02.07

By Magistrate : JC MARIBANA

The assessor : Adv E GAISA concur with the order.