**IN THE HIGH COURT**
**(BHISHO)**

Case No.: 53/2007
Date delivered: March 2008

In the matter between:

**QUEENSTOWN GIRLS HIGH SCHOOL** Appellant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE** 1st Respondent

**THE HEAD OF THE EDUCATION DEPARTMENT, EASTERN CAPE PROVINCE** 2nd Respondent

**MR SITHEMBELE NDABAMBI** 3rd Respondent

**MRS PUMLA OLIVE NDABAMBI** 4th Respondent

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**JUDGMENT**

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**LEACH, J:**

[1] As its name implies, the appellant is a public high school situated in Queenstown. By reputation, it is one of the leading schools in the Eastern Cape. The third and fourth respondents are the parents of a girl, named Buhle, whom they wished to place in the appellant school at the commencement of the school year in 2007. Accordingly, late in 2006, they applied to the school for her admission. As will be more fully detailed below, this application was refused, the functionary who took that decision being the school's principal, one Richard Stanley Edkins. Subsequently, a directive was issued by the Department of Education, Eastern Cape *("the Department")* in effect overruling this decision and instructing Edkins to admit the child to the school in 2007. Faced with this, the appellant applied to the High Court in Bhisho as a matter of urgency seeking an

order that the directive be reviewed and set aside. In doing so, it cited the M.E.C. for Education in the Eastern Cape and the Head of the Department as the first and second respondents, with Buhle's parents as the third and fourth respondents.

[2] None of the respondents filed opposing papers and the application was set down for hearing before Ndzondo, AJ on 15 Feburary 2007. However, when the matter was called that day, counsel appeared on behalf of the first two respondents and informed the court that he wished to oppose the matter and to argue on the applicant's papers. Although the third and fourth respondents did not formally appear, they were present in court when the matter was heard. Having heard argument, the learned acting judge dismissed the application with costs. In his reasons for judgment delivered a few days later, he indicated that he had done so on two bases – firstly, the urgency in the matter had been created by the school's principal, Edkins and, secondly, that Edkins had acted improperly in refusing to admit Buhle to the school. The appellant now appeals to this Court.

[3] At the outset, it is necessary to determine precisely what issues are before this Court on appeal. In the application for leave to appeal, the appellant sought to attack both the finding that Edkins had been responsible for the urgency as well the finding on the merits of the dispute. In regard to the latter, it contended that the judgment had dealt with an issue not before court *viz.* the alleged unlawfulness of the decision to refuse Buhle admission whereas the administrative action which the appellant had sought to review was a different

administrative action *viz.* the Department's instruction to admit Buhle to the school.

[4] In his judgment on the application for leave to appeal, Ndzondo, AJ stated that he had given full reasons in his main judgment for his conclusion in regard to the issue of urgency, and then proceeded without more ado to deal with the merits. In doing so, he stated that although he had considered the conduct of the department's officials, another court might find that he had not paid sufficient attention thereto and that he had erred in that regard. He therefore granted leave to appeal *"to the Full Bench only on this aspect"*.

[5] At first blush, it might be thought that the learned acting judge intended to limit the appeal to the question of the lawfulness or otherwise of the Department's directive and had refused leave to appeal against his finding in regard to urgency. It is generally accepted that leave to appeal can be restricted to certain specified grounds of appeal, especially where there is a lengthy record.[1] However, where the Supreme Court of Appeal is faced with an appeal where leave to appeal has been so restricted, it lies within its power to allow argument to be directed on wider grounds.[2] Its authority to do so appears to be based upon its power to adjudicate upon a petition for leave to appeal where such leave was refused by a lower court, a power which a Full Court of a Provincial Division does not have. Accordingly, it has been held that a Full Court

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[1] **S v Safatsa & Others** 1988 (1) SA 868 (A) at 877 and **Douglas v Douglas** [1996] 2B All SA 1 (A) at 8.

[2] **S v Safatsa**, *supra*.

does not have the power to allow argument on appeal to be advanced on grounds wider than those in respect of which leave to appeal was granted.[3]

[6] Consequently, if the learned acting judge intended to limit leave to appeal solely to the issue of the Department's directive, it would create considerable problems in regard to this Court hearing the appeal. As the application had been dismissed on the urgency issue, for this Court to deal with the lawfulness or otherwise of the department's administrative action would be an exercise in futility as, even if we were to hold against the respondents in that regard, the decision of the court *a quo* would still stand on the issue of urgency which, in itself, was found to be sufficient to determine the outcome of the application, and against which no appeal lies.

[7] When this potential anomaly was drawn to their attention, counsel for both sides were agreed that it was inconceivable that the learned acting judge, in granting leave to appeal, intended this appeal to be ineffective and a *brutum fulmen*, and that he must have accepted that his order could be set aside by this Court. In the light of this, counsel for both sides were agreed, correctly in my view, that the learned acting judge's statement that leave to appeal was granted *"only on this aspect"*, *viz.* the merits of the administrative decision, was ambiguous and should be construed as meaning no more than that while he felt that it was the sole issue having a reasonable prospect of success, unrestricted leave to appeal should be granted.

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[3] See **Harlech-Jones Treasure Architects CC v University of Fort Hare** 2002 (5) SA 32 (E) at 48 – 52 paras [40] to [58].

[8] Consequently both the parties and this Court were of the view that leave to appeal had not been limited solely to the issue of the lawfulness or otherwise of the administrative action taken by the Department, and that both it and the question of urgency were ripe for adjudication on appeal. In the light of this, I turn now to deal with the facts.

[9] Fortunately, it is not necessary for present purposes to deal with the factual background in any great detail. Suffice it to say that in 2006 Buhle attended the Balmoral Primary School, one of the appellant's feeder schools. An application by the third and fourth respondents for Buhle to be admitted to the appellant in 2007 was lodged but, as a result of Buhle having a poor disciplinary record at the Balmoral Primary School, Edkins decided not to grant her admission. The Department's local district officials supported this decision, but Buhle's parents complained elsewhere and, on 5 December 2006, a Chief Director in the Department, one S.S. Zibi, addressed an instruction to the Acting District Director, Queenstown in which, *inter alia*, he stated:

> ". . . the Department cannot accept your position not to support the admissions of Buhle Ndabambi to the (appellant). You are accordingly instructed to ensure that Buhle finds a space in (the appellant) . . .".

[10] As a result, on 6 December 2006, the District Director wrote to Edkins. He attached a copy of the instruction he had received from Zibi to his letter and directed him to ensure its *"immediate implementation"*. Quite correctly, Edkins accepted that this was an instruction from the Department directing him to admit Buhle, a directive which overrode his decision to refuse her admission. He was

not prepared to back down and, consequently, the appellant sought legal advice. As a result, on 4 January 2007 its attorneys wrote to the Department and demanded that it withdraw the instruction to admit Buhle to the appellant. The Department refused to do so, and responded by way of a letter addressed to the appellant's attorney on 15 January 2007 in which it reiterated that its instruction was that Buhle be admitted. In addition, an official in the Department warned Edkins not to ignore its directive and threatened him with a loss of benefits and with disciplinary proceedings for insubordination. Consequently, in the light of these developments and the fact that the school had already been filled before the directive had been received, the appellant instituted the proceedings in the court *a quo*. In the light of this brief summary of the facts, I turn to consider the correctness of the judgment *a quo*.

[11] I intend to deal firstly with the question of urgency. There are various authorities[4] to the effect that a court is entitled to dismiss an application brought as a matter of urgency solely on the ground that the applicant created the urgency. Relying on this principle, the learned acting judge held that he was *"not persuaded that urgency has not been created by the principal (*Edkins*) himself"* and, accordingly, that the application should be dismissed. He appears to have placed an onus upon the appellant to show why the matter should not be dismissed for self-created urgency. In my view, he misdirected himself as there was no onus on the appellant in that regard. In any event, there was no justification for the Court's discretion to be exercised adverse to the appellant. While it is so that Edkins did not detail why he took no action during the period

[4] Collected in *Erasmus*, **Superior Court Practice** B1 – 54A.

from 6 December 2006 when he received the directive to 4 January 2007 when he first consulted with the appellant's attorneys, one cannot lose sight of the fact that the school would have been on holiday during the Christmas recess. In any event, Edkins was not called upon to give any explanation as the issue of self-created urgency had never been raised by the respondents who had not filed papers. Moreover it is not disputed that after the appellant consulted with its attorneys, the Department was requested to withdraw the directive. It refused to do and then threatened Edkins in the manner that I have described. In these circumstances, bearing in mind that the school year was opening, the matter was by its very nature urgent and it is a *non sequitur* to suggest, as the learned acting judge did, that Edkins could merely have obeyed the directive and admitted Buhle to the school until such time as the application had been decided, and that his failure in that regard should be regarded as having caused the urgency. It was because he was of the view that it would be detrimental to the school and the other learners for Buhle to be admitted that Edkins had taken his decision not to admit her, a decision which the appellant sought to protect by way of the review it brought. It was because of the directive and the Department's refusal to withdraw it that the proceedings became urgent, and it is illogical to suggest that such urgency had been created by the appellant because the directive could merely have been obeyed.

[12] In these circumstances, the court *a quo* clearly erred in dismissing the matter on the basis that the urgency of the matter was self-created by Edkins or the appellant, and the judgment on this issue cannot stand.

[13] Turning to the merits of the matter, it appears that the learned acting judge focused his mind on the correctness or otherwise of the decision not to admit Buhle to the school rather than on the administrative action which was pertinently in dispute *viz.* the Department's subsequent directive that she be admitted. In this he appears to have fallen prey to the fact that the papers were extremely poorly drawn. The appellant's case was a simple one *viz.* that Edkins was the functionary entitled to take the decision whether to grant or refuse an application for admission to the school, that there is a prescribed procedure (as more fully set out below) whereby a parent or learner aggrieved by such a decision can appeal, that this procedure had not been followed and no appeal had been heard, and that the Department was therefore not entitled to direct Edkins to reverse his decision. Unfortunately, the manner in which the appellant's papers were drafted was such as to create the impression that the appellant's primary task was to justify the decision Edkins had taken not to admit Buhle to the school. As a result of this, and the manner in which the matter was argued[5] when counsel for both parties concentrated almost exclusively upon the decision of Edkins, the learned acting judge in his judgment focused on that aspect almost exclusively. But in doing so, he seems to have lost sight of the fact that the relief sought related solely to the directive issued by the Department. Indeed in his judgment, he concluded that Edkins had acted *"precipitately and improperly in refusing to admit Buhle"* but made no mention of the Department's directive. He attempted to explain this in his judgment on the application for leave to appeal by stating that it was necessary to consider the lawfulness of the

[5] For some unknown reason the argument was transcribed and included in the appeal record. While irregular, in this instance it at least had the advantage of illustrating where all concerned went wrong.

action taken by the appellant in refusing admission to Buhle before proceeding, if necessary, to consider the conduct of the Department's officials. In this he was clearly wrong. Whether Edkins was right or wrong was not the issue. The dispute turned on whether the Department had the authority to countermand Edkins' decision, and in that regard the correctness or otherwise of that decision was irrelevant (as more fully dealt with below).

[14] In June 2007, after the present dispute had been decided in the court *a quo*, the first three respondents (respectively the MEC for Education, the Head of the Department of Education and Buhle's mother) brought an application in the Eastern Cape Division of the High Court in which they sought, firstly, an order declaring the appellant's admission policy relating to the relevance of the previous conduct of learners to be inconsistent with the National Admission Policy issued by the National Minister of Education, secondly, an order reviewing and setting aside Edkins's refusal to admit Buhle to the appellant school for 2007 and, thirdly, an order directing the appellant to admit Buhle to the school as a learner. This relief was opposed and a full set of affidavits was filed. The matter finally came before Froneman, J who, on 20 November 2007, delivered a judgment in which he refused to declare the relevant clauses of the school's policy to be unlawful. In regard to Buhle's admission, he found that Edkins's decision was flawed in that he ought to have afforded her and her parents a hearing in regard to her poor disciplinary record before deciding whether or not to admit her. However, he went on to hold that as the 2007 school year had all but passed, an order reviewing and setting aside that decision or directing the appellant to admit her to the school as a learner would serve no purpose.

[15] In the course of his judgment, Froneman, J drew attention to the provisions of s 5(7) of the South African Schools Act, 84 of 1996 which requires an application for the admission of a learner to a public school to be made to the Department in a manner determined by the Head of Department (*viz.* the second respondent). In addition he referred to s 5(8) of such Act which provides that if an application for admission to a public school is refused, the second respondent must inform the parent in writing of the refusal and the reason therefor. He also stressed that s 5(9) entitles any learner or parent of a learner who has been refused admission to appeal to the present first respondent. Then, after having concluded that it had been legitimate for Edkins, in considering the application for admission of a respective learner, to have regard to such learner's history of ill discipline but that, before acting thereon, the learner concerned should have the right to make representations in regard thereto, the learned judge then went on to say the following:

> "[71] . . . [T]he principal would then have to consider each application for admission on its own merits, having proper regard to the representations made to him about past conduct or behaviour by the prospective learner and her parents, as well as to all the other lawful and relevant factors relating to the admission of a prospective eligible learner to a public school. That is what the law requires of the principal and it is not the task or responsibility of a judge to tell him or her what decision should have been made. All that the law requires is a lawful and reasonable decision, not to prescribe what the decision should be.
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> [72] Nor, for that matter, is it the responsibility or function of other officials in the department to second-guess the principal's decision. If, in the administration of the school's admission policy, the head of the department appoints the principal of the school to act under his authority in giving practical effect to the school's admission policy, other officials in the department have no authority to instruct the principal to change his decision or to instruct him to admit a particular learner to the school. The right to object to the refusal of admission of a learner is that of the parent of the learner, no-one else. In terms of section 5(9) the parent may lodge an appeal to the Member of the Executive Council for Education, who must then make a decision on the merits of the appeal. The appeal process, too, must be fair, providing the opportunity for all parties (parent,

> principal and governing body) to make a proper input so that the Member of the Executive Council is also in a position to give a lawful and reasonable decision" (my underlining).

[16] This is to me a clear and succinct summary of the position. Although it was not pertinently spelled out in the papers, it is clear and accepted by all that Edkins was in fact the functionary who had been charged with taking the decision on Buhle's admission. Whether his decision was right or wrong is of no relevance to the present enquiry, and the Department had no right to countermand it. If the third and fourth respondents were unhappy with the refusal of their application, they had the right to appeal to the first respondent. Had they done so, the first respondent would have been obliged to hold a proper hearing and to receive the representations of all the interested parties *viz.*, the parents, Edkins and the governing body of the school. No such appeal was held and, without that having been done, neither of the respondents nor any other functionary was entitled to direct the school to admit Buhle as Zibi did.

[17] It is clear from all of this that the learned acting judge in the court *a quo* was confused as to what administrative action was in issue and reached the incorrect conclusion. He should have concluded that the appellant was entitled to an order setting aside Zibi's directive. Indeed Mr *Bloem*, who appeared on behalf of the first and second respondents, both *a quo* and in the appeal, was eventually driven to concede that he could not attempt to persuade this Court that the judgment in the court *a quo* should be upheld.

[18] However, Mr *Bloem* submitted that the questions raised in the matter had become moot and that no purpose would therefore be served by this Court

entertaining the appeal. His argument in that regard was based, firstly, upon the fact that this case has largely been overtaken by events as it is agreed that Buhle was admitted to the Cathcart High School at the beginning of 2007 (indeed before the matter was argued in the court *a quo*), that she still attends that school and that she did not apply to be admitted to the appellant for 2008 and, secondly, that it was unnecessary for this Court to spell out the legal position as that had been done by Froneman J in his judgment. He therefore submitted that this Court ought to exercise its discretion under s 21A of Act 59 of 1959[6], to dismiss the appeal on the ground that it would have no practical effect, and in truth only the costs in the court *a quo* were at stake.

[19] There may have been some merit in this argument had only Buhle's admission been at stake. But it is not the only issue to which the outcome of this appeal is relevant. Until such time as the directive is set aside, it has consequences. Indeed, as I have mentioned, Edkins has been threatened with disciplinary action for failing to comply therewith and, strictly speaking, if the third and fourth respondents change their minds about Buhle's schooling in Cathcart, they may seek to rely upon the directive to gain admission for her at the appellant school.

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[6] **21A Powers of court of appeal in certain civil proceedings**
(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
(2) . . . . .
(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.

[20] Our law has always recognized that even an unlawful administrative action is capable of producing legally valid consequences for as long as the unlawful act is not set aside, and the proper functioning of a modern State will be compromised if all administrative acts may just be ignored depending upon the view the subject took of their validity.[7] And it is no argument, as was submitted by *Mr Bloem* on behalf of the respondents, that Froneman, J had dealt with the matter. While the learned judge may have expressed some reservations about the validity of the Department's directive to the appellant, he was at pains to point out that he was not dealing with that issue but with Edkins's decision. In addition, his order certainly did not refer to the Department's directive at all.

[21] In any event, it is clear that the costs order was based upon the court *a quo* having concluded that Edkins' decision was incorrect, rather than on a finding that he Department acted lawfully. In this it misdirected itself, and just as a failure to exercise a judicial discretion would constitute an *"exceptional circumstance"* as envisaged by s 21A(3)[8] justifying a court to entertain an appeal[9] even if the only practical effect would be to vary the costs order so, too, should a failure to deal with the true issue be regarded as such a circumstance. To hold otherwise would mean that:

> ". . . a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order simply because an appeal would be concerned only with costs; and that, obviously, cannot be the effect of the section." [10]

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[7] **Oudekraal Estates (Pty) Ltd v City of Cape Town & Others** 2004 (6) SA 222 (SCA) at 242 para [26].

[8] Set out in footnote 6 above.

[9] **Logistic Technologies (Pty) Ltd v Coetzee & Others** 1998 (3) SA 1071 (W) at 1075 – 1076 and **Naylor & Another v Jansen** 2007 (1) SA 16 (SCA) at 22 para [10].

[10] **Naylor's** case, *supra.*

[22] Taking these considerations into account, I am of the view that the matter cannot be regarded as being purely moot and I am disinclined to invoke the provisions of s 21A against the appellant.

[23] In the light of these considerations, it is clear that the appeal must succeed, and there is no reason for costs not to follow the event. In the result, the following order will issue:

1. The appeal is upheld, with costs.

2. The order in the court *a quo* is set aside and is replaced with the following:

"(a) Due to the urgency of the matter, the applicant's failure to comply with the Uniform Rules of Court in regard to time limits relating to the services of notices and documents is hereby condoned.

(b) The directive of the Department of Education, Eastern Cape Province that the appellant admit the daughter of the third and fourth respondents, Buhle Ndabambi, as a learner, as contained in the letters dated 5th December 2006 and 6th December 2006, annexures "D" and "E" to the founding affidavit, is declared to be unlawful and is set aside.

(c) The respondents are to pay the applicant's costs of suit, jointly and severally, one paying, the others to be absolved."

6/3/2008

**L.E. LEACH**
**JUDGE OF THE HIGH COURT**

**EBRAHIM, J**

I agree.

**Y. EBRAHIM**
**JUDGE OF THE HIGH COURT**

**TOKOTA, AJ**

I agree.

**B.R. TOKOTA**
**ACTING JUDGE OF THE HIGH COURT**