Citation	2014 JDR 0099 (KZP)
Court	KwaZulu-Natal High Court, Pietermaritzburg
Case no	5167/2013
Judge	Vahed J
Heard	September 23, 2013
Judgment	January 22, 2014
Appellant/ Plaintiff	PI obo PI Jnr
Respondent/ Defendant	St Charles College, Pietermaritzburg Allen Van Blerk

[zSMz]Summary
School and school board — School — Private school—Administrative decisions — Such not constituting administrative action as defined in Promotion of Administrative Justice Act 3 of 2000 — Application to have son reinstated as cricket captain of private school concerned, dismissed.
[zJDz]Judgment

Vahed J:
[1] Lisa Endlich Hefferman, described as a stay at home mother and the author of *Goldman Sachs: The Culture of Success* and *Be the Change*, wrote an insightful magazine article in the October 2013 issue of *The Atlantic*

(http://www.theatlantic.com/education/archive/2013/10/parents-ruin-sports-for-their-kids-by-obsessing-about-winning/280442/) titled *Parents Ruin Sports for Their Kids by Obsessing about Winning*. *The Atlantic* is an American magazine founded in 1857 and published in Boston, Massachusetts In it she said:

'The aching desire to win can be seen on the sidelines of competitions even among the youngest participants. Parents pace the sidelines, twitching at every kick or pitch or shot of the ball, shouting exhortations at their children and the team. I have watched parents cover their eyes, unable to watch, such is the stress they feel. In many cases it becomes clear that it is the parents who want to win. Parents want the dopamine thrill of winning, the heady rush that adults feel with success. Winning, even for spectators (and the research was done only on males), gives a testosterone surge, and losing actually lowers hormone levels. As parents we so identify with our kids that their success quickly becomes our own. As spectators, parents seek confirmation even at the earliest stages that great athletic possibilities exist for their child: a better team, starting spot, varsity experience or college scholarship.?

[2] Although it is nowhere expressly stated in the papers, or raised in argument for that matter, that extract captures the subliminal message that is conveyed by the papers in this application.
[3] The applicant is an attorney in Pietermaritzburg. He brings these proceedings in his representative capacity as the father and natural guardian of his son, PI ("PI jnr").
[4] The first respondent ("St Charles") is an independent school established and registered in terms of chapter 5 of the South African Schools Act, 84 of 1996 ("the Act"). It is located in Scottsville, Pietermaritzburg.
[5] The second respondent is the principal of St Charles.
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[6] At all times material PI jnr was a minor and a learner enrolled at and attending St Charles. During 2013 he turned 18 (on 2 August 2013) and was in his final year of schooling (Grade 12).
[7] In paragraph 4 of the founding affidavit the applicant describes the nature of the case as being:

'...an application to reinstate [his] son, PI jnr to his former position as the "first team cricket captain" of the St Charles school first cricket team, pending the outcome of an internal enquiry to be conducted at the first Respondent's school as set out more fully in the Notice of Motion...?

[8] The relief claimed in the Notice of Motion is the following:
'1.

The First Respondent is directed to institute an internal hearing and/or to utilise its internal remedies within a period of fifteen (15) days from the grant of this order (hereinafter referred to as "the internal hearing") for purposes of resolving the dispute between the parties relating to the removal of PI jnr as the captain of the First Respondent's first cricket team.

2.

It is directed that:

2.1 PI jnr and the Applicant are permitted to attend the said internal hearing;

2.2 PI jnr and the Applicant be permitted to make representations at the internal hearing;

2.3 The Applicant and PI jnr be entitled to adduce and challenge evidence at the internal hearing.

3.

The Respondents are directed to provide the Applicant with written reasons for the final decision reached at the conclusion of the internal hearing should the Applicant request same.
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4.

Pending the outcome of the internal hearing to be instituted as aforesaid, PI jnr be and is hereby reinstated as captain of the First Respondent's first cricket team forthwith.

5.

The Respondents are ordered to pay the costs of the application, only in the event of them opposing same.

6.

The Applicant is granted leave to supplement his Founding Affidavit insofar as may be necessary.'

[9] The facts which underpin the application are dealt with in great detail in the affidavits. In summary they recount PI jnr's prowess as a school cricketer and his various achievements, particularly during his high school years.
[10] At the end of the third term in 2012, when PI jnr was in Grade 11, he was advised by the first respondent's first team cricket coach, Dave Karlsen ("Karlsen"), that he had been appointed as captain of the first cricket team for 2013. On 15 January 2013 PI jnr was advised that he had been removed (dropped) from the first team. The respondents maintained that it was PI jnr's loss of form subsequent to the end of the 2012 third term that motivated the decision to drop him from the first team.

[11] Aggrieved at that decision, and in an effort to reverse it, the applicant mounted a challenge against the respondents which involved lengthy correspondence (inappropriately set out in turgid detail on the applicant's
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professional practice letterhead) and a written request for access to information in terms of the Promotion of Access to Information Act, 2 of 2000.
[12] The application was launched on 09 May 2013, the founding affidavit being deposed to on the same day. No urgency was alleged and the ordinary time limits as prescribed by the Uniform Rules of Court applied to the exchange of further affidavits. The matter was initially set down on 28 May 2013 on which day it was adjourned *sine die* with no order as to costs. The answering affidavits were delivered on 31 July 2013 and the replying affidavits were delivered on 13 September 2013. The matter was argued on 23 September 2013. The reasons for the delay, firstly between May and July, and secondly between July and September, became apparent from the affidavits exchanged in a separate application brought by the applicant for an Order condoning the late delivery of his replying affidavits and his heads of argument.
[13] In his affidavit in support of condonation the applicant says that although the respondents? notice of intention to oppose was delivered in time no answering affidavits were delivered by the respondents within the time allowed (ie. by 21 May 2013). He goes on to say that the parties were engaged in settlement negotiations as a result of which no pressure was brought to bear upon the respondents to deliver their answer and that when eventually the answer was delivered on 31 July 2013 it was not as a result of any prompt from him. The further delays thereafter are explained by him as being due to, firstly, his illness, secondly, his counsel's other commitments and finally to a power outage at counsel's chambers.
[14] The respondents do not oppose the grant of condonation but nevertheless delivered an affidavit explaining what transpired and annexing thereto
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correspondence confirming every fact testified to therein. Regrettably, that affidavit reveals that the applicant has been less than frank in his explanation and the respondents assert that the applicant has engaged in a deliberate attempt to mislead the Court and that he has attempted to portray the respondents as being dilatory in the filing of their papers in order to justify his application for the condonation of the late filing of his papers.
[15] The situation, as disclosed in the respondents? explanatory affidavit (and as I said earlier every fact is confirmed by the correspondence put up), is the following:
a. the notice of intention to oppose was not filed in time but, by arrangement between the parties, only on 20 June 2013, after a mediation process that had been engaged in the parties broke down on 19 June 2013;
b. the delivery of the answering affidavit was, at the applicant's request, suspended on 25 June 2013, pending further negotiations between the parties;
c. those negotiations finally broke down on 11 July 2013 and the time limit for the delivery of the answering affidavit commenced running from that point and it was timeously delivered on 31 July 2013;
d. the applicant's replying affidavits, if any, were due on 15 August 2013 and by that date no replying affidavits were delivered;
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e. on 20 August 2013 the respondents, inviting the applicant to participate in the process, approached the Judge President in writing for the allocation of a preferent date for the hearing of the opposed application. Indicating that the applicant was ill the applicant's attorneys did not participate in that process;
f. further written requests were delivered to the applicant requesting that he deliver his reply and it was only on 28 August 2013 that the applicant requested an extension until 11 September 2013 for the delivery of his reply. That was consented to by the respondents;
g. in the interim the Judge President granted the preference sought and the matter was set down for opposed argument on 23 September 2013. On 4 September 2013 the

applicant was advised of this and reminded to deliver his reply by 11 September 2013 and his heads of argument by 13 September 2013;

h. the reply was not separately delivered but instead, on 13 September 2013, a full set of indexed and paginated papers was delivered to the respondents. That set included the applicant's replying affidavits.

i. the applicant's heads of argument were delivered on 16 September 2013.

[16] Those events suggest that there is much force in the respondents? contention concerning the applicant's *bona fides* in the condonation application. In

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addition, that recount of the events surrounding the delivery of further affidavits suggests to me that had respondents not been proactive, opposed argument in the matter may well have been delayed considerably beyond 23 September 2013. Had the respondents not elected not to oppose the grant of condonation I might well have adopted a firmer approach. In the event, condonation was granted.

[17] I have dealt with the application for condonation in some detail because a recount of those facts prompted me to raise with counsel the question of the effectiveness of any order I might make. As I indicated earlier, the matter was argued on Monday, 23 September 2013. That was already in the middle of the third term school recess with the fourth term due to commence on 1 October 2013. It seemed to me that the fourth school term would be occupied largely with an emphasis on academic, as opposed to sporting, pursuits and that any order I might make in the interim with regard to the captaincy of the first cricket team appeared moot. Mr *Dickson* SC, who appeared for the respondents, very properly indicated that the first cricket team were nevertheless still scheduled to play some matches during the fourth term and that, therefore, an order in the applicant's favour might be of some benefit to his son. Conversely, Mr *Potgieter* SC, who, together with Mr *Khan*, appeared for the applicant agreed with my view but nevertheless urged me to deal with the application on its merits. While commending Mr *Dickson* on his approach I was not entirely certain, given the legal complexities involved in the matter, that I would have been in a position to deliver a decision on the matter such that, if I were to grant the relief sought, it would have been timeous enough to enable an effective resumption of the captaincy of first team by PI jnr.

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[18] I turn now to deal with the merits of the application.

[19] As the battle lines became more clearly delineated the allegations concerning the decision to drop PI jnr from the first cricket team became infected and blurred with racial overtones (PI jnr is Indian and the first respondent's cricket coaching team and the majority of the members of the first cricket team are White) and with assertions that the panel which took the decision to drop him was not properly constituted. None of this was established or proved in the matter and nothing more needs to be said on those scores.

[20] Mr Potgieter submitted that the applicant had a right to challenge the decision to drop PI jnr from the first team and focused his argument on the three broad themes. Firstly, relying upon the authority of *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (AD), *Lunt v University of Cape Town & Ano* 1989 (2) SA 438 (C), *Gut-os v School Principal, Cornelius Goraseb High School* 1990 (3) SA 536 (SWA), *Moselane & Ors v Manager, Bonhomme Commercial High School & Ors* [1998] JOL 2186 and *Klein v Dainfern College* 2006 (3) SA 73 (T), he contended that the common law rules of natural justice applied to the situation at hand, more particularly because in terms of section 59 of the Act the school is obliged to furnish information to a parent.

[21] Secondly, but closely allied to the first, he submitted that the common law rules of natural justice, read with section 39 the Constitution, should be employed and applied so as to include the principle of rationality as a ground for interference. For this second submission he relied also on the decision in *National Horseracing Authority of South Africa v Naidoo & Ano* 2010 (3) SA 182 (N).

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[22] Lastly, he submitted that the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") could be called into aid in granting the applicant the relief he sought.

[23] It seems to me that it would be proper to firstly place the applicant's case into perspective by closely examining his "cause of action". In doing so I must look at what he has set out in the founding affidavit only. See *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 460 (D) and *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (T).
[24] The applicant has stated that he relies upon the provisions of the Constitution, the Act and certain of the provisions of PAJA. In addition, he applied for access to certain information. This he said in paragraph 5 of his founding affidavit. Reference to those provisions was introduced with the broad statement that they were being relied upon "… save for the provisions of the common law as applicable to this application…".
[25] As the papers reveal the information applied for was supplied. Section 59 of the Act also relates to the furnishing of information and to that extent there was an overlap the application for access to information. As the papers again reveal, that was supplied and furnished.
[26] The cases referred to by Mr *Potgieter* all speak to the time-honoured principles of natural justice as and when they are applied to the decisions of a domestic tribunal. However, and notwithstanding the reference to the common law in the founding affidavit, it seems to me that none of the applicant's claims are grounded in the common law.
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[27] All of the references to the Constitution made by the applicant point conclusively to the fact that the rights relied upon, and those being asserted as being relevant, are those under section 33 of the Constitution. These are the allegations that relate to unfair procedure and to an unfair decision.
[28] It is convenient at this stage to allude to the basis of respondents' opposition to the relief sought. These are set out in paragraph 9 of the answering affidavit:
'9.1 Generally, the appointment and removal of a pupil as the Captain of a sporting team at the College is a matter of internal governance which does not entitle Applicant to any relief before this... Court.
9.2 This concerns a matter of internal governance without any alleged violations of any constitutional right and as such is a matter in respect of which this Court has no power to intrude.
9.3 This Court has no power to make the orders sought by the Applicant on the basis that there is no cause of action made out under Section 32 or 33 of the Constitution or under the Promotion of Administrative Justice Act Number 3 of 2000 ("PAJA"). It is submitted that the definition of "administrative action" does not include the decisions impeached herein because the College, in making the decision, was not "exercising a public power or performing a public function in terms of an empowering provision". The said decisions of therefore for outside the scope of the constitutional provisions or PAJA.
9.4 This Court has no power to appoint always reinstate Applicant's son,…, As the captain of the College's first cricket team because this is a matter of internal governance. In any event such an order would be educationally unsound.?
[29] Generally the courts will defer to the jurisdiction of the school over its internal affairs, policies and other matters, and will ordinarily only interfere where
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there has been a violation of a fundamental right. See *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).
[30] In *Sibiya v Director General: Home Affairs* 2009 (5) SA 145 (KZP) *Wallis* J observed at para 14 that:
'[14] This is also consistent, as Mr *Dickson* pointed out in reply, with the fact that there is no longer a distinction between administrative law under the Constitution and administrative law under the common law. PAJA is the statute enacted to give effect to the constitutional right to just administrative action and the underlying intention is that it is comprehensive and should cover the entire field of administrative law. While PAJA itself refers to administrative action as constituting either a decision or a failure to take a decision it is apparent from the definition of 'decision' that it extends to the basic conduct of administrative functionaries in dealing with ordinary citizens in circumstances

which can adversely affect the rights of those citizens and which has a direct, external legal effect on them. The failure by the State to provide an identity document to a citizen who is entitled thereto, whatever the reason for that failure may be, clearly affects the rights of that person and has a direct, external legal effect upon them. It would be surprising were this not so, bearing in mind that even under our pre-constitutional dispensation it was held that the withdrawal of such a document could be the subject of judicial review, albeit within the narrow constraints of our administrative law at the time.'

[31] Section 33 of the Constitution provides:

'33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.?

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[32] As I have indicated earlier, all of the rights contended for by the applicant are grounded within the context of section 33 of the constitution. As was pointed out in *Sibiya*, section 33 of the Constitution only provides a remedy if it can be sourced and secured through the provisions of PAJA.

[33] The definition of "administrative action" in PAJA cannot and does not include the decision under attack in the present application. Here St Charles was not exercising a public power or performing a public function in terms of an empowering provision. The administrative decisions taken by an independent school are not the exercise of public power or the performance of a public function.

[34] In *Khan v Ansur N.O. & Ors* 2009 (3) SA 258 (D) *Swain* J held as follows:

'[32] As I understand the argument, the effect is to transform the nature and identity of a private school into that of a public institution whose officials, when exercising the power not to reregister the applicant, exercised a public power and performed a public function. The leap of logic inherent in such reasoning only has to be stated to be rejected. It is clear that there is a fundamental statutory distinction between a public school and an independent school in terms of the South African Schools Act 84 of 1996. The administrative control over an independent school by the executive branch of government lies in the power to register and deregister such a school. The object is obviously the maintenance of educational standards in independent schools. There is, however, no control over the administrative decisions taken by officials of an independent school in the exercise of their functions. Such officials therefore do not exercise a public power, nor perform a public function, when doing so.'

[35] Based on the aforegoing I conclude that I have no power to intrude upon the internal affairs of St Charles. No breach of any of PI jnr's fundamental rights, reviewable under PAJA read with section 33 of the Constitution, have been alleged or proved.

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[36] Given the view I take of the matter it must be clear that I am not disposed towards examining the decision to drop PI jnr and whether it was a good one on its own merits. However, and if I were inclined to interrogate that decision, I am of the view that it was one properly taken, following proper procedure. The facts reveal that Karlsen believed that there were good grounds to drop PI jnr. Those were based on his loss of form subsequent to the end of the 3rd term in 2012. Karlsen consulted with the 2nd respondent and then followed his procedure. The committee which ultimately took that decision met and the team sheet which reflected that decision was countersigned by all the members of the committee. Those facts are set out in sufficient detail in the respondents? answering affidavits. An attempt was made by the applicant to cast doubt

over those facts but in my view that attempt failed dismally. Interfering with that decision, accordingly, would be an intrusion into the private affairs of the school and would be educationally unsound.
[37] Finally, a word about costs. The respondent contended that it was entitled to costs on a scale as between attorney and client. This was based on the applicant's vexatious and personal attacks on the second respondent and on St Charles. In addition, the applicant's deliberate conduct as revealed in the condonation application was said to support that claim. There is much force in these submissions, particularly when regard is had to the unseemly attempt by the applicant to turn the dispute into a race based conflict.
[38] Ultimately the question of costs is confined exclusively to the exercise of my sole discretion and in doing so I am not inclined to be punitive.
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[39] The application is dismissed with costs, such costs to include those relating to the respondents' employment of senior counsel.

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Vahed J

CASE INFORMATION

Date of Hearing:	23 September 2013
Date of Judgment:	22 January 2014
Applicants' Counsel:	A E Potgieter SC (with A R Khan)
Applicants' Attorneys:	Subhash Maikoo & Associates 484 Burger Street Pietermaritzburg (Ref: 011025001/SM/RK) Tel: 033 342 7173
Respondents' Counsel:	A J Dickson SC
Respondents' Attorneys:	E R Browne Incorporated 167-169 Hoosen Haffejee Street Pietermaritzburg (Ref: AJD/pc/076264) Tel: 033 394 7525