IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

Case No. 2089/2004

In the matter between :

MARITZBURG COLLEGE — Applicant

and

C.R. DLAMINI N.O. — First Respondent
T. MAFU — Second Respondent
T.W. KONDZA — Third Respondent

JUDGMENT

Delivered on 27 May 2004

P.C. COMBRINCK, J.

The facts giving rise to this application are not in dispute and can be summarised as follows:

1. During October 2003, three pupils at the applicant school were involved in an incident in which a window of a hired bus was smashed. Two pupils were found to be smelling of alcohol and a bottle of brandy was discovered in one pupil's kitbag.
2. During November 2003, a disciplinary committee was constituted and was to conduct a hearing into the activities of the three pupils. The hearing did not take place because one or more of the members of the committee had to recuse themselves.
3. The disciplinary committee was reconstituted in December 2003 and at a proper and fair hearing, the three pupils were found guilty of misconduct and a recommendation was made that they be expelled

from the school. Apparently all three pupils had in the past been guilty of frequent acts of misconduct.

4. In accordance with the Regulations relating to the conduct of learners at and their suspension and expulsion from public schools, the disciplinary committee submitted their recommendations in writing to the Governing Body. A meeting of the Governing Body was accordingly held on 17 December 2003.

5. Serious allegations about the proprietary of the disciplinary process was made by one of the parents in a written submission to the Governing Body and the Governing Body felt constrained to call for a typed transcript of the disciplinary proceedings. This took some time to prepare and was only available on 17 January 2004 when the Governing Body had its next meeting.

6. On this date, the Governing Body resolved :

   (a) that the finding of the Disciplinary Committee as to the guilt of the three pupils be accepted as correct;

   (b) that the disciplinary committee's recommendation as to expulsion and interim suspension should be endorsed in respect of two of the pupils (the sons of the second and third respondents);

   (c) that pending the completion of the procedure prescribed by law for the expulsion of pupils, the pupils concerned would not be readmitted at the start of the 2004 year.

7. By letter dated 19 January 2004 the first respondent was advised of the aforementioned facts.

8. In terms of section 9(1)(b) of the South African Schools Act, Act No. 84 of 1996 the applicant was obliged to consult with the Head of Department of the Department of Education regarding the suspension of the two pupils pending a decision on their expulsion. For three days from 20 to 23 January 2004 the applicant telephonically attempted to establish from the Ulundi Head Office of the Department of Education who had to be contacted for the purpose of arranging a consultation as to the question of the interim suspension of the two pupils. The applicant's endeavours met with no success. By letter dated 23 January 2004, addressed to The Ward Manager, Pietermaritzburg East, KwaZulu-Natal Department of Education, the applicant recorded that one of the parents (the second respondent) was presenting his son at school each day despite the Governing Body's decision that he was not to return to school. The Ward Manager was called upon to find another school for the pupils until such time as a decision could be made regarding their expulsion. In this regard he was referred to Regulation 3(5) of the Regulations issued under the KwaZulu-Natal School Education Act No. 3 of 1996. No reply apparently was received to this letter.

9. On 26 January 2004, an official from the Head Office of the Department contacted the school's principal and advised him that the person to consult with was the first respondent. The first respondent however, he said, was at that stage out of the country.

10. Believing (foolishly) that the first respondent would have delegated his powers to another official in his absence, the applicant wrote a letter on

26 January 2004 enquiring who they were to consult with in the absence of the first respondent.

11. On 16 February 2004, a letter was addressed by the applicant to the first respondent recording the history of the matter and stating inter alia the following:

"On the morning of 20th January, 2004, the full documentary record of the disciplinary proceedings was delivered by hand to Mr. Thango at the District office. He had been informed, in two earlier telephone conversations, that the matter was one of extreme urgency and that it would be necessary to consult with the Head of Department concerning the decision to suspend the learners pending the decision as to their expulsion. Unfortunately, Mr. Thango took it upon himself to deal with the suspension aspect and, according to my information, informed the parents of the learners that they should be returned to the school with immediate effect. He also issued an instruction to the Principal, Mr. Pearson, to that effect. The learner, Mafu, was brought to School by his father each morning and, because of the Governing Body's decision, was made to sit in the Conference room for the whole school day.

Because the situation was regarded as untenable, I addressed a further letter to Mr. Thango (with a copy being sent to you) on 23rd January 2004. I stressed that, in terms of section 9(1)(b) of the South African Schools Act, Act No. 84 of 1996, interim suspension of a learner was required to be put into effect in consultation with the Head of Department. At that time we had been informed that you were away overseas and we assumed that you would have delegated your functions to an official in the Department and we required to be told who the relevant official was. Again, for your convenience, I annex a copy of this letter marked "B".

Mr. Thango did not furnish us with the information requested and by the first week in February the situation was becoming tense, particularly because it appeared that Mr. Mafu had approached the

media and was making serious allegations about the School. In a series of telephone calls to the Department (both in Pietermaritzburg and Ulundi), the Principal at length ascertained that a Mr. Nyawuza, in Ulundi, was deputed to perform the functions of the Head of Department in your absence. He accordingly contacted Mr. Nyawuza by telephone and explained the problem to him. According to my information, Mr. Nyawuza stated a Mr. Mandla Ndlela was the person who would be considering the matter and consulting with the Governing Body in relation to the decision that he would contact the District Office and ask that the documentation be send immediately to the Head office in Ulundi so that it could be considered. This conversation took place on Friday, 30th January. On 4th February, we learnt that you had returned from your overseas trip and assumed that you would be attending to the matter or delegating the task to a suitably qualified official in your Department.

Between 30th January and 12th February various officials in the Ulundi Office were contacted and various assurances were given to the effect that the documents were under consideration in Pietermaritzburg. I will not detail these for present purposes. It will suffice to say that, notwithstanding our continual attempts to identify an official in your Department who is properly authorised and prepared to consult about the matter of interim suspension, we have met with a series of dilatory responses and, by all appearances, nothing has been done by any official to acquaint himself or herself properly with the matter so that meaningful consultations can be held in terms of section 9(1)(b) of the Schools Act."

The letter concluded with an ultimatum that the first respondent consult with the Governing Body within one week of receipt of the letter. The demand was couched in the following terms:

"I regret that it is impossible for me to allow this highly unsatisfactory situation to persist. It is causing restlessness among the staff, particularly the Principal who is endeavouring to settle into an onerous new job and should be able to devote his time to educational matters. It is, more importantly operating to the prejudice of the two learners involved. They have not had any tuition this year. I need hardly point out to you that the regulations required you, in any situation where the suspension of a learner will persist for more than seven days, to place him in another school.

It is therefore necessary for me to give you formal notice, in terms of section 6(3) of the Promotion of Administrative Justice Act, Act 3 of 2000, that you are required to consult with the Governing Body and make a decision in regard to the interim suspension of these two learners *within a period of one week from the date on which this letter is telefaxed to you.* It is my submission that the period of one week is more than reasonable in the prevailing circumstances since your Department has been in full possession of all the necessary information since 20th January and there have, in the interim, been several communications in which officials in your Department have been informed as to where the documentation can be found."

The letter concluded thus:

"I must regrettably stress to you that if my request for immediate action is not complied then I will have to approach my Governing Body for authority to make an application to the High Court in accordance with the provisions of sections 6, 7 and 8 of Act No. 3 of 2000.

I accordingly look forward to your response within the stipulated period of one week."

12. Copies of the aforesaid letter were telexed to the MEC for Education, KwaZulu-Natal and to the National Minister for Education.

13. Over the week-end of 21 and 22 February 2004, the first respondent telephonically advised the applicant that he was prepared to set aside a half an hour in the morning of Tuesday 24 February 2004 at the steps of the Legislature building in Ulundi to discuss the matter with a delegation from the Governing Body.

14. Two members of the Governing Body duly met the first respondent as arranged. The first respondent was handed a documented chronology of contact between the school and the Department of Education. The first respondent indicated that he would revert to the Governing Body after studying the documents.

15. In a letter dated 24 February 2004, the applicant recorded that the meeting with the first respondent had taken place and expressed its hope that the first respondent would revert within week.

16. The applicant heard nothing from the first respondent and eventually on 17 March addressed the following letter to the first respondent:

"I am most embarrassed to have to record that, to date, no response to these communications has been received. This, despite a telephone call made to you on Monday, 8th March 2004, to explain that the Governing Body now regards the lack of response from your department as completely unacceptable.

The first term of 2004 is very nearly at an end and the Department has signally failed to comply with its obligations under the SA Schools Act and the Provincial Act and regulations, either to consult with the Governing Body in connection with the interim suspension of the learners or to make any arrangements for alternative schooling for the learners pending the decision on their expulsion.

You informed the Reverend Mambi and me, on 24 February 2004, that you would "come back to us within a week". We understood that

statement to mean that if you considered any consultation necessary for the purpose of deciding upon the interim suspension order, you would contact us within the period of a week, failing which the interim suspension order would simply be endorsed by your Department. By virtue of your failure to contact us, you are still in breach of the obligation imposed under section 9(2) of the SA Schools Act, to consult with us concerning the interim suspension. We very much regret that in these circumstances the interests of the Governing Body and the School can only be properly protected by us if you are put on the strictest terms to respond to our request.

It is therefore necessary to notify you, as we hereby do, that unless you have, **by no later than Wednesday, 24th March 2004**, discharged your duty to consult with us, or else inform us, in writing, that our order for interim suspension is to be of a full force and effect until a decision is taken on the expulsion of the learners in question, we will be constrained to proceed to Court with the application referred to in our letter of 16 Feb 2004."

17. On 24 March 2004, the first respondent addressed what can only be described as an astonishing letter to the applicant. It reads as follows:

"In your letter you refer to the telephone call of 8 March 2004. On that day I was on my way to Nelsprult for the meeting of the Heads of Education Departments. From that day I have not been in my office. I do not need to bore you with the details save to say that my delay in responding to your letters was not deliberate, but was because of the commitments I have.

As regards the issue of suspension of learners in terms of section 9(2) of the Schools Act, the provision makes it clear that this has to take place "in consultation" with the Head of Department. It is not that I had to consult you but that you had to consult me. Moreover, I was supposed to concur with the suspension. It is not a question of your suspending the learner and I have to automatically concur with that.

I do appreciate that you could not get me at the time you wanted to contact me. But I am not persuaded that your decision to suspend the learners before consulting me was in accordance with the provisions of the Act. For this reason I regard the suspension as illegal, and consequently the learners have to be reinstated pending the decision on their expulsion."

As a consequence of the aforegoing the applicant launched an urgent application on 1 April 2004 in which it sought the following relief:

"1.

That the decision of the First Respondent, contained in the letter dated 24th March 2004, annexure 1 to the founding affidavit herein, to reject the recommendation that the learners Kondza and Mafu be suspended from attendance at the applicant school pending a decision by the First Respondent as to their expulsion from the school is set aside.

2.

That the First Respondent is directed to consult with the representatives of the applicants Governing Body and with any other person with whom consultation may be necessary and to make a decision on the recommended interim suspension of the said learners by not later than 14th April 2004.

3.

That the First Respondent is hereby ordered to make a decision in regard to the recommended expulsion from the applicant school of the said two learners and to communicate such decision, with his reasons therefor, to the school and the Second and Third Respondents by not later than 14th April 2004.

4.

The First Respondent is ordered to pay the costs of this application."

When the matter came before Court the first respondent indicated that he intended opposing the matter and after agreeing to dates for the filing of answering and replying affidavits, the matter was adjourned to 21 May 2004.

On 5 April 2004, the first respondent made a decision to uphold the recommendation by the Governing Body to have the two pupils expelled. The decision was formally communicated to the applicant in writing on 13 April 2004.

Having taken the decision, the first respondent then contended in his answering affidavit that the relief sought in paragraphs 1 and 2 of the Notice of Motion had become academic and that there were therefore no live issues between the parties. He nevertheless felt constrained to depose to the following paragraph:

> "However, it is necessary to record that before making such a decision, although this application had been made, there was no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me. The Governing Body of the applicant itself had had to adjourn its proceedings before making recommendations to me. To have expected me to decide the issue within two months was utterly unreasonable."

The respondent in his answering affidavit reiterates that the suspension of the pupils by the applicant was unlawful though he says that he made no

decision in this regard *"...it was a mere restatement of the law as I understood it."*

Because of the decision taken by the first respondent on 5 April 2004, it was common cause between counsel who argued the matter before me that the relief sought in paragraphs 2 and 3 of the Notice of Motion had fallen away. In the light of the letter written by the first respondent in which he contended that applicant had acted unlawfully in suspending the two pupils and the reiteration by him of that view in the answering affidavits the applicant contended that I should make a declaratory order to the effect that the applicant had not acted unlawfully. Counsel for the applicant stressed that it was of the utmost importance for not only the applicant but also other schools to have clarity on this issue. Counsel for the first respondent argued that the question of the applicant's right to suspend pupils is a matter of historical curiosity and bears no significance at all for the second and third respondents or any one else for that matter. He submitted that the legal position is clearly defined by statute – the provisions of section 9(1)(d) of the Schools Act are clear and do not require interpretation.

I am satisfied that both in terms of section 19(1)(a)(iii) of the Supreme Court Act, Act 59 of 1959 and at common law, I should exercise my discretion in favour of granting a declaratory order in the circumstances of this case. It is of vital importance to the applicant to know whether it acted legally when it suspended the pupils because it will affect the procedure it

adopts in all future suspensions and expulsions. Where a public official maintains that his interpretation of the law and consequently the procedure to be adopted in cases of suspension and expulsion is the correct one it is a duty of the Court to step in and determine the rights and obligations of the parties, more particularly so when it regards the public's official's interpretation of the law to be manifestly wrong. The history of problems encountered by the applicant with the Department of Education as outlined in the founding affidavit is a further factor which I have taken into account in considering whether to entertain the grant of a declaratory order. The applicant relates (and these facts were not disputed by the first respondent) that:

(a) In the case of one pupil the disciplinary committee recommended be expelled, the applicant has been waiting 21 months for a response from the Department. None to date has been received;

(b) in the case of another pupil, the applicant waited a year for a decision from the first respondent and eventually when no response was made, the Governing Body reviewed the matter and allowed the pupil to continue schooling;

(c) in yet another matter, 11 months elapsed without response from the Department on a recommended expulsion.

It is appropriate in the light of the history set out above to consider the first argument advanced by the first respondent in resisting the application. It was argued on behalf of the first respondent that the applicant is an institution within the hierarchy of the Department of Education and as such

an organ of State. It has not complied with the principles of co-operative government which enjoin it to avoid legal proceedings against the Department of Education of which the first respondent is its head. In this regard, reference was made to section 41 of the Constitution of the Republic of South Africa Act, Act 108 of 1996 which reads as follows:

> "41(1) All the spheres of government and all organs of State within its sphere must-
>
> (h) co-operate with one another in mutual trust and good faith by -
>
> (i) fostering friendly relations;
>
> (ii) assisting and supporting one another;
>
> (iii) informing one another of, and consulting one another on, matters of common interest;
>
> (iv) ...
>
> (v) ...
>
> (vi) avoiding legal proceedings against one another."

The first respondent in his answering affidavit maintains that it is the duty of the applicant to resolve the matter inter-departmentally and it should have exhausted all remedies available to it including endeavours to seek the intervention of the Members Executive Council for Education and Culture (KwaZulu-Natal). He says further:

> "In my respectful submission it has a duty under the Constitution to co-operate with me in the exercise of my duties on behalf of the Department of Education. It is improper, in my respectful submission, for the applicant, as has been done in this case, to hasten to Court for the relief sought in the Notice of Motion."

Assuming, without deciding, that the applicant is an organ of State, from the history of the matter, it appears to me that if anybody was guilty of breaching the principles of co-operative governance it is the first respondent. In the past, as demonstrated by the three cases outlined above, the first respondent has persistently failed to co-operate with the applicant and has failed dismally to carry out the duties imposed on him by virtue of his office. In the present matter, the applicant made telephone calls, wrote numerous letters, sent copies of the important letters to both the MEC for Education in KwaZulu-Natal and to the National Minister of Education. It flew two members to Ulundi in an attempt to consult with the first respondent. It eventually was compelled to give ultimatums. All efforts met with no response. It defies belief that in these circumstances the first respondent can accuse the applicant of not adhering to the principles of co-operative governance and maintain that it should have avoided legal proceedings.

I turn now to deal with the issue of whether the applicant acted lawfully when it decided on 17 January 2004 to suspend the three pupils. The first respondent's counsel in argument still maintained that the provisions of section 9(1)(b) of the South African Schools Act, Act 84 of 1996 are peremptory and that any suspension for more than a week without consultation with the first respondent is unlawful. Despite the applicant spelling out in a number of its letters that it acted under the Regulations promulgated under the KwaZulu-Natal School Education Act, No. 3 of 1996, no reference is made to these regulations by the first respondent in his

answering affidavit nor is it dealt with at all by first respondent's counsel in his Heads of Argument.

Section 9(1) of the Schools Act reads as follows:

> "Subject to this Act and any applicable provincial law the Governing Body of a public school may after a fair hearing suspend a learner from attending the school –
>
> (a) as a correctional measure for a period not longer than one week; or
>
> (b) in consultation with the Head of Department pending a decision as to whether the learner is to be expelled from the school by the Head of Department."

Section 63(2) of the KwaZulu-Natal School Education Act provides:

> "The control of learners at, and the expulsion from public schools and hostels and the suspension of, or meting out of other punishment to those learners, shall be as prescribed."

Regulation 3 issued in terms of section 72(1) of the aforesaid Act and published in Provincial Notice No. 285 of 1997, reads as follows:

> "Suspension – (1) a Governing Body may order the suspension of a learner –
>
> (a) as a correctional measure for a period not longer than one week after being found guilty of misconduct;
>
> (b) pending a decision by the Secretary on whether a learner is to be expelled from the school after being found guilty of misconduct and a recommendation to this effect had been forwarded to the Secretary;

2. A Governing Body may order the suspension of a learner before misconduct charges are put to a learner if the following requirements are met –

(a) the learner is accused of serious misconduct on or off the school premises which could lead, if the truth of the charge is established, to the expulsion of the learner from the school;

(b) it is the opinion of the Governing Body that the continued presence of the learner –

(i) endangers the maintenance of discipline or social well-being of such school; or

(ii) hinders or prevents the investigation into his/her conduct."

In relying on the provisions of section 9(1)(b) and ignoring the regulations promulgated under the KwaZulu-Natal School Education Act, the first respondent has clearly lost sight of the words in section 9(1) "***Subject to ... any applicable provincial law ...***" The clear and unambiguous intention of the Legislature was that the Provincial law would take precedence over the National law. Accordingly suspensions and expulsions had to be dealt with by the applicant and other schools in terms of the Regulations promulgated under the KwaZulu-Natal School Education Act.

The effect of the use of the words "subject to" in legislation has been authoratively laid down by the Appellate Division (as it was then called) in the case of S v Marwane 1982(3) SA 717 A at 747 H – 748 A where Miller, J.A. said the following :

"The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant – in case of conflict it prevails over that which is subject to it. Certainly, in the field of Legislation, the phrase has this clear and accepted connotation. When the Legislator wishes to convey that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As Megarry, J. observed in C and J Clarke v Inland Revenue Commissioners [1973]2 All ER 513 at 520:

> 'In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing; if there is collision, the phrase shows what is to prevail."

See further Rennie NO v Gordon and ano, 1988(1) SA 1(A) at pg 21.

Counsel for the applicant has drawn my attention to Regulations governing the suspension and expulsion of pupils in other Provinces and they all have provisions similar to that applicable in this Province. So for instance in the Eastern Cape the Regulations (Provincial Notice 10 of 2003) provide:

> "(c)(iii) that the suspension (by the Governing Body) takes immediate effect and will last until the Head of Department has decided whether or not to expel the learner."

In the Western Cape (Provincial Notice 372 of 1997) Regulation 3(2) provides:

> "Where a Governing Body recommends to the Head of Department that a learner be expelled, such learner shall not be allowed to attend the School pending a decision by the Head of Department in this regard."

Mpumalanga Gauteng and the Free State have similar provisions.

In my judgment the applicant correctly applied the provisions of the Provincial Act and Regulations. It follows that it acted lawfully in suspending the pupils on 17 January 2004.

The finding that the first respondent was incorrect in relying on the provisions of section 9 of the South African Schools Act has no bearing on his conduct in this matter. I would be failing in my duty if I did not comment on it.

I find it disturbing (to put it mildly) that a public official had to be galvanised into action to do his duty only when served with a Court application. Even more disturbing is his attitude as spelt out in paragraph 11 of his answering affidavit, quoted earlier in this judgment, that there is "*... no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me.*" He then goes on in the paragraph to state that to expect him to make a decision within 2 months was "*utterly unreasonable*". This attitude not only ignores the obligations on the Governing Bodies to maintain discipline and good standards at the schools, but more importantly totally disregards the rights of the pupils who stand in the shadow of expulsion. They have a right to know expeditiously whether they are going to be expelled so that they may be taken up in another school. Indeed the

Regulations promulgated under the KwaZulu-Natal School Education Act provide in Regulation 3(5) the following:

> "If the period of suspension is likely to exceed 7 days, the Secretary must make alternative arrangements for the schooling of the learner pending his decision on the expulsion of the learner."

It is idle for the first respondent to suggest that because of his many other duties, he is not able to attend to consultations with school Governing Bodies and decisions of expulsion or suspension. He has the power to delegate and it is a simple matter for him to appoint officials in his department to consider disciplinary records and make recommendations. I find it shocking that in the three cases mentioned by the applicant, pupils had to wait a year to 21 months for a decision by the first respondent on their expulsion. Consideration must be given in future, in my view, where litigants are forced to come to Court to compel public servants to carry out their duties where they have failed to do so, that such officials be ordered to pay the costs incurred, personally. There is no justification for taxpayers' money being used to pay legal costs incurred consequent upon a public servant failing to carry out the duties he is obliged to by virtue of his office. As it is, I consider, in my discretion, that I should reflect the displeasure of this Court in the conduct of the first respondent by making a punitive order of costs.

In the event I make the following order:

1. It is declared that the decision taken by the Governing Body of the applicant on 17 January 2004 to suspend the learners, Kondza and Mafu for attendance at the applicant's school was lawful.

2. It is declared that it is not necessary for a Governing Body to consult with the Head of Department, Department of Education, Province of KwaZulu-Natal before implementing the interim suspension of a learner pending a decision as to whether the learner is to be expelled from the school by the Head of Department as contemplated in section 9(1)(b) of the South African Schools act No. 84 of 1996 read with Regulation 3(1) of Regulations promulgated under Act 3 of 1996 published in Provincial Notice 285 of 1997 dated 21 August 1997.

3. The first respondent is ordered to pay the applicant's costs on the scale as between attorney and own client.