IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: 1102//2016

In the matter between:

ARTWELL FRANCIS MLAWULI APPLICANT

And

ST FRANCIS' COLLEGE RESPONDENT
(MARIANHILL SECONDARY INDEPENDENT SCHOOL)

Judgment

PLOOS VAN AMSTEL

[1] The applicant's two sons have been learners at St Francis' College, near Durban, since 2013. They are currently in grade 11. Towards the end of 2015 the applicant was notified by the school that one of the boys would not be allowed back for the 2016 academic year. He seeks an order declaring that decision to be unlawful and directing the school to admit his son for the 2016 year. In terms of an interim

order granted on 8 February 2016 the school was directed, pending the finalisation of this application, to admit the boy. The central issue in the case is whether the decision by the school is reviewable as administrative action or whether the matter is purely one of contract.

[2] The school is an independent school as defined in section 1 of the South African Schools Act[1]. Admission to the school is on application and in terms of a contract concluded in respect of each academic year. Provisions of the school's standard contract which are material for present purposes include the following:

(i) The learner is enrolled for one academic year only.
(ii) If he wishes to be enrolled for the following year he has to re-apply for admission. His application will be considered by the school authorities who may re-accept him at their entire discretion.
(iii) If the school is not satisfied with his attitude or behaviour he may not be re-admitted.
(iv) The agreement is for a period of one academic year only and can be terminated by either party giving the other one term's notice or three calendar months, whichever is the lesser.

[3] The contract signed by the applicant and his son for the 2015 academic year was in the standard form and contained the terms to which I have referred. The stance taken by the school is that it honoured the contract in respect of the 2015 year but was under no obligation to conclude a new contract for the following year. Although the school maintains that it was not obliged to provide reasons, Mrs Kuboni, an educator and head of the disciplinary committee, explains in the answering affidavit that although the applicant's son never failed any subjects and did not commit any act which would warrant expulsion, his attitude at the school was surly, disrespectful and disruptive. She says when he was called into a meeting with her, two other teachers and the applicant to discuss his attitude he said he was not happy there and did not want to be at the school. She emphasises that the school has a proud academic record and strives to produce young people with the right attitude. She said the school authorities felt that the boy was a negative influence on

[1] South African Schools Act 84 of 1996.

the other learners and that they did not want him to return after the 2015 year. She says the applicant was notified of this in November 2015, in good time for him to make arrangements for his son to be enrolled elsewhere.

[4] The basis on which the applicant seeks the decision by the school to be reviewed is that it constituted administrative action and was taken in bad faith, arbitrarily and capriciously.

[5] Administrative action is defined in section 1 of PAJA.[2] In the case of a natural or juristic person, other than an organ of state, it means any decision taken or any failure to take a decision, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. It was held in *Khan*[3] that the officials of an independent school who take administrative decisions do not exercise a public power, nor do they perform a public function. The judgment in *Khan* is binding on me unless I am convinced that it is clearly wrong. It does not appear to me to be wrong, and accords with the approach in *Klein*.[4] A clear distinction is drawn in the Schools Act[5] between public and independent schools. Public schools are provided by the provincial government out of funds appropriated for this purpose by the provincial legislature.[6] The professional management of such a school is undertaken by the principal under the authority of the head of the education department.[7] There are extensive provisions in the Act regarding the management of public schools, relating to, inter alia, the admission of learners[8], norms and standards for school infrastructure, the capacity of a school in respect of the number of learners a school can admit and the provision of learning and teacher support material,[9] language policy,[10] a code of conduct for learners,[11] suspension and

[2] Promotion of Administrative Justice Act 3 of 2000.
[3] Khan v Ansur NO And Others 2009 (3) SA 258 (D) para 32.
[4] Klein v Dainfern College And Another 2006 (3) SA 73 (T) para [30].
[5] South African Schools Act 84 of 1996.
[6] Section 12(1).
[7] Section 16(3).
[8] Section 5.
[9] Section 5A.
[10] Section 6.
[11] Section 8.

expulsion,[12] the academic performance of the school,[13] governing bodies[14], funding of the school[15] and so on. These provisions do not apply to independent schools. They are not subject to the supervisory provisions in the Act to which I have referred. The only requirement is that an independent school must be registered by the head of education in the province.[16] He can however not prescribe to the school which learners, or how many, it should admit.

[6] It seems plain that the context in which public schools operate is a public one. They offer education to the public in general. It is a public function. The schools are provided by the government and the educators are employed by it. Independent schools are different. Such a school is owned by a private entity. The owner may be a church, a company, a trust or a private individual. The motive may be religion, educational excellence, profit or a combination of these. The principal and the teachers are employed by the school and paid by it. The relationship between the school and its learners is contractual and the school is not obliged to accept anyone.[17]

[7] The right of the school in the present matter to decline to enter into a further contract for the following year was expressly provided for in the contract. The decision not to conclude a new contract with the applicant, at a time when the current contract was about to come to an end, was to my mind a private matter between the contracting parties. There is nothing in the contract which suggests that the parties intended to incorporate the requirements of administrative justice into the contract. I conclude therefore that the provisions of PAJA find no application in this matter.

[8] The decision in *Hlongwane*[18]*,* to which counsel for the applicant referred me, has no application in this matter. It was decided before PAJA was promulgated, and

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[12] Section 9.
[13] Section 16A.
[14] Sections 18-32.
[15] Sections 34-44.
[16] Section 46.
[17] Subject to its constitutional obligation not to discriminate against anyone.
[18] Hlongwane And Others v Rector, St Francis' College And Others 1989 (3) SA 318 (D)

what Galgut J said[19] about review proceedings must be seen in the context of disciplinary proceedings and a common law review.

[9] Counsel submitted that the contract in any event required one term's notice or three months for its termination. The simple answer to this is that the contract was not terminated. It ran its course and the school declined to enter into a new contract for the following year.

[10] Counsel also referred to section 6(2) of the Children's Act[20] and section 29(2) of the Constitution[21], in support of a submission that a child's rights, dignity and best interests are paramount in every matter concerning the child. This is so, but in the proper context. These considerations have nothing to do with a determination as to what contractual or administrative rights or remedies a child has.

[11] It follows that the decision by the school not to admit the applicant's son for the 2016 academic year is not reviewable. The applicant has also not shown that he has any contractual right to demand that his son be so admitted.

[12] In the result the rule nisi is discharged with costs, including those reserved on previous occasions.

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PLOOS VAN AMSTEL J

[19] At 323F-G.
[20] Children's Act 38 of 2005.
[21] Constitution of the Republic of South Africa 1996.

Appearances:

For the Applicant	:	Adv. V Sitram
Instructed by	:	Deker Govender Durban
For the Respondents	:	Adv. J W B Wolmarans
Instructed by	:	Collingwood Attorneys Durban
Date of Hearing	:	01 April 2016
Date of Judgment	:	20 April 2016