IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
PRETORIA

CASE NO: 33750/01

2002-04-24

In the application between

WILLEM STERNBERG SCHOONBEE	First Applicant
ADRIAAN JACOBUS VAN WYK	Second Applicant
PIERRE GROBLER	Third Applicant
ELSIE JACOBA DE JAGER	Fourth Applicant
ADRIAAN WILLEM JANSEN VAN RENSBURG	Fifth Applicant
LINDA DE WIT	Sixth Applicant
JOHANNES ADAM ERNST	Seventh Applicant
BATHELOMIAS JACOBUS VAN DER MERWE	Eighth Applicant
JAN FREDERIK PIETER CORNELIUS OOSTHUIZEN	Ninth Applicant
HERMAN FRANCOIS SWART	Tenth Applicant
JACOBUS KRUGER	Eleventh Applicant
CORNELIUS WILHELMUS GREYLING	Twelfth Applicant
ALBERT SWATERS	Thirteenth Applicant
VERA ALBERTS	Fourteenth Applicant
JOHANNA ERRYNA VERMAAK	Fifteenth Applicant
MICHAEL WHEELER	Sixteenth Applicant
LYNNE OOSTHUIZEN	Seventeeth Applicant
ELMARIE KRUIDENIER	
and	
THE MEC FOR EDUCATION IN THE MPUMALANGA PROVINCE	First Respondent
THE HEAD OF THE DEPARTMENT: DEPARTMENT OF EDUCATION OF THE MPUMALANGA PROVINCE	Second Respondent

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J U D G M E N T

MYNHARDT J: This is the extended return date of the rule nisi that was granted by Moseneke J on 10 January 2002. I am delivering this judgment in English because my colleague delivered his judgment in English despite the fact that the applicants' papers are drafted in Afrikaans and those of the respondents in English.

Because the rule nisi was granted the applicants were the victorious parties, at least at that stage, and perhaps one would have expected the judgment to be delivered in Afrikaans. Nevertheless, the learned judge decided, for reasons of his own, to deliver the judgment in English. I will therefore also deliver my judgment in English because

it is to some extent a mere follow-up of the judgment that was delivered by my learned colleague.

In terms of the rule nisi, and summarised in a nutshell, an order was granted in favour of the applicants, firstly reviewing and setting aside the decision of the second respondent to dissolve the governing body of the Ermelo High School. In the second instance an order was granted setting aside the decision of the second respondent of 12 December 2001 in terms of which the eleventh applicant - the principal of the Ermelo High School - was suspended. Similarly an order was granted setting aside the decision of the second respondent of the same date, suspending the twelfth applicant who, according to the papers, is the senior deputy principal of the Ermelo High School.

Ancillary to these orders that were made an order was also made that any subsequent decisions or steps taken by either of the respondents be set aside, and lastly, the respondents were ordered jointly and severally to pay the costs of the applicants on a party and party scale.

These orders were granted on an interim basis with immediate effect, pending the final adjudication of the application. The date for the final adjudication of the application has now arrived. It is today, as I have already said, the extended return day of that rule nisi that was granted by my learned colleague in January.

The applicants contend that they are entitled to the relief which they sought and which was granted on an interim basis by Moseneke J in January 2002. They therefore ask for confirmation of the rule. The respondents contend that in at least one respect Moseneke J erred in arriving at his conclusion, particularly with reference to the position of the principal of the school, the eleventh applicant, and that because of that error he mistakenly or wrongly granted the relief at least as far as the eleventh applicant is concerned. Be that as it may, the contention was that also in respect of the other applicants, namely the governing body of the school and the twelfth applicant, the rule nisi ought to be discharged with costs. The order that Mr Ellis, who appeared on behalf of the respondents, submitted that ought to be granted today, was the following - and I quote from his heads of arguments:

> "In the premises it is submitted that an order in the following terms be made:
>
> 12.1 The rule nisi is discharged with costs;
>
> 12.2 The application is dismissed with costs."

I have referred in this introductory part of my judgment to the governing body of the school. The governing body as such was dissolved by the second respondent and that explains why there are actually eighteen applicants before the court. They are the individual members of the governing body that was dissolved by the second respondent in December 2001. The eleventh applicant, being the principal of the school, is a member of the governing body by virtue of his post and the same applies to the twelfth applicant who is the senior deputy principal of the Ermelo High

School. In the founding affidavit it is alleged in the relevant paragraphs thereof, dealing with the positions of the eleventh and twelfth applicants, that the eleventh applicant is ex officio a member of the governing body whilst it is stated that the twelfth applicant was elected to the governing body in his capacity as an educator in terms of the provisions of the South African Schools Act 84 of 1996. Nothing really turns on that. All the other applicants were members of the governing body that was dissolved in December 2001 .

The papers are voluminous and exceed 500 folios. The last paginated page is numbered 525. It is therefore a factual impossibility to deal extensively with all the contentions and allegations contained in the papers of the respective parties.

It appears from the papers that during the early part of 2001 a forensic audit was requested by the first respondent who is the MEC for Education of the Mpumalanga Provincial Government. That investigation started in approximately April 2001. By September 2001 the point was reached where the Auditor-General was in the position to produce what I shall call a preliminary report. That report is annexed to the founding affidavit as Annexure F thereto. It appears from the report that the Auditor-General raised a number of queries about the conduct of the School Governing Body - to which I shall refer as the SGB - as well as the eleventh applicant, the principal of the school. The queries related to the manner in which the finances of the school were dealt with. The report does not only deal with these aspects but in the main that is the question that was addressed by the Auditor-General. It is a fairly long report and I do not deem it necessary or relevant to refer extensively to the contents thereof.

According to the papers the parties had agreed that a reply would be furnished to the Auditor-General by the SGB and that further discussions would take place between the office of the Auditor- General on the one hand and the 8GB and the principal on the other hand. Eventually it was decided that by 15 October 2001 the SGB had to furnish its reply to the report to the Auditor-General.

In the meantime certain articles appeared in the Sunday Times which is a newspaper which circulates in South Africa and also in Mpumalanga where the school is situated. It appears from these newspaper reports that the newspaper, the Sunday Times, had to some extent conducted its own investigation. In the edition of the newspaper of 27 September 2001 various allegations were made about mismanagement of school funds and other irregularities uncovered by the investigation conducted by the newspaper. These irregularities were laid at the door of, especially, the principal, the eleventh applicant in this case.
On 25 September 2001 a letter was written by the second respondent to the principal of the school. The relevant part of this letter reads as follows:

> "NOTICE OF INTENTION TO SUSPEND.
>
> Kindly take note that in terms of the Employment of Educators Act, 1998 (Act No. 76 of 1998), read together with the Promotion of Administrative Justice

> Act, 2000 (Act No.3 of 2000), you are hereby given notice of my intention to suspend you from your services.
>
> The reasons for your suspension are mismanagement of school resources and allegations of same as averred in the investigation report of the Provincial Auditor (Mpumalanga), dated 3 September 2001, (which is in your possession).
>
> You are hereby called upon to show cause within 7 days from the date hereof, why you should not be suspended."

In response to this letter, a trade union to which the principal belongs and of which he is a member, wrote a letter to the second respondent. The principal himself also wrote a letter to the second respondent on 3 October 2001. For present purposes it suffices to say that in that letter, in paragraph 2.4 thereof, he requested an extension of time until 15 October 2001 "to submit to you a full response to your letter dated 25 September 2001 with specific regard to the management letter of the Auditor-General dated 3 September 2001 ".

The reference to the "management letter of the Auditor- General" in this letter is a reference to what I called the report of 3 September of the Auditor-General. Nothing turns on that.

An extension of time was allowed by the second respondent and so it happened that on 15 October 2001 an extensive reply was furnished to the Auditor-General by the Ermelo High School. For present purposes it can be accepted that this reply was furnished by the school governing body. In the body of this response they dealt fairly extensively with the queries - if I may refer to them in that manner - or the shortcomings or the "irregularities" raised by the Auditor-General in his report of 3 September 2001. This letter was signed by the chairman of the SGB, Mr Schoombee, who is one of the applicants, and also by the principal. For present purposes it is not necessary to refer extensively to the contents of this reply.

For present purposes it is necessary to mention the next step and that is the final report of the Auditor-General which was handed to the second respondent on 12 December 2001, In this final report of the Auditor-General the matters that were mentioned in the initial report of September 2001 were once again addressed. The response of the SGB, in so far as it may afford an answer or an explanation for what the Auditor-General regarded as "shortcomings" or "irregularities", was also mentioned. In respect of some of those "irregularities" there were comments made by the Auditor-General and in many respects a standpoint was adopted by the Auditor-General.

When this document was made available to the second respondent, according to the papers, on 12 December 2001, the immediate reaction on his part was to write a letter on that very sam'e day, to the chairperson of the school governing body of the Ermelo High School, which reads as follows:

> "DISSOLUTION OF THE SCHOOL GOVERNING BODY: ERMELO HIGH SCHOOL.
>
> Kindly take note that I hereby, in terms of Regulation 14(1) and (3) of the Governing Body Regulations for Public Schools, 1999, read with section 28(c) of the South African Schools Act, (Act No. 84 of 1996), dissolve the School Governing Body of Ermelo High School.
>
> Kindly further take notice that the above is with effect upon receipt of this letter."

That letter was signed by the second respondent.

On the very same day letters were also addressed to the eleventh applicant, the principal, and the twelfth appli.cant, the senior deputy principal of the school. In these letters the two applicants were informed that in the light of the report of mismanagement at the school and -

> "Owing to the seriousness of the allegations in the said report implicating you, it is not in the interest of the Department that you continue with your services until the disciplinary process is concluded.
>
> I therefore inform you that I suspend you from duty with effect from 13 December 2001 in terms of item 6(1) of Employment of Educators Act 1998, as amended."

The final paragraph of the letter reads as follows:

> "During your suspension your emoluments will remain unaffected."

On 13 December - just for the sake of the chronology of events - a media statement was issued by the first respondent in which, inter alia, the eleventh applicant as well as the SGB, was accused of mismanaging the affairs, especially the financial affairs, of the Ermelo High School. It is stated in this media release, for instance, that -

> "Clearly, the collusion of the school management and the School Governing Body (SGB) has only served to absolutely abuse the faith of the parents. They were supposed to be safeguarding their interest. In this regard the SGB of Ermelo High School has been effectively dissolved."

I do not think it is necessary for present purposes to refer to other statements made in this press release.

Effectively then, from 12 December 2001 the SGB was dissolved, the principal was suspended as well as the senior deputy principal of the school. According to the papers caretakers were appointed by the second respondent to take charge of the financial affairs of the school and they were also charged with some other duties which it is not relevant for present purposes to refer to.

This prompted the applicants to launch an urgent application and that is the application that came before Moseneke J on 10 January 2002. By that time the respondents had replied extensively to the founding affidavit and the allegations made in the founding affidavit about the procedural irregularities committed by the second respondent in dissolving the SGB and suspending the eleventh and twelfth applicants.

In its turn it prompted the second respondent to withdraw, as far as the SGB is concerned, the letter of 12 December 2001 and to issue a fresh notice to the chairperson of the SGB. I interpose to mention that I have difficulty in understanding how one can address a letter to the chairperson of a body that does not exist, de facto and de jure, as far as the second respondent is concerned, but be that as it may, a letter which bears the date 18 December 2001 and which apparently was signed on 20 December 2001 , was addressed to the chairperson of the SGB by the second respondent. The relevant part of that letter reads as follows:

> "Kindly take notice that in terms of section 28(c) of South African Schools Act 1996, Act no. 84 of 1996, read with Regulation 14(3) of the Governing Body Regulations for Public Schools 1997, I hereby dissolve the School Governing Body of Ermelo High School.
>
> The main reason for my action in terms of Regulations 14(3) of Governing Body Regulation is because of the findings in the Auditor General Report dated 11/12/2001, which reveals serious financial irregularities.
>
> You are given 30 days in terms of Regulation 14(3)(b) to make representations."

The regulations referred to in this letter provide for dissolution of School Governing Bodies. They were issued in 1997. In Regulations 1 and 2 the position is dealt with where a School Governing Body is dissolved in the ordinary course of events. It provides that the second respondent, the head of the Department of Education in terms of the relevant regulations, may "on reasonable grounds dissolve a governing body". Regulation 2 provides that he may not take such action unless he/she has -

> "(a) informed the Governing Body of his/her intention to act and the reasons therefor;
>
> (b) granted the Governing Body 30 days to make representations to him/her regarding such intentions; and
>
> (c) given due consideration to any such representations received."

Regulation 3 provides for dissolution of the School Governing Body in the case of an emergency or, as it is stated in the Regulation, in case of urgency. In that event, if the second respondent acts in terms of sub-regulation (3), he can dissolve the School Governing Body "without prior communication to such Governing Body" but then it is provided that he shall thereafter, firstly, furnish the Governing Body with

reasons for his/her actions; secondly that he should give the Governing Body thirty days to make representations about the action taken; and thirdly, that he duly considers the representations received.

In the nature of things, because in such an event the School Governing Body will then in any event have been dissolved, Regulation 4 provides that the head of the Department may "on sufficient reasons" reverse or suspend his actions taken in terms of either Regulation 1 or Regulation 3.

As far as the second respondent is concerned, it would appe'ar that the attitude of the second respondent was that there was something wrong with his first letter of 1 2 December and he tried to rectify that with the later letter to which I have referred. That explains the reason why the applicants, when the matter came before Moseneke J, applied for an amendment of the notice of motion by including a prayer relating to the letter of either 18 or 20 December - the one to which I have just referred - dissolving the SGB. That amendment, according to the judgment, was granted and ultimately Moseneke J also granted an order in favour of the applicants pursuant to that relief that was claimed.

Subsequent to the judgment of Moseneke J being delivered the respondents saw fit to file a further so-called supplementary answering affidavit. This time the deponent was not the second respondent but one Mr Mochana. who described himself as the Director, District Services in the Department of Education in the Mpumalanga Provincial Government. One point only was raised in this so-called supplementary affidavit and that is that the conduct or actions of the second respondent was alleged to have been justified in the light of the provisions of sections 16, 17 and 18 of the Employment of Educators Act 76 of 1998. Reference is made in the affidavit to certain personnel administration measures, referred to as "PAM", which were promulgated in the Government Gazette of 18 February 1999. This morning Mr Ellis furnished me with a copy of the relevant regulation on which reliance is now placed by the second respondent in this supplementary affidavit which was delivered in January 2002 after the judgment of Moseneke J became available.

The relevant part of this document is to be found in paragraph 4.2(e)(i). Sub-paragraph (e) bears the heading "CORE DUTIES AND RESPONSIBiliTIES OF THE JOB". The job referred to here is that of a principal at a public school. The relevant part of this paragraph - that is sub-paragraph (e), reads as follows:

> "The duties and responsibilities of the job are individual and varied, depending on the approaches and needs of a particular school and include, but are not limited to, the following:
>
> (i) GENERAL/ADMINISTRATIVE
>
> To be responsible for the professional management of a public school;
> to give proper instructions and guidelines for timetabling, admission and placement of learners;

> to have various kinds of school accounts and records properly kept and to make the best use of funds for the benefit of the learners in consultation with the appropriate structures."

The rest of the provisions under the heading "GENERAL ADMINISTRATIVE" are not relevant for present purposes.

The point made in the supplementary answering affidavit is that a principal of a public school,

> "...is responsible, not only to the governing body to the school but also to the head of the department in respect of his handling of financial affairs of the school. I therefore submit that Moseneke J erred when he found as a matter of law that a principal may not be called to account to the head of the department for his handling of financial affairs."

The relevance of the document to which I have referred, and the supplementary answering affidavit, is that it is now contended that Moseneke J erred in his judgment when he found as a matter of law that the head of the department, the second respondent in the present instance, could not in law call the eleventh applicant to account for mismanagement of the funds of the Ermelo High School. The argument was advanced to Moseneke J that in terms of the provisions of the Employment of Educators Act 1998, read with the provisions of the South African Schools Act 1996, a principal is also liable to be held accountable by the head of the department, the second respondent, for the management and administering of funds of a public school which the Ermelo High School of course is. The gist of the argument was that in terms of sections 16, 17 and 18 of Act 76 of 1998, read with the second schedule thereto, which deals with disciplinary procedures, the principal of the Ermelo High School could be held accountable for any mismanagement of the funds and the financial matters of the Ermelo High School. Reliance was placed, especially, on the wording of section 18(1)(b) of Act 76 of 1998. In its context this sub-paragraph reads as follows:

> "Misconduct refers to a breakdown in the employment relationship and an educator (which the eleventh applicant is), commits misconduct if he/she
>
> (b) wilfully or negligently mismanages the finances of the State, a school, a further education and training institution or an adult learning centre.

I may say at this stage that in my view the provisions of sections 16 and 17 of Act 76 of 1998 do not apply to the facts of the present case. That is why I only refer to the provisions of section 18.

It is further provided in section 18(2) of Act 76 of 1998 as follows:

> "If it is alleged that an educator committed misconduct as contemplated in subsection (1) the employer (of which the second respondent is the

representative) must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in schedule 2."

I do not intend to refer to the provisions of schedule 2. It suffices for present purposes to say that the procedure, when misconduct is alleged against an employee of the Department of Education, is set out in detail in that schedule, and should he be found guilty, various sanctions that could be imposed are provided for in section 24 of the Act. These sanctions include, for instance, that an educator may be dismissed if he is found guilty of certain acts of misconduct set out in the section. As far as the eleventh and twelfth applicants are concerned, the sanctions are provided for in section 18(3) of the Act and it includes sanctions, for instance, like dismissal "if the nature or extent of misconduct warrants dismissal", but it may also merely amount to the imposition of "a fine not exceeding one month's salary" or it may only be, in the words of subparagraph (a), "counselling".

The fact of the matter is that if it is alleged that an employee had misconducted himself/herself in terms of that which is relevant in the present instance, namely mismanagement of the finances of the school, he/she will face a disciplinary inquiry and certain sanctions may be imposed upon him/her.

In his judgment Moseneke J considered the submissions that were made to him that the eleventh applicant, being the principal of the school, was the so-called accounting officer and could therefore be held accountable by the second respondent for mismanagement of the finances of the school. The learned judge dealt with various sections in the Schools Act as well as this provisions of Act 76 of 1998, and came to the conclusion that that submission was unacceptable and wrong in law and he held that the second respondent could not hold the eleventh applicant accountable for mismanagement of school funds. It is now contended, as I have mentioned, that he wflS wrong in reaching that conclusion.

Mr Ellis again argued and contended for a conclusion contrary to that which was reached by Moseneke J in his judgment. Mr Du Toit, on behalf of the applicants, contended that Moseneke J was right in his reasoning and conclusion and supported the judgment as far as that particular aspect is concerned.

I have considered the arguments and submissions advanced by Mr Ellis today. He made a valiant attempt to persuade me to find that Moseneke J was wrong in coming to the conclusion to which he did come. Unfortunately for Mr Ellis I must disappoint him. As a matter of fact, I fully agree with the reasoning and conclusion reached by Moseneke J. It is quite clear in my view, if one has regard to the various sections of the Schools Act of 1996, and especially the provisions of sections 16, 19(2), 20 and 34 to 44 thereof I that the governing body is, as far as the finances of the school are concerned, the entity saddled with the liability and obligations to deal with the funds of the school in the manner provided for by the Schools Act. I mention but a few of the relevant sections which indicate that the conclusion reached by Moseneke J in this respect was correct.

Section 16 provides for the management of a public school. The Ermelo High School is a public school. The section provides in the first subsection thereof that, subject to the provisions of the Act -

> "...the governance of every public school is vested in its governing body."

Subsection (2) then provides that a governing body "stands in a position of trust towards the school".

Subsection (3) provides for the position of the principal of the school. It provides that, subject to the Act and any applicable provincial law:

> "The profeesional management of the public school must be undertaken by the principal under the authority of the head of the department."

One sees immediately that according to the Act there is a difference between the professional management of a public school which is done by the principal, and the "governance" of a public school. The one falls within the domain of the 5GB; the other within the domain of the principal. It stands to reason why that is so. The principal, being an educator, is the person who would be able to manage the school professionally. He would be the person who would be able to decide whether it is better for the school and the learners to utilise a particular educator in a particular position and that is something which cannot be expected in the normal course of events from a governing body which consists, according to the applicable sections of the Act, of a variety of people, including learners from the school. One can therefore quite understand the division made in section 1 6 between the- governance of the school on the one hand and the professional management thereof on the other hand.

In my view this immediately demarcates the position of each of these entities vis-a-vis each other. It is true that the principal, according to the relevant provision of the Act, is an ex officio member of the governing body, non constat that he is now vested with authority and Rowers to administer the financial affairs of the school. To some extent he might be able to make an input because he is a member of the 8GB, non constat that his views will carry the day if there is a difference of opinion. If the SGB differs from his views and passes a resolution, then, of course, the views of the SGB will carry the day and it is then those views, and the policy laid down by the SGB, which will have to be implemented, inter alia, also by the principal to the extent that the principal is required by the SGB to implement its policy and its resolutions.

If one has regard to the provisions of section 20 it becomes more clear that the viewpoint of Moseneke J, and that which I hold, is correct. Section 20(1)(g) provides as follows:

"Subject to this Act the governing body of a public school must

(g) administer and control the school's property and buildings and grounds occupied by the school, including school hostels, if applicable;"

As far as the concept "the school's property" is concerned one must have regard to the provisions of section 37 of the Schools Act. Section 34, as a prelude to the provisions of section 37, provides that the State must provide finances to be utilised by schools. It is then provided in this context by section 36 that a governing body of a public school "must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school".

It is quite clear when one reads this, that there is now a so-called partnership between the State, the SGB, and the pare,nts and the learners of a public school, as was also, in my view correctly so, held by Moseneke J in his judgment.

Section 37(1) provides that the SGB of a public school "must establish a school fund and administer it in accordance with directions issued by the head of the department". It is common cause on the papers that up to now no such directions have been issued by the second respondent.

The section further provides, that monies received by a school, including school fees and voluntary contributions, must be paid into a school fund. The 5GB must open and maintain a bank account.

The following important provisions are to be found in subsection (5) thereof:

"All assets acquired by a public school on or after the commencement of this Act are the property of the school."

In subsection (6) it is then provided for what purposes a school fund may be used and one of the purposes mentioned in subparagraph (c) of the subsection is "the performance of the functions of the governing body". It is further provided in the other sections to which I have referred, for instance, section 42, that the 5GB must "keep records of funds received and spent by the public school, and of its assets, liabilities and financial transactions". It is provided in section 43 that those financial records must be audited by a properly qualified auditor which must be appointed and that must be done on an annual basis.

From these provisions it is quite clear that as far as monies are concerned about which the allegation could be made against anyone that there was mismanagement of its financial affairs at a particular school, those monies fall under the control of the governing body. Mr Ellis, quite correctly in my view, conceded that at least the funds available in the school fund are the property of the school in terms of section 37 and that in terms of section 20(1)(g) of the Act, the SGB is the body responsible to administer and control those funds. He, however, went further and submitted that

sight must not be lost of the position of the principal in the structure that the Schools Act has established. He submitted that in his capacity as an employee of the State, falling under the authority and control of the head of the department, the second respondent in the present case, the principal is also liable to be charged with misconduct in terms of the provisions of section 80 of Act 76 of 1998 to which I have already referred. In the debate about what the content of the powers of the SGB would be, compared to that of the principal and so on, Mr Ellis submitted that there is - if I understand at least his heads of argument correctly - a so-called dual responsibility between the SGB and the principal. Although it might be so that the head of the department might not hold the SGB accountable for what it did, he/she certainly can do that, according to Mr Ellis, as far as the principal is concerned, in terms of the provisions of section 18 of Act 76 of 1998, read with the provisions of the Personnel Administration Regulations to which I have already referred.

I do not agree with those submissions of Mr Ellis. In my view it is quite clear from the provisions of the Schools Act to which I have referred, that in a case, of which the present one is. an example, where there is a SGB in existence, the financial management of school funds and monies falls within the domain of the SGB. Only if one approaches it on that basis and from that perspective, then one can quite easily deal with situations where there might be a difference of opinion between the various functionaries, namely the SGB and the principal, in the management of the school funds or the school property.

Mr Ellis' submission, which he made in paragraph 8.10 of his written heads of argument and which he also repeated in his oral argument this morning, reads as follows:

> "From a practical perspective the position of a principal is clearly that of an accounting officer or 'rekenpligtige amptenaar'. He is the chief executor (sic) member of the SGB and in charge of the day to day running of the school, including financial matters."

One of The consequences, for instance, of that submission is - and that was also debated with Mr Ellis - that in the event of the principal doing something which was prohibited by the SGB, or which was specifically permitted by the SGB, the principal would then have to face a disciplinary inquiry in terms of the provisions of Act 76 of 1998. In my view this consequence which Mr Ellis did not disavow and for which he contended, shows conclusively that the contention that the principal should be held accountable as the accounting officer of a public school and its funds, is an absurd proposition.

I do not find any justification in either the Schools Act of 1996 or the Employment of Educators Act of 1998 for this untenable situation in which a principal might find himself if I were to accept Mr Ellis' submissions. On a daily basis the principal would find him in a situation where he would have to face disciplinary inquiries and be held accountable by the head of the department for what he had done in furtherance of and in implementing the policies and resolutions of the SGB.

In my view, the provisions of the Schools Act of 1996 to which I have referred, exclude such a proposition and I therefore find myself in agreement with the conclusion reached by Moseneke J that the second respondent in this instance had barked up the wrong tree when he tried to hold the principal, the eleventh applicant in this matter, accountable for what was alleged to be financial mismanagement by the Auditor-General.

To the extent that reliance was placed on the two documents produced by the Auditor-General to act against the eleventh applicant, the conduct of the second respondent was impermissible and unlawful. That disposes of the point raised in the supplementary answering affidavit on behalf of the respondents.

Mr Ellis, however, went further in his submissions this morning and he contended that the second respondent had committed no procedural irregularity in taking the steps to which I have already referred, in September 2001 and especially in December 2001, as far as the eleventh and twelfth applicants are concerned, and also in regard to the dissolution of the SGB.

As far as the twelfth applicant is concerned, it appears from the judgment of Moseneke J that, although Mr ,Ellis was invited to make specific submissions to him as to what the sins were of the twelfth applicant for which he could have been held accountable and suspended by the second respondent, Mr Ellis did not see his way clear to make any submissions.

I again asked Mr Ellis this morning whether he sees his way clear to make any submissions regarding the position of the twelfth applicant. Mr Ellis, correctly in my view, had the insight to tell me that his position is unchanged and that he has no submissions to make as far as the twelfth applicant is concerned. Mr Ellis' attitude and view is quite clearly correct.

As far as I am concerned - and I have studied the papers in this case - there is no ground revealed in the papers, voluminous as they may be, which in the slightest instance could have justified the actions of the second respondent as far as the twelfth applicant is concerned. There is an oblique reference in the answering affidavit to the position of the twelfth applicant vis-a-vis that of the eleventh applicant and the implication seems to be that for the same reason why the eleventh applicant could be held accountable for the mismanagement of the finances of the school, the twelfth applicant could be held accountable, because he has the same duties and obligations. It suffices to say that there is absolutely no merit in that allegation and that is why I think that Mr Ellis was quite right in January of this year, and also this morning, in not making any submissions as far as the twelfth applicant is concerned.

It therefore follows that in my view, as far as the twelfth applicant is concerned, there was absolutely no ground upon which action could have been taken against him. Nothing has been alleged against him which could or would have justified the action taken against him and as far as he is concerned I am in agreement with the view of Moseneke J that the application should succeed.

It follows then that as far as the twelfth applicant is concerned, the rule nisi has to be confirmed today.

As far as the SGB is concerned, Mr Ellis quite correctly also conceded that when the first letter of 1 2 December 2001 was written to the 5GB dissolving it, it was procedurally wrong because it was not told at any stage that such action was being contemplated against it. That is why that letter was withdrawn, according to the answering affidavit of the second respondent, and why the letter of either 18 December or 20 December 2001, which is Annexure JJ to the supplementary founding affidavit, was sent to the chairperson of the 5GB. It is for that reason that the chairman was told that the body was dissolved and what the reason was for dissolving the body, and that it was given thirty days to make representations. According to the letter the second respondent acted in terms of Regulation 14(3) of the relevant regulations to which I have already referred, which entitles him in the case of urgency to dissolve the 5GB and thereafter to invite representations and to reconsider his decision.

As far as this second letter of December 2001 is concerned, Moseneke J came to the conclusion that it was ineffective to save the situation for the respondents. Without going into the detail thereof I am in agreement with the conclusion reached by Moseneke J in this regard. Briefly stated, one of the reasons. was that the reasons why the 5GB was dissolved was not given or stated in the letter. It is stated in the letter what the main reason was. Non constat that that was the only reason, the letter does not say that that was the only reason. It is expected of the second respondent by the relevant regulation where he acts in an emergency situation, to furnish the governing body "with reasons for his/her actions". Evidently in that letter only one reason, namely the main reason, was furnished, but that in my view, falls foul of the provisions of the relevant regulation to which I have referred.

Moseneke J also found that the action taken by the second respondent to dissolve the 5GB was disproportionate to the problems that were revealed in the report of the Auditor-General. He, therefore also found on that basis that dissolution of the governing body could not be permitted and that it was not permissible in terms of the relevant principles of law applicable to administrative action.

It is not necessary for me to say that I am in agreement with that part of the reasoning of Moseneke J. It suffices to say that I am not persuaded by any argument advanced on behalf of the respondents by Mr Ellis, that Moseneke J was clearly wrong in coming to that conclusion. As far as I am concerned there is sufficient reason, which I have already mentioned, namely that the letter of 18 December falls foul of the provisions of the relevant regulations to which I have referred, to justify the issue of the order made by Moseneke J as far as the 5GB is concerned. I therefore guard myself specifically from agreeing with the second reason relied upon by Moseneke J as to why he came to the conclusion that the dissolution of the 5GB should be set aside.

As far as the eleventh applicant is concerned, Mr Ellis still contended today that there was nothing wrong with the actions of the second respondent in ultimately

suspending the eleventh applicant. The problem that I have with that submission is that it seems to me that the second respondent is now relying, in justification of his actions, on grounds which were not made clear to the eleventh applicant at any stage before the letter of 12 December suspending him, was delivered to him. The first paragraph of that letter of 12 December reads as follows:

> "I have to advise you that the investigation report on mismanagement at Ermelo High School has been furnished to my office."

That report on mismanagement, according to the second respondent's answering affidavit, was the so-called final report of the Auditor- General which, as I have already mentioned, was made available to him on the 12th, or perhaps the 11 th, of December 2001.

The response of the SGB - and for present purposes I think it can also be accepted, the response of the eleventh applicant - which was furnished to the Auditor-General, was a response on the so-called management letter of the Auditor-General of 4 September 2001. The second respondent says in his answering affidavit that on 12 December he relied upon the final report of the Auditor-General and that he adopted the view that the response furnished to the Auditor- General on 1 5 October 2001 should also suffice as representations made to him on behalf of the elevet;lth applicant. He therefore, took into account what the Auditor-General said in the final report of 12 December 2001 as well as the response to the first report of the Auditor-General contained in the document of 15 October 2001 which was furnished to the Auditor-General. In my view the second respondent erred in that regard. The applicants say in the replying affidavit that they had a meeting with the second respondent in his office on 12 October 2001. They say that it was agreed on that date that no action would be taken by the second respondent until the final report of the Auditor-General had been made available and they say it was agreed between them, which would include the eleventh applicant because he was part of the delegation that went to see the second respondent on 1 2 October 2001, that they would still have the opportunity to make representations in so far as it may be necessary to do so, to the second respondent after receipt of the final report of the Auditor-General. In the alternative they allege that they had a legitimate expectation of being afforded the opportunity to make representations to the second respondent and that, of course, applies to the eleventh applicant in particular. The second respondent, in his answering affidavit, disputes this. Moseneke J said that there was a dispute of fact about this aspect and he deemed it, in the light of the conclusion to which he came, unnecessary to resolve that factual dispute.

A tape recording which has been transcribed and which it is alleged to be a true record of what was recorded during the discussions of 12 October 2001, is annexed to the applicant's replying affidavit as Annexure LL thereto. If one refers to pages 11 and 1 2 thereof then, in my view, it is clear that there is substance in the allegations made in the replying affidavit and also, to some extent, in the founding affidavit of the applicants, that there was an agreement that no action would be taken until the final report of the Auditor-General had become available. On page 11 of the

document Mr Ernst who was a member of the delegation, asked the second respondent the following:

> "Can we take it then as a fact that from your department there is no intention to suspend him (the eleventh applicant), he is not suspended and no further actions will be taken till the Auditor-General's report is final.

Dr Mashinini (the second respondent): Yes, we also appreciate it that we have received the response, because this is the response I was looking for."

On page 12 of the document the following appears: Mr Van der Watt who also was a member of the delegation asked the second respondent the following:

> "All that we ask is that the principal do not give you any further response until the finalisation of the Auditor-General's report. Can we agree on that?
>
> DR MASHININI: We can agree to a point like that."
>
> On the same page the following was said by the second respondent,
>
> "DR MASHININI: Okay, now whatever action is going to take place, it will be based on the final report of the Auditor-General.
>
> WILLEM SCHOOMBE. (the first applicant in the present application): If we can agree to that we will be very happy, thank you.
>
> DR MASHININI: Okay, thank you."

On page 14 of the document the following was said by the second respondent:

> "I am clear what I have agreed upon. Let me phrase that again: What I am agreeing upon is on the letter of the investigation by the Auditor-General. There will be no other action based on that letter until the report of the Auditor-General has been finalised."

The applicants say that on 12 October 2001 nobody, including the second respondent, could predict what the final report of the Auditor-General would contain. The Auditor-General would have had to consider what he initially felt to be "shortcomings" or "irregularities", as well as the response thereto of 1 5 October 2001 which response was not yet delivered to the Auditor-General on 12 October 2001 and he would then have to decide finally what his views are on the so-called shortcomings or irregularities, taking into account the response of the 5GB and the principal. They say that, as far as they are concerned, an agreement was reached with the second respondent on 1 2 October that nothing further would happen until such time as the final report had become available. I have already indicated that the second respondent disputes that. In my view the applicants are right. In the light of the passages to which I have referred in the transcription of the tape recording it is

quite clear that the parties agreed that nothing would happen until the final report had become available.

I therefore find that the view of the second respondent in the answering affidavit as to what had happened on 12 October is wrong and that in fact an agreement as alleged by the applicants had been concluded on that day.

The next question is what the implications thereof are. From a procedural point of view, as far as administrative actions are concerned, my view is that the second respondent should have afforded the eleventh applicant the opportunity after 12 December 2001 to make representations to him in the light of the contents of the final report of the Auditor-General. Mr Ellis submitted that nothing further could have been said by the eleventh applicant because what had been furnished to the Auditor-General on 15 October 2001 was the reply to the irregularities or shortcomings mentioned by the Auditor-General in his report of 4 September 2001 . Whether that is in fact so is not necessary to decide. The fact of the matter is that if one wants to take administrative action against a subordinate one has to follow certain procedures. Whether one bases this on the principle of legitimate expectation or compliance with the audi alteram partern rule is for the moment irrelevant. The fact of the matter is, that the second respondent should, after 12 December 2001, have furnished the opportunity to make representations to him about the conclusions or viewpoints of the Auditor-General in the final report. It is quite clear from the documents that he did not do that.

Apart from any other reasons found by Moseneke J to have existed in January 2002, I therefore find on this basis too, that the second respondent acted procedurally incorrectly when he on 12 December 2001 suspended the eleventh applicant in terms of the letter that I have referred to. It therefore follows that his actions in regard to the eleventh applicant must also be set aside. It was in fact set aside by Moseneke J on an interim basis. Apart from the reasons furnished by Moseneke J it is my conclusion that, in any event, Moseneke J was correct in his findings. There is also this further reason which I have mentioned. It therefore follows that in respect of the eleventh applicant the rule nisi also has to be confirmed.

I therefore make an order as follows:

The rule nisi issued on 10 January 2002 is confirmed.

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