Sneller Verbatim/DM

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 33750/01

2002-01-10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED ✓

DATE 12-02-2002 SIGNATURE

In the matter between

WILLEM STERNBERG SCHOONBEE Applicant

AND 17 OTHERS

and

THE MEC FOR EDUCATION First Respdonent

IN THE MPUMALANGA PROVINCE

and

THE HEAD OF DEPARTMENT: Second Respondent

DEPARTMENT OF EDUCATION OF THE

MPUMALANGA PROVINCE

J U D G M E N T

MOSENEKE J: Before me is an urgent application to review and set aside *pendente lite* certain decisions of the second respondent, the Departmental Head of Education in the Province of Mpumalanga.

On the other hand the first respondent is a Member of the Executive Council ("MEC") for Education in Mpumalanga Province: he is cited in his official capacity as such.

Before me there are no less than 18 applicants. First applicant, who has deposed to the main founding affidavit, is the elected chairman of the school governing body ("SGB") of Ermelo High School, situated in Ermelo, within the province of Mpumalanga (hereinafter "the school".) The 11th applicant is the principal of the school. The 12th applicant is the senior deputy principal of the school. Both have been duly appointed in terms of the provisions of section 23(1) and 23(2) respectively of The South African Schools Act 84 of 1996 (hereinafter "the Schools Act.") The remaining applicants as well as the three applicants mentioned above are all members of the school governing body, itself duly constituted under the Schools Act during the course of 2000.

The applicants this morning moved for an amendment of the notice of motion: I granted the amendment. As a consequence the prayers sought by the applicants read as follows -

"2. Dat 'n bevel *nisi* uitgereik word waarkragtens die Eerste en die Tweede Respondente opgeroep word om redes aan te voer, indien enige, op Dinsdag 12 Februarie 2002 om 10:00 waarom die volgende bevel nie verleen sal word nie:

2.1 Dat die besluit van die Tweede Respondent gedateer 12 Desember soos vervat in bylae JJ tot Eerste Applikant se aanvullende beëdigde

verklaring waarkragtens die beheerliggaam van die Hoërskool Ermelo ontbind word, hersien, vernietig en ter syde gestel word;

2.2 Dat die Tweede Respondent se besluit gedateer 12 Desember 2001 waarkragtens die Elfde en die Twaalfde Applikante geskors word, hersien, vernietig en ter syde gestel word;

2.3 Dat alle besluite en stappe voortspruitende uit die besluite om die voormelde beheerliggaam te ontbind en die voormelde applikante te skors, hersien, vernietig en ter syde gestel word;

2.4 Dat die Eerste en Tweede Respondente gelas word om die koste van hierdie aansoek gesamentlik en afsonderlik te betaal op die skaal soos tussen prokureur en eie kliënt;

3. Dat die bevel verleen in paragrawe 2.1, 2.2 en 2.3 hierbo vermeld sal geld as tussentydse interdik met onmiddellike regskrag en werking hangende die finale beregting van hierdie aansoek."

The crux of the prayers sought is to reverse and set aside the decision by the second respondent to dissolve the school governing body of the school on 12 December 2001 as well as the decision to suspend the principal and the senior deputy principal of the school on 12 December 2001.

This being an urgent application I do not propose to set out the full facts of the background contained in no less than 500 pages of

record. Suffice it to set out the facts as they are usefully summarised in very ably crafted heads of argument presented by both counsel. The important facts are really the following.

1. On 26 April 2001 the Auditor-General for the Province of Mpumalanga was requested by the First Respondent to institute a forensic audit at the school.

2. On 31 August 2001 a meeting was held between the provincial Auditor-General and various officials of the school and a minute was generated setting out the proceedings of that meeting.

3. On 3 September 2001 a management letter generated by the Auditor-General following upon the forensic audit was presented to the school. The management letter calls for a response or comment to its contents not later than 7 September 2001.

   Both the principal and the chairman of the SGB requested an extension and in their view the end of October would have been a suitable date to permit them to provide a response to the management letter. In a letter, the Auditor-General granted an extension up until 15 October within which time he had hoped to receive comments from the school.

4. Before 15 October, and more specifically on 25 September, the second respondent directed a letter to the principal calling upon him to show cause why he should not be suspended. The principal, being a member of a teachers' union referred the letter to the teachers' union. Several submissions were made

respondent. I do not propose to set out any details thereof, but important of these submissions was drawing attention of the second respondent to the fact that it was necessary for him to set out the grounds upon which the second respondent proposed to suspend the principal.

5. Clearly concerned by the developments, the first applicant, the chairman of the SGB, with several others, requested a meeting with the second respondent. Such meeting was held on 12 October 2001 with the second respondent. The meeting was at Nelspruit. There is indeed a dispute about what happened at the meeting. Given the conclusion I have come to, the dispute is not of great significance. The dispute is about whether or not the decision or agreement of that meeting was to release the principal of the school from the need to respond to the letter of 25 September 2001 which was forwarded to him by the second respondent and whether the arrangement was that there will be a response or further action, from the second respondent only and only after the final report of the Auditor-General was available to the parties.

6. It is common cause that on 15 October 2001 the SGB, through its chairman submitted a memorandum, also signed by the principal, to the Auditor-General in response to the management letter. The memorandum of 15 October was followed by a meeting on 22 October between the chairman and other members of the SGB and officials of the Auditor-General's office where further discussions were held. It is of course

significant that the second respondent was not present or part of those discussions on the applicant's response to the management letter.

7. On 11 December 2001 the Auditor-General made available to the second respondent his final forensic report. Suffice it to state that the final report took a fairly usual form, namely that it sets out the particular audit findings on each area of investigation followed by comments by management, as would often happen, when management of an institution or company is faced with a management letter, followed by a brief conclusion, comment or finding by the Auditor-General. That report is annexed to the papers and I shall refer to it again later in this judgment.

8. Immediately upon receipt of the final report the second respondent generated a letter dated 12 December 2001 directed firstly at the SGB in which he purported to dissolve the SGB and another letter to the 11th and the 12th applicants, again purporting to suspend them from their duties already described.

Now the litmus test for evaluating administrative actions is well-settled in our law. It has been the subject of judicial pronouncements over several decades. More lately the legislature saw it fit to bring into being *Promotion of Administrative Justice Act No.3 of 2000*. The Act contains in great part, what one may regard as partial codification of administrative law, with specific reference to administrative actions. I do not propose to set out each of these tests

to be found in the Act. Where appropriate, I will refer to a specific test as I evaluate particular conduct on the part of the second respondent.

Suffice to say that an administrative action should not be taken on account of bias or a reasonable suspicion of bias. The action has to fall within the parameters of the law, in other words where there is a material procedure or condition which the law prescribes, the wielder of power is obliged to have regard to that. Administrative action has to be procedurally fair and it should not be undermined by an error of law or, put otherwise, an error of understanding or application of the law. For this purpose, lastly, it is quite settled law that the official who takes the administrative action should not be persuaded by matters other than those which are relevant for purposes of the decision before it; he or she should not have regard to or be persuaded or moved by some ulterior purpose or motive or make considerations which are irrelevant. He or she must act honestly, he or she cannot act arbitrarily, or capriciously. He or she must act rationally.

At the outset of Mr Ellis's argument, who appeared for both the first and second respondents, I invited him to make submissions on why the suspension of the 12th respondent or the senior deputy principal should not be set aside. Mr Ellis chose to make no submissions in this regard. Whilst his was not a concession, I think the total circumstances of this case would not have permitted him to suggest that there exists any valid ground for holding that the second respondent was entitled, without prior notice, without affording the

12th applicant an opportunity to consider the intended administrative action and to make such representations as he may choose to, to terminate, albeit pending a disciplinary action, his services as a senior deputy principal. I do not propose to spend any more time on his case. I could not find any legally valid basis whatsoever for the suspension of the 12th applicant from his duties.

In regard to the principal, it is essential to determine the relationship, might I add the legal and/or statutory relationship, between the principal and the assets and/or property of the school. To be able to understand that, it is proper to look at certain provisions of the *Schools Act*. In this regard Mr du Toit, appearing for all the applicants, submitted that there is no justification for the submission by the respondents that the principal is equivalent to an accounting officer of the school and that, that one best determines by looking at the actual provisions of the Act and its purpose. Having read the Act again it seems to me that the new education regime introduced by the *Schools Act*, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders, the state, the parents, educators and learners, enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the state, to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents.

Significant is that a school is made a juristic person. In the

principal vests the professional management of the school, of course under the direction of the second respondent. The overall governance of the school vests in the governing body, whose role the Act describes as fiduciary in respect of a school. Democratic principles are introduced to governing structures of a school by creating representativity on the SGB from all stakeholders, indeed including learners. The Act vests in the corporate entity, being of a public school, ownership of the property of a such a school which must be administered and controlled by the governing body. Several other tasks are entrusted to an SGB related to the management of school property and finance. More specifically, an SGB must open and maintain accounting books. It must establish and administer a school fund, it must take measures to acquire, to manage and supplement resources such as text books, educational material and equipment. It has a duty to maintain, improve and protect the property of the school. In relation to these matters the Act describes the principal's role simply as providing assistance to the SGB.

I wrestled, as I suspect Mr Ellis did in his submissions, with the notion that the principal has no executive role in relation to the SGB, on proprietary and financial matters of a public school. On a careful look at the provisions of the Act, which are by no means replete or comprehensive, no specific duties relating to assets, liabilities, property, financial management are entrusted to or vested in the principal. In my view, the proper interpretation is to regard the principal as having a duty to facilitate, support and assist the SGB in the execution of its statutory functions relating to assets, liabilities,

property, financial management of the public school and also as a person upon whom specified parts of the SGB's duties can properly be delegated. On any of these interpretations the principal would be accountable to the SGB. It is the SGB that would hold the principal accountable for financial and property matters which are not specifically entrusted upon the principal by the statute.

This decision has momentous significance for this particular application. Mr Ellis argued that the second respondent is entitled to hold liable, responsible and accountable a principal for matters other than those entrusted upon it by the Act.

On the other hand, Mr du Toit argued that the second respondent is entitled to act only within the ambit of chapter five of the *Employment of Educators Act 1998* in so far as he is or represents the employer of the educator, in this case being the 11th and 12th applicants. In my view, there should be no confusion in identifying the two roles played by the 11th and the 12th applicants, on the one hand, as *ex officio* members of the SGB and on the other as employees of the first and second respondents. As and when the first and second respondents act against the 11th and 12th applicants they must have regard to those dual capacities. It is the misappreciation of that duality which led to the second respondent acting as he did. The second respondent sought to hold liable the 11th and 12th applicants for the statutory obligations of the SGB. That is not legally permissible. I find much merit in these submissions by Mr du Toit. The fact that the 11th and 12th applicants sit as members of the SGB does not make them the SGB, nor is the second

respondent entitled to impute to the 11th and 12th applicants the statutory functions which vests in the SGB. Should the second respondent be disenchanted by the expenditure patterns of the principal. I think it is the SGB that must be invited to deal with and account for each of such proprietary or financial matters as may earn the displeasure of the second respondent. Acting properly, the respondents as employers are entitled to hold liable and accountable the principal and his deputy in terms of the Employment of Educators Act, 1998 and also under the Schools Act for their duty to manage the school professionally.

It must follow from what I have said that I am not persuaded that the second respondent was entitled upon receipt of the final report of the Auditor-General to suspend without much ado the principal or the senior deputy principal.

What remains is to deal with the position of the SGB. I agree with Mr Ellis that the SGB has to execute its statutory duties, and the management of the affairs of the school, in a manner that is lawful. Before us is a report which suggests that there are several financial matters which could have been done differently, in respect of the arrangements around expenditure of school funds or use of school property by the principal on various matters. Frankly, that is a matter which in my view should properly be taken up with the SGB who must be called upon to give such explanations as the second respondent may find necessary, in the interests of the objectives which are contemplated in the Act.

It appears from the responses of the SGB to the management

letter of the Auditor-General that indeed in at least two categories of the issues raised, they intend to take such measures as would improve, for instance financial record-keeping; contracting around human resources matters and control and management of certain school fleet vehicles. These examples appear to have been criticisms raised by the Auditor-General and which can be corrected. I hold the view that at this stage it is not necessary to dissolve the entire school governing body in order to be able to raise and deal with, as the second respondent wanted to, the matters or accounting concerns raised by the report of the Auditor-General. Put otherwise, I find that there is no proportionality between the acts or conduct of the SGB which in the view of the second respondent compelled him to take certain administrative action on the one side and the administrative action which was actually taken; the action of the wielder of power in dissolving the SGB is disproportionate to the conduct which was intended to be corrected or the result aimed at.

Moreover, the SGB was not afforded even the slightest opportunity to deal with the intentions of the second respondent to dissolve it. In a society such as ours where we seek to create a constitutional state, rationality, reasonableness, fairness and openness are very important considerations in evaluating the conduct of wielders of statutory executive power when under judicial review. One would readily find these principles in the *Promotion of Administrative Justice Act No.3 of 2000*. Such administrative actions have to be supported by reasons. The intended administrative action has to be disclosed timeously to the affected party to allow him or her

to make such representations as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that administrative act. These statutory injunctions must be observed and failure to do so, of necessity leads to abortive administrative action.

In conclusion I hold the view that the second respondent's decision of 12 December 2001 in respect of the 11th and the 12th applicant should indeed be set aside. I equally so hold that the decision of the second respondent of 20 December 2001 in terms whereof the school governing body of High School Ermelo was dissolved, should be set aside. I make the following order, which order shall be in terms of the applicant's notice of motion as amended: in particular in terms of prayers 2, 2.1, 2.2, 2.3 and 2.4 and 3. Prayer 2.4 shall be amended to read -

"2.4 Dat die Eerste en Tweede Respondente gelas word om koste van hierdie aansoek gesamentlik en afsonderlik te betaal."

To summarise therefore I have just made an order in terms of prayers 2, 2.1, 2.2, 2.3, 2.4 (as amended) and 3. I have not granted attorney and client costs, I have granted costs on a party and party scale.

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