correct course to follow. In the light of our concerns relating to procedural issues I have refrained from addressing the merits of the appeal. It may be that the accused is guilty of the crime charged. If so, it is right that he should be prosecuted and possibly convicted after a procedurally fair trial.

In all the circumstances, I would set aside the conviction and sentence, leaving it to the Director of Public Prosecutions to decide whether a further prosecution should follow.

(Van Zyl J concurred in the judgment of Mitchell AJ.)

For the appellant:
TR Tyler

For the respondent:
A Bouwer

Phillips v Manser and another

SOUTH EASTERN CAPE LOCAL DIVISION

KROON J

Date of Judgment: 28 SEPTEMBER 1998 Case Number: 1944/98

Sourced by: BJ PIENAAR AND PG BENINGFIELD SUMMARISED BY S MOODLIAR

Constitutional law – Right to basic education – Applies to education for children up to 15 years of age or Grade 9.

Education – Section 9(1) – South African Schools Act 84 of 1996 – Decision of governing body to suspend learner pending head of department's decision whether or not to expel him – Whether principal and governing body had adopted fair procedures – Whether governing body had locus standi *to be sued.*

Editor's Summary

The Applicant was a pupil at a public school as envisaged in the South African Schools Act 84 of 1996 ("the Act"). The First Respondent was the principal and the Second Respondent was the governing body of the school.

The governing body had resolved that the Applicant be suspended from attending the school, pending a decision by the head of department whether or not he should be expelled from the school. The Applicant, assisted by his father, sought an order declaring that (i) the hearing of the governing body was unfair and not in compliance with section 9 of the Act, (ii) that the conduct of the principal and the governing body in suspending him was unfair and not in compliance with section 9, (iii) that such conduct was a infringement of his constitutional right to a basic education and (iv) that the principal allow him to attend the school. When the matter came before the Court, there were also certain preliminary issues which fell to be decided.

Section 9(1) of the Act provided that "the governing body of a public school may, after a fair hearing, suspend a learner from attending the school" as a

correctional measure for up to one week *or* pending a decision by the head of department as to whether or not the learner should be expelled from the school.

Held – The Court noted that with regard to the factual disputes, it had applied the following principle: the onus-bearing party who chooses not to go to oral evidence to resolve conflicts of fact, must discharge the onus on an acceptance of the facts alleged by him which are not disputed, together with the facts alleged by his opponent.

With regard to the preliminary issues, the Court made the following findings: (i) It was clear that the principal was being sued in his official capacity and not his personal capacity although this was not specifically stated in the papers; (ii) the Court rejected the Respondents' contention that the urgent procedure adopted by the Applicant had amounted to an abuse of the process of court and that he should accordingly be non-suited; (iii) the Court held that there would be no costs order with regard to the Respondents' application for the striking out of a certain affidavit which they abandoned on the basis that that they would not be prejudiced by the inclusion of the material in question; (iv) the Court also rejected the Applicant's argument that in the absence of a code of conduct as contemplated in section 8(1) of the Act, no decision to expel a learner could validly be taken; (v) the Court rejected the argument that the governing body was not a juristic person; the governing body was assigned various functions under the Act and an aggrieved party had to have the right to bring the governing body to court.

With regard to the procedure which had been followed, the Court considered in detail the sequence of events which had led to the Applicant's suspension. The Applicant contended that he had been suspended under both section 9(1)(*a*) and 9(1)(*b*) of the Act, he contended further that as the paragraphs were separated by the word "or", only one or other action could be taken against him. The Court accepted this argument as correct without deciding the issue but held that the decision of the principal that the Applicant be suspended for five days was not a decision of the governing body in terms of section 9(1)(*a*). Action in terms of section 9(1)(*b*) was therefore not precluded. The Court also found on the facts that the suspension by the principal was a consensual one.

On the question of the proceedings at the inquiry held by a disciplinary committee of the governing body, the Court found that there was no partiality on the part of the principal and the Court found that the hearing was in all respects a proper and fair one. The Court held that the decision to suspend the Applicant had been made by the governing body and not the disciplinary committee. This decision had been fairly made despite the fact that the governing body did not itself hold a hearing. The Court found that a disciplinary committee constituted in terms of section 30 of the Act could legitimately undertake a hearing and that the governing body was entitled to thereafter act on what occurred at the hearing and reach its decision in the light thereof. The Court was not persuaded that the Applicant had established that the governing body, did not have before it for consideration all the material facts to enable it to reach a proper and valid decision.

The Court rejected the argument that the Applicant's right to basic education was being violated as the Constitution provided for education up to the age of 15 years or Grade 9 and the Applicant was 17 years old and in Grade 11.

The Court concluded that the principles of natural justice had been complied with and that the application was dismissed with costs.

Notes

For Constitutional law, see *LAWSA* Re-issue (Vol 5(3), paragraphs 15-240)

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed.)

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) – **F**
Caledon Street Restaurant CC v Monica D'Aveira case no 2526/97, unreported (SE)
Bejai and another v Governing Body of Westville Boys' High School and another case no 8342/98, unreported (N) – **R**
Jockey Club of South Africa and others v Feldman 1942 AD 340

Judgment

KROON J: The applicant, Bradley Phillips ("Bradley"), is a pupil at the Alexander Road High School, Port Elizabeth. The school is a public school as envisaged in the South African Schools Act 84 of 1996 ("the Act"). In the terminology of the Act, Bradley is a learner. He is 17 years of age and is in Grade 11. The first respondent is Mr Manser, the principal of the school ("Manser"). The second respondent is the governing body of the school ("the governing body").

On 2 June 1998 the governing body resolved that Bradley be suspended from attending the school, pending a decision by the head of department, referred to in the Act, on the question of whether or not he should be expelled from the school. The applicant, assisted by his father ("Phillips"), seeks relief in the form of an order declaring that the hearing of the governing body on 2 June 1998 was unfair and not in compliance with section 9 of the Act; that the conduct of Manser and the governing body in suspending him was unfair and not in compliance with the said section 9, and was as well an infringement of his basic right to a basic education as provided for in section 29(1)(*a*) of the Constitution; and that Manser allow him forthwith to attend the school to receive education in the usual way.

Initially, a rule *nisi* was sought with *interim* relief in the form of an order that Manser allow Bradley to return to the school. At the first hearing of the matter, i.e. on 7 August 1998, an order that Bradley be allowed to return to the school pending the determination of the application, was made by consent. The matter was thereupon postponed to 3 September 1998 for the purpose of further papers being filed. The costs occasioned by the postponement were reserved. On 3 September 1998 the matter was again postponed, Leach J having been of the view that the Department of Education at Bisho should be given notice of the application, and he ordered that certain papers be served on the State Attorney, Port Elizabeth. The costs were again reserved. Counsel were agreed that the costs of the postponements on 3 and 10 September 1998 should be costs in the cause. I will return later to consider the costs occasioned by the postponement on 7 August 1998.

The application concerns, *inter alia*, the interpretation of section 9(1) and 30(1) of the Act, which provide as follows:

> "9. (1) 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*) pending a decision as to whether the learner is to be expelled from the school by the head of department.

30 (1) A governing body may –

(*a*) establish committees, including an executive committee; and

(*b*) appoint persons who are not members of the governing body to such committees on grounds of expertise, but a member of the governing body must chair each committee."

I may, incidentally, advert to the attitude of the head of department. The official concerned is Mr Tsengiwe, who is the acting incumbent of that position. He points out that for him to decide whether to expel Bradley from the school he would need, *inter alia*, to investigate whether the procedure adopted by Manser and the governing body was lawful and fair and whether they afforded Bradley a lawful and fair hearing. Those are the very issues with which I am seized and for him to decide thereon would infringe on this Court's jurisdiction and it would, accordingly, be improper and inappropriate for him to do so. Once my decision is made, he will, if necessary, attend to the issue of his decision whether or not Bradley should be expelled. Suffice it for me to say that in the circumstances Tsengiwe's stance is a proper one. In explanation of the delay in reaching a decision in the matter, Tsengiwe states that he was advised by Mr Khumalo, the Director of Human Resource Utilisation in the department and the appropriate person initially to give attention to the matter, that he first learnt thereof when he received certain advices from a Mrs Nkume, an education development officer stationed in Port Elizabeth at the beginning of August. Khumalo confirms the statement. An aspect on which both Tsengiwe and Khumalo are silent, is the letter of 5 June 1998, annexure "RP9" to the founding affidavit of Phillips which, it is common cause between the parties, was addressed by Mr McLaggan, the chairman of the governing body, to the head of department. In that letter, McLaggan set out the details of the history of the matter, accompanied by the relevant documentation and the motivation of the governing body for the expulsion of Bradley.

To a large extent the relevant facts are common cause. There are, however, certain factual aspects on which there is a dispute between the parties. In resolving such disputes I have applied the well-known principle set out in such cases as *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). The essence of that principle may be stated as follows. The onus-bearing party who chooses not to go to oral evidence to resolve conflicts of fact, must discharge the onus on an acceptance of the facts alleged by him which are not disputed, together with the facts alleged by his opponent, although there are exceptional circumstances where the case may be decided on facts alleged by the applicant, even although they are disputed, namely, where the respondent's denial of a fact alleged by the applicant is on the papers and an application of common sense to be stamped as untenable.

Before I refer to the relevant facts there are certain other preliminary issues that should be canvassed. First, in his answering affidavit, Manser takes the point of misjoinder. In essence, the contention is that he was wrongly cited in his personal capacity, whereas it is common cause that throughout he acted in his capacity as the principal of the school. He should accordingly have been cited in his official capacity. The point was echoed in the heads of argument of Mr *Rorke*,

who appeared for Manser and the governing body. It was, however, correctly not persisted in during argument. The short answer thereto is that while it was not specifically stated that Manser was being sued in his capacity as principal of the school, a reading of the papers makes it abundantly clear that that was the intention.

Second, the issue of urgency. Bradley's notice of motion reflected that the application would be moved as a matter of urgency at 9.30 am on 7 August 1998. That was a Friday, not a motion day in this Division. Although, in the course of correspondence during the preceding days, Bradley's then attorney had threatened the launch of proceedings if Bradley were not to be permitted to resume attendance at the school, the application papers were only served on Manser and the governing body at 2.25 pm on 6 August 1998, i.e. some 19 hours prior to the appointed time for the hearing of the application. A postponement of the matter, so it was argued by Mr *Rorke*, was inevitable. Reliance was also placed on the fact that Phillips had been advised by McLaggan by letter as early as 3 June 1998, i.e. at a time when Bradley's suspension from attending the school was already in operation (as to which see below), of the decision of the governing body, yet on Phillips' own showing, a period of two months elapsed before he took any steps in the matter, i.e. by calling on Mrs Nkume and thereafter consulting his attorneys. Phillips had accordingly, so it was argued, been the cause of the urgency that had arisen. In any event, having regard to the time lapse, any urgency that did remain could have been met by notification that the matter would be heard on Wednesday, 12 August 1998, which was a motion day in this Division. The procedure adopted by Bradley had accordingly amounted to an abuse of the process of this Court and on that ground alone he should be non-suited. In support of his contentions Mr *Rorke* relied heavily on the judgment that I handed down in this Court in the as yet unreported case of *Caledon Street Restaurant CC v Monica D'Aveira* (case no 2526/97). The argument was not without merit. Mr *Scott*, for Bradley, relied, however, upon the fact that on 7 August 1998 the interim relief sought, namely an order that Bradley be permitted to return to the school pending the finalisation of the application, was by consent secured. That circumstance, so it was argued, demonstrated that however short the notice of the hearing had been, Manser and the governing body had, in fact, been in a position to deal therewith and had reached a decision thereon. Mr *Rorke*'s counter thereto was that there may have been many reasons why a decision to consent to an order that Bradley be permitted to return to the school was taken. That may be so, but the fact remains that the stance was not taken that Manser and the governing body were not in a position to deal with the prayer for interim relief and required time to do so. In the circumstances I consider that Mr *Scott*'s point was well taken. It is true that a respondent is also entitled to come to court to resist even the grant of a rule *nisi*. The non-suiting of an applicant on the grounds of an alleged abuse of the urgency provisions in the rules of court, is, however, a matter resting within the discretion of the court. In all the circumstances I am not persuaded that that course is warranted.

Third, the issue of the inclusion in the papers of Mr Nkume's report, annexure "RP6" to the founding papers. It may be mentioned that the report contains hardly veiled accusations of racism levelled at those in charge of the affairs of the school. Incidentally, Manser records that he took this aspect up with Mrs Nkume and that she has recanted. An application was filed for the striking-out of the contents of the report and the relevant paragraphs in Phillips' affidavit

referring thereto, on the grounds that the contents thereof are hearsay. At the hearing, however, Mr *Rorke* intimated that he was not persisting in the application to strike out. Presumably he did so on the basis of an acceptance thereof that his clients would not be prejudiced by the inclusion of the material in question. Being hearsay, I would ignore same. That attitude was correct. However, it was not proper for the report to be included in the papers and in the circumstances I consider, in the exercise of my discretion, that there should be no costs order in respect of the filing of the application to strike out.

Fourth, section 8(1) of the Act enjoins the governing body of a school to adopt a code of conduct for learners after certain consultations have been held. Subsection (3) provides that the Minister of Education may determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners. Such guidelines were only published on 15 May 1998. As yet the governing body has not adopted a code of conduct as envisaged in section 8(1). That is, however, neither here nor there. It was not argued, nor could it have been, that in the absence of such a code of conduct the governing body was not entitled to take disciplinary action against Bradley. The school had its existing code of conduct which may be summed up as requiring good and proper conduct and behaviour of each pupil and which, in my view, the governing body was entitled to apply. In any event, Manser legitimately takes the attitude that in the matter of maintaining discipline at the school, the governing body was entitled to have regard to acceptable societal norms. It may be added here that the relevant member of the executive council has not as yet made any determination as provided for in section 9(3) which reads as follows:

> "The Member of the Executive Council must determine by notice in the Provincial Gazette:
>
> (*a*) the behaviour by a learner at a public school which may constitute serious misconduct;
>
> (*b*) disciplinary proceedings to be followed in such cases;
>
> (*c*) provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings."

Notwithstanding what has been said above, it was argued that in the absence in the school's code of conduct of provisions for a fair hearing or other provisions for due process safeguarding a learner's rights, such as a time limit on a suspension pending a decision on expulsion, no decision to expel a learner can be validly taken. That cannot be so. The court will assess in all cases whether the requirements of due process and natural justice were complied with.

Fifth, Mr *Rorke* made available to me a copy of the judgment of Mthiyane J in the unreported case of *Bejai and another v The Governing Body of Westville Boys' High School and another* (case no 8342/98 (NPD)). In that case relief was sought in the form of an order that the learner in question be permitted to return to school pending the finalisation of the decision whether he should be expelled or not. A point *in limine* to the effect that the governing body of a school was not a juristic person capable of being sued was upheld and it was held accordingly that the application against it should be dismissed on that ground. It should be mentioned that Mr *Rorke* intimated that it had been his duty to place this decision before me but he voiced a disclaimer on behalf of his clients that the matter should be disposed of on that narrow basis. With respect, I am unable to align myself with the approach in *Bejai*'s case. The governing

body of a public school is a body the creation of which is provided for in the Act. It is assigned a number of functions. If any person is aggrieved at the manner in which those functions are performed, he must have the right to bring the governing body to court. The question arises, who else would he be able to sue? The fact that the Act does not specifically provide that the governing body is a juristic person capable of suing and being sued is neither here nor there.

I turn now to the facts. Bradley was admitted to the school during 1994 when he was in what was then known as Standard 6. The relevant application form, signed by Phillips, contained an undertaking that Bradley would abide by the school's code of conduct. During February 1998 Bradley was found guilty by a disciplinary committee of an assault on a fellow pupil, Roscoe Pagel. In his papers, Phillips denies that Bradley was ever convicted of the alleged assault. He avers that the only evidence at the disciplinary hearing was that of Bradley, who admitted that he had been involved in a fight with Roscoe, the latter having insulted his mother. The other allegations about what had occurred were based on hearsay, school ground gossip, unsubstantiated rumours and perceptions. No evidence existed, nor were any witnesses called to verify the facts. Suffice it to say that these allegations are based on a disingenuous misreading of the minutes of the hearing and the subsequent report submitted by the disciplinary committee, annexures "RP10" and "RP11", respectively.

According to Manser the assault was categorised as a serious and unprovoked one. This is denied by Phillips who points to the fact that the minutes of the inquiry in question do not contain those words. It would seem that while, as stated elsewhere by Manser, the disciplinary committee had accepted Bradley's denial that he had used a spanner during the assault, what Manser had in mind was the fact that Roscoe had sustained injuries to his head and arm that required medical attention. Nothing turns on this aspect, however. As far as the absence of provocation is concerned, it would seem that although there had been an altercation between the two lads on the previous day when Roscoe allegedly made certain disparaging remarks concerning Bradley's mother, the committee had noted that there was no provocation on the following day prior to the assault. Again, nothing turns on this aspect. Manser continues as follows:

> "As far as that disciplinary committee was concerned, the assault in itself, being a criminal offence and being totally against the rules of conduct and ethos of Alexander Road, was sufficient to recommend the Applicant's expulsion, but, with a sympathetic understanding of his background and personal circumstances, the first disciplinary committee ultimately recommended certain remedial steps, on condition that certain undertakings were given by the applicant and his father."

These allegations too are placed in dispute by Phillips, who again points out that the minutes are silent thereon. That mere circumstance is insufficient not to accept Manser's evidence. It is, moreover, supported by the fact that Bradley's expulsion was not recommended and that certain discussions did take place between Manser and Phillips concerning steps to guide Bradley along the right lines and conditions relating to his continued presence at the school.

According to Manser he and Phillips reached agreement on these aspects. Phillips disagrees. It is, however, common cause that on 9 February 1998 Manser addressed annexure "RP5" to Phillips which read as follows:

> "I wish to confirm our telephonic conversation regarding Bradley's conditional return to school. Bradley will be allowed to return to school, subject to the following conditions:

1. He will not become involved in any violent altercation or offer threats of violence or retribution.
2. He joins the school's Interact Club.
3. He joins the school choir.
4. He undergoes a psychological counselling programme. A quarterly report is to be submitted to the school.

If any of the conditions are not met, you will agree to remove Bradley from the school of your own free will. Should you be in agreement with the contents of this letter, please sign in the appropriate space below."

Phillips states that he never signed acceptance of the document and he denies that, whether by implication or orally, he accepted the terms thereof. On the contrary, he says that when he received the letter, he refused to sign same as he was of the opinion that "it was unlawful and contrary to the Constitution". In certain correspondence penned by Manser, included in the papers, it was alleged that Phillips had signed the document. Manser explains that this was an assumption on his part in the light thereof that, as is not disputed, Phillips never reverted to him in response to the letter. Whether the letter was in fact signed or not is neither here nor there. The question is whether, as a matter of fact, Phillips had agreed to the terms contained therein. On the *Plascon-Evans* principle this issue must be resolved in favour of Manser. That conclusion is supported by the fact that Phillips never reverted to Manser to voice any objection to the contents of the letter.

The next events to which reference is to be made are those that occurred on Friday, 15 May 1998. It is, however, relevant to record that, as will appear below, Bradley had, prior thereto, been guilty of a number of other infractions of discipline at the school. Manser's undisputed evidence details the events of 15 May 1998. During the morning it was brought to his attention that Bradley had fallen asleep in class; that he had awakened and created a disturbance in class and had thereafter again fallen asleep. When he was confronted by his teacher concerning his behaviour, he ascribed same to his having a cold. He later admitted that this was a blatant lie. In fact, so it transpired, and this is not in dispute, he had stolen some chloroform from the school's science laboratory and, in the presence of his teacher and classmates, had in class sniffed some material impregnated with the chloroform. Be that as it may. I make that comment because, although Phillips and Bradley concede that the latter was guilty of the conduct in question and certain of the other conduct found proved against him at the subsequent disciplinary inquiry referred to below, although not the whole thereof, Bradley's cause of action in these proceedings is not that his suspension was not justified on substantive grounds, but that the decision to suspend him was not reached in a fair manner. For the sake of completeness, however, I would record that in the light thereof that Phillips and Bradley do not seek to specify which of the other conduct he was not guilty of, and that after the inquiry, which was properly held, Bradley was found guilty of all the conduct bar the first charge in respect of which his denial was accepted, it must be found that he was in fact guilty of all the other conduct.

Manser spoke to Bradley on 15 May 1998 and advised him that he wished to see him and his father in his office on the morning of Monday 18 May 1998. Manser's evidence is that such an interview did occur. Phillips contends that only he, and not Bradley, attended on Manser on that morning. Bradley supports

this statement. On the *Plascon-Evans* principle Manser's evidence must prevail. Manser's affidavit then proceeds thus:

> "I therefore discussed the incident with both the Applicant and Phillips in my office during the morning of 18 May 1998. I informed both of them of the gravity of the matter and of my intention to hold a disciplinary hearing. I also informed Phillips of my intention to suspend the Applicant pending the hearing since I was of the honest view that the discipline at the school was being undermined by the Applicant's conduct and continued presence at the school. Not only was Phillips co-operative regarding the convening of a disciplinary committee, but he and his son (the Applicant) also agreed to the suspension of the Applicant pending the inquiry. A date for the disciplinary hearing was discussed and as a result of Phillips' unavailability during the week due to out of town commitments, it was agreed that the hearing would be held on Saturday, 23 May 1998."

Phillips disputes this version. He denies that "this incident", i.e. the chloroform incident, was discussed at this meeting. In this regard two comments may be made. First, Phillips has not sought to suggest what was discussed at the meeting if it was not the chloroform incident. Second, in annexure "RP7", a letter addressed by Phillips' attorney to Manser on 1 June 1998, it was specifically stated that the meeting was held to discuss the incident that occurred on 15 May 1998. Phillips denies further that he, or for that matter Bradley, who he says was not present, consented thereto that Bradley be suspended pending the disciplinary hearing. He states that in terms of advices received from Bradley on 15 May 1998, confirmed by Bradley in his affidavit, Manser had already on that date suspended Bradley for a period of five days. Again, in terms of the principle referred to earlier, Manser's evidence must prevail. The fact, invoked by Phillips, and pursued by Mr *Scott* in argument, that the letter of 18 May 1998, annexure "RP1", addressed by Manser to Phillips to confirm the suspension of Bradley, the terms of which letter are set out later, did not mention the alleged consent is of little, if any, assistance to Bradley. It is certainly not sufficient to attract to Manser's evidence the epithet of untenable as required in *Plascon-Evans*. Phillips finally denies that it was agreed on 18 May 1998 that the disciplinary hearing was to be scheduled for 23 May 1998, a Saturday. He points to the fact that annexure "RP1" is silent on the date of the hearing and that a follow-up letter from Manser, dated 21 May 1998, annexure "RP2", advised that the hearing would be held on 23 May 1998. In the first place, this contention overlooks the fact that annexure "RP2" *confirmed* that the inquiry would be held on the stated date. Second, Manser explains that the date was arranged with Phillips to accommodate his employment commitments and it is a fair inference that Manser regarded the date as provisional, dependent on the ability to convene the disciplinary committee. The aspect is in any event but a peripheral one.

The two letters referred to now require to be set out. The first, annexure "RP1", read as follows:

> "Re: BRADLEY PHILLIPS.
>
> Thank you for coming to see me at school today. I understand you have a busy schedule and appreciate your willingness to visit the school. As you are aware, Bradley has been in trouble at school again. I am very concerned about the latest spate of incidents, especially in the light of his past record. The following is a summary of the problems we have encountered:

1. A forged letter regarding Bradley's absence from school.
2. A forged letter of explanation regarding Bradley's non-attendance at detention classes, in which he fabricated an uncle's death.
3. Writing graffiti on the school's chair.
4. An unacceptable altercation with a senior. He was rude and unwilling to remove a red 'beanie' he was wearing.
5. Inhaling a dangerous substance taken illegally from the school's science laboratory. His use of Chloroform in a Silver Nitrate bottle as an inhalant is particularly disturbing. He fell asleep in the Afrikaans class, and then awoke and began reading out loud, continued inhaling the substance from a wad of tissues, and fell asleep again. When questioned about the incident he was deceitful and refused to admit he had done wrong.

I had seen Bradley two days prior to this event and he assured me that he was determined to follow an honest path. This does not seem to be the case.

I am very concerned that Bradley's presence at the school may have a negative effect on those around him. His use of Chloroform in the company of the teacher and his peers is most disturbing. This act, coupled with the violence that was witnessed earlier in the year may place those around him at risk.

I therefore wish to inform you in writing that Bradley has been suspended from school. A disciplinary hearing will be convened as explained to you. You are reminded that you are entitled to representation at the hearing.

Should you wish to remove Bradley to another school before the disciplinary hearing takes place, please inform me in writing as soon as possible.

The guidance and counselling that Bradley has received at school does not seem to have had the desired effect. There appears to be very little else that we can do for him here. I await your telephone call as discussed."

The second, annexure "RP2", read as follows:

"DISCIPLINARY HEARING: BRADLEY

This serves to confirm that a disciplinary hearing will take place on Saturday, 23 May at 09h00 in the school committee room. You are entitled to any representation you wish at the hearing.

As stipulated in the letter of contract between you and the school and to which you agreed, the disciplinary committee requests a quarterly report from Bradley's guidance counsellor. It was agreed that he would undergo psychological counselling programme. We need to review the contents of such a report (please refer to the agreement reached on 9 February 1998). If you cannot acquire such a report please furnish me with the name and contactable telephone number of Bradley's psychologist as there may be information available that could be important to the committee.

The disciplinary committee will discuss the following:

1. A seemingly forged letter regarding Bradley's absence from school.
2. A seemingly forged letter of explanation regarding Bradley's non-attendance at detention class in which he fabricated an uncle's death.
3. Writing graffiti on a school chair.
4. An unacceptable altercation with a senior. It seems he was rude and unwilling to remove a red 'beanie' he was wearing.

5. Removing a dangerous chemical from the science laboratory without permission. Inhaling the chemical in front of others. His use of Chloroform in a Silver Nitrate bottle is disturbing. He fell asleep in his Afrikaans class, awoke and behaved in a strange manner by reading out loud. He inhaled the substance again and fell asleep once more. When questioned about the incident he was deceitful and refused to admit he had done wrong.

In the light of the fact that Bradley is already on a contract (a document of agreement between you and the school), the disciplinary committee is concerned that the conditions agreed upon may not have been met. You are reminded that you have signed an agreement that stated that should the conditions of the contract not be met, you would remove Bradley from the school of your own free will.

The disciplinary committee will need to be assured that the conditions have been kept before the committee discusses the latest incidents placed before them."

Phillips states that he was advised that it was not necessary for him to deal with the allegations in the two letters over and above the averment that he disputes a number of allegations contained therein which, he says, reflect incorrect facts and are misleading. The only specific aspect he raises, however, is a denial that he had signed any letter of contract between him and the school as alleged or any agreement to the effect that should the conditions of the contract not be met, he would remove Bradley from the school of his own free will. Manser's response was that, as is reflected in the minutes of the disciplinary inquiry referred to below, neither Phillips nor Bradley nor Mrs Adams (Bradley's grandmother) nor Mrs Peacock (Phillips' companion), who were present at the disciplinary hearing, placed in issue any of the contents of the correspondence that Manser had addressed to Phillips. It would be convenient at this stage to record that it was Manser's further testimony, which, save for what was contained in the letters and the minutes of the disciplinary inquiry, was not gainsaid by any other evidence, that at the disciplinary hearing no reliance was placed on a breach of contract entered into during February 1998. The undertakings given by Phillips at the time, which I have found were given, were, however, relevant to the determination by the disciplinary committee of what appropriate recommendations it should make. I do not find this testimony of Manser not to be acceptable.

The disciplinary hearing, which was undertaken by the disciplinary committee of the governing body, was duly held on 23 May 1998. A number of persons were present, including, as intimated earlier, Mrs Adams and Mrs Peacock. The minutes of the meeting, annexure "RP3", read as follows:

"*Alexander Road High School.*

Minutes of the Disciplinary Committee Hearing held on Saturday 23 May 1998.

Present: Mr B Phillips. Mr Phillips (father), Mrs Peacock, Mrs Adams, Mr McLaggan, Mr Manser, Ms Boyce, Mr Rowles, Mr Bossard, Mr Loubser, Mr S Morgan, Ms C Cole

Disciplinary Hearing:

We referred to the letter sent to Mr Phillips. In mitigation the following stated by Mr Phillips:

1. *Mr Phillips*:

Concern regarding Bradley's past. This is related to his mother who left home when he was 10. Mother left very quickly. She was afraid of him (father). Not a violent relationship.

Bradley always believed his mother would return.

Mother began contacting Bradley. Father did not know this. From Grade 8 father noticed 'double standards' appearing to emerge in Bradley's character.

During this week, Bradley began to describe incidents that happened with his mother, for example being kissed by another man, drinking.

Bradley had been carrying this burden with him.

Mother would shower Bradley with presents.

Contacted Bradley to remind him that she was his mother.

Bradley has now reached a point where he is able to communicate re: these activities.

Mrs Adams: (Grandmother)

Does not condone what Bradley has done.

Sees Bradley in a period of confusion between right and wrong.

Disciplined at home, physically by mother and verbally. Verbal discipline from her (Mrs Adams).

A channel of communication was needed between father and son. This has created problems.

Gran feels she needs to shield her son from others.

Mother should have contacted her or father.

Mrs Peacock:

Very close to Bradley.

Plays the role of Bradley's mother.

Told Bradley to tell father that mother phoned.

Concerned that mother shows little interest in Bradley.

Fiona Bosman said that Bradley is receiving counselling at school, she need not get involved.

Referred to letter on 21 May.

Point one: Letter was written by Mrs Peacock.

two: Accepted as a forgery.

three: Accepted guilt. Lied to father about the chair. Probably fearful.

four: Accepted guilt. Said he was trying to be the 'man'.

School:

Expressed the following:

Concerned about lying.

List of offences worrying.

Critical issue is that father and son need counselling. There seemed to be little remorse on behalf of Bradley. Concerned that Bradley could not give reasons for his actions.

Concerned what effect Bradley's actions would have on other students. Mr Phillips replied that his son had rights too. It was explained that this was never denied.

Concern that Bradley had not followed the agreed conditions of the contract.

Sympathised with Bradley's previous situation but were concerned that family had not sought counselling as suggested.

Concerned that neither father nor Bradley understood the seriousness of his offences.

Mr Phillips enquired as to whether Bradley should return to school on the Monday. The committee agreed to this, but explained that his presence at school would be conditional and dependent upon the governing body's decision.

Mr Phillips agreed to this.

As there was no further comment, the meeting closed at 10h20."

Again, Phillips denies that these minutes are an accurate reflection of what occurred during the hearing, but the only specific aspect mentioned by him, he having been advised that he need go no further, is his denial that, as is reflected in the last paragraph of the minutes, he agreed to the conditional return of Bradley to the school. This particular allegation was not specifically responded to by Manser. One queries, however, on what basis Bradley was allowed to return to school at that stage if it was not, as appears elsewhere from the allegations made by Manser, that such return would be permitted pending the final decision of the governing body on the matter.

The disciplinary hearing was followed up by a further letter dated 28 May 1998, annexure "RP4", addressed by Manser to Phillips. It furnished in comprehensive detail the motivation and reasoning of the disciplinary committee in arriving at its decision. Phillips was further advised that the matter was being submitted to the governing body for final decision and that if he, Phillips, wished to discuss the matter with McLaggan, the chairman of the governing body, he, Manser, would arrange a meeting between the two. Manser explained – an aspect to which I will revert later in another context – that what occurred was that the disciplinary committee had, after the hearing, reached a decision but that its finding, together with its recommendation, was communicated to the governing body which would make the final decision in the matter. It is true that this letter contained the statement that until the governing body had made a decision on the matter Bradley was not to return to the school, whereas in fact, as already indicated, Bradley did return to the school for that interim period. This aspect is, however, of no importance.

The governing body met on 2 June 1998 to consider the matter. The minutes of that meeting are annexure "PGM2" to Manser's answering affidavit. In some respects, so Manser explained, the minutes contained errors but these are not of any moment. On the following day McLaggan addressed a letter to the attorney of Phillips, annexure "RP8", which, *inter alia*, recorded the findings and decision of the governing body. Bradley was thereupon suspended from attendance at the school pending the decision of the head of department. Here again, Phillips states that most of allegations in this letter are disputed but that he was advised that it was not necessary to deal therewith. Accordingly, no details of the disputes were forthcoming. As intimated earlier, by letter dated 5 June 1998,

McLaggan referred the matter to the head of department. The history of the matter was set out and the relevant documentation was enclosed.

The attack on the fairness and lawfulness of the procedure followed by Manser and the governing body must now be considered. It would be convenient first to consider an aspect that, although not adverted to in the papers, was argued by Mr *Scott* as a point of law. The essential basis of the argument was that the word "or", separating subsections 9(1)(*a*) and 9(1)(*b*), was used in a disjunctive sense. Accordingly, so the argument ran, the governing body had available to it two mutually exclusive courses. The adoption of the course provided for in section 9(1)(*a*) therefore in law precluded the governing body from having recourse to the course provided for in section 9(1)(*b*). Mr *Rorke* offered no counter-argument to this submission. For present purposes I will accept, without deciding, the validity thereof. That is, however, not the end of the matter. Mr *Scott*'s argument proceeded as follows. The suspension of Bradley from the school by Manser with effect from 18 May 1998 until the hearing of the disciplinary committee on 23 May 1998, i.e. entailing a period of five school days, whether this suspension was by agreement or not, was a suspension in terms of section 9(1)(*a*). Accordingly, it was not permissible for the governing body, whether by itself or via the vehicle of its disciplinary committee, thereafter to seek to invoke the provisions of section 9(1)(*b*) and suspend Bradley pending a decision of the head of department whether or not he should be expelled from the school. I am unable to uphold the argument. In the first place, although this aspect was not fully canvassed during argument, there is room for a finding that the earlier suspension of Bradley was not a correctional measure as envisaged by section 9(1)(*a*); that its purpose was not the punishment of Bradley. It was rather a preventative measure, aimed at combating the undermining of the discipline to the school. The circumstance that, as I have found, the suspension was a consensual one, underscores this view. However, because this issue was not the subject of full argument I will express no firm view thereon. In the second place, it should be pointed out that section 9(1)(*a*) refers to a suspension by a governing body. The suspension in question was effected not by the governing body, but by Manser. Mr *Scott* submitted that it should nevertheless be equated with, and held to be tantamount to, a suspension by the governing body. During argument I raised with Mr *Scott* the question whether a school principal, where the exigencies of the situation demanded it, could not take immediate action in the form of a suspension, disciplinary or otherwise, prior to a meeting of a governing body being convened to consider the matter in issue. Counsel declined to venture any answer to that question. His submission was no less than that any suspension of a learner by any school authority – he went so far as to include, for example, the master in charge of the Grade 11 pupils – and whatever the circumstances, was a suspension as envisaged in section 9(1)(*a*). I cannot agree. The suspension in question was not, nor was it purported to be, nor indeed could it have been, a suspension by the governing body in terms of section 9(1)(a). Action thereafter by the governing body in terms of section 9(1)(b) was accordingly not precluded.

An allied aspect that may be mentioned here is that it is a further complaint of Phillips that Manser's suspension of Bradley was unlawful and unprocedural in that, before Manser could take that step, the governing body would have had to have given Bradley a fair hearing as prescribed by section 9(1)(*a*). The answer thereto is threefold in nature. First, as already shown, the suspension was not effected in terms of section 9(1)(*a*). Second, on Manser's evidence, which I have said is to be accepted, Bradley was given a fair hearing, and, indeed, the suspension

was agreed to. Third, as far as the issues to be decided in this case are concerned, it is difficult to see what relevance or bearing thereon the suspension, even if it were unlawful, would otherwise have. In fact it has none.

The next submission was a twofold one. It related to the proceedings at the inquiry held by the disciplinary committee of the governing body. Both submissions rested on the fact, as it was contended to be, that the disciplinary committee had in fact taken a decision which would otherwise have been one as envisaged by section 9(1)(*b*), ie the suspension of Bradley pending a decision by the head of department as to whether or not he should be expelled. The first submission, incidentally inconsistent with Mr *Scott*'s argument that the earlier suspension of Bradley effected by Manser was to be held to be a decision by the governing body as envisaged by section 9(1)(*a*), was that it was the governing body and only the governing body that was entitled to make a decision as envisaged by section 9(1)(*b*). The decision of the disciplinary committee purportedly in terms of this section was accordingly a nullity. There was therefore no valid suspension in force preventing Bradley's attendance at the school. The second submission was that in any event the hearing before the disciplinary committee was flawed for want of fairness. I propose first to deal with this latter aspect. It is one of Phillips' allegations that the punishment meted out to Bradley was based on prejudice against him. This allegation must be taken as a contention that the decision of the disciplinary committee that Bradley should be suspended pending the decision of the head of department, assuming such a decision was taken by the disciplinary committee, was, in part at least, founded on prejudice against Bradley. However, save for a complaint against Manser's participation in the proceedings, an aspect to which I will return later, Phillips did not elucidate the charge of prejudice. Manser, perceiving that the charge may in fact be one of racial prejudice – and I would interpose here to record that although Bradley's race is not specifically stated in the papers it is clear that he is not a member of the White group; Schauderville, where he resides, is known to this Court as an area inhabited by members of the Coloured population group – has denied that Bradley's race played any part in the decision reached. The contrary was not suggested by Phillips in his replying affidavit. If, so Manser's affidavit continued, the reference was to simple bias against Bradley, that averment too fell to be rejected. The only basis for "prejudice" that must have existed in the minds of the members of the disciplinary committee would have arisen out of the fact that they had knowledge that Bradley had previously been involved in a serious incident when he assaulted a co-learner. That, however, Manser acceptably explained, was a relevant consideration when deciding on appropriate disciplinary steps to be taken against Bradley on the second occasion. Again, Phillips in reply has not raised any contrary averments.

It is then alleged that the penultimate paragraph of annexure "RP1" quoted above makes it apparent that Manser had prejudged the issue and wished to have Bradley removed from the school. In addition, reliance is placed on what is alleged to have been Manser's unlawful, unilateral earlier suspension of Bradley. It would seem that the contention is not only that Manser disqualified himself from participating in the deliberations of the disciplinary inquiry, but also that his participation therein somehow tainted the proceedings. Manser's response is a denial of having prejudged the issue and an explanation that the comment in the paragraph referred to arose out of a query by Phillips during the meeting of 18 May 1998 as to what the consequences might be of his removing Bradley from the school prior to the disciplinary hearing. This

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explanation is to be accepted. Manser further states that his prior knowledge and investigation of the incident was in no way prejudicial to Bradley receiving a fair hearing. On the contrary, his input was a necessary prerequisite in order to ensure that the full picture emerged at the hearing. This stance too I find acceptable. I would in any event add that even if Manser did harbour views as to what steps should be taken against Bradley, of which there is no direct evidence, this did not disqualify him on the ground of alleged partiality from participating in the disciplinary hearing, nor did it taint same. What transpired at the hearing was to be taken into account and there is insufficient basis, indeed no basis, to hold that Manser had closed his mind thereto prior to the hearing (cf. Baxter *Administrative Law* at 566–567). Moreover, the disciplinary committee comprised a number of other persons in addition to Manser and, as Manser states, the ultimate findings and recommendations, which were arrived at unanimously, were not his but those of the full disciplinary committee. The final aspect is that any allegation of partiality can only be invoked if prejudice is shown (cf. *Jockey Club of South Africa and others v Feldman* 1942 AD 340 at 359). *In casu*, save for reliance on one aspect which I have found was not established, namely an alleged wrongful reliance on an alleged breach of contract, and save for unelucidated denials of guilt in respect of unspecified portions of the conduct laid at Bradley's door, there is no attack on the findings of guilt or the substantive validity of the sanction applied. *Ergo*, there is no prejudice. The point sought to be taken was no more than a red herring.

It is next alleged by Phillips that the disciplinary hearing was not a fair one in that he was not aware of his rights. He mentions in this regard that he was not aware that the hearing was not taking place in accordance with the provisions of section 9 of the Act and that he was subsequently advised that, by reason of Manser's alleged lack of impartiality, he should not have participated in the hearing. This latter aspect has already been dealt with above and it need only be repeated that the allegedly perceived lack of impartiality on the part of Manser has not been shown to have any valid basis. Even if Phillips was at the time aware of what he states is the content of advice received by him subsequently, one has difficulty in seeing what rights he would have exercised. Certainly any application for the recusal of Manser from the hearing would have had no merit. The former aspect will be dealt with below. Suffice it at this stage to record that, as will be shown below, any contention that the disciplinary committee was not entitled to conduct the hearing, would similarly not have had any merit. Phillips does not indicate whether there were any other rights of his of which he was unaware and what the consequences of such unawareness were. Should it be the contention that he was not aware of the purpose of the inquiry or that Bradley was in jeopardy of a finding that a recommendation be made that he be suspended from attending the school – and some argument along these lines was addressed to me – then I consider that, as Mr *Rorke* argued, such a contention would be met by stating that, having regard to the antecedent correspondence, only the most naive person would have been unaware of the purpose of the inquiry and the possible sanctions. It is otherwise clear from the evidence that the hearing was in all respects a proper and fair one. Certainly Phillips has not sought to contend otherwise on any other bases than those set out above.

The next issue is whether, on the premise that the disciplinary committee did itself make the decision as envisaged by section 9(1)(*b*) to suspend Bradley pending the signification by the head of the department of his decision on the

expulsion of Bradley, that decision was a nullity. As intimated earlier, the submission was in short that in terms of the section only the governing body was competent to make that decision. A delegation of that competence was not permissible. I am unable to agree. Section 30 of the Act provides in terms that the governing body may appoint committees. What else are the committees to do if not perform functions of the governing body itself? I hold therefore that the appointment by the governing body of a disciplinary committee entailed a permissible delegation by the former to the latter of the former's disciplinary functions. *En passant* I would note that the code of conduct guidelines published by the Minister provide for a disciplinary committee of a governing body to undertake disciplinary hearings and arrive at a decision which would be that of the governing body.

However, I am persuaded on the evidence that in fact the disciplinary committee did not make the decision envisaged by section 9(1)(*b*). In some of the documentation there is some loose language that may be interpreted as indicating that the disciplinary committee did make that decision. That language must, however, be seen in the context of all the evidence which shows clearly that all that the disciplinary committee did was to make certain findings and resolve to make a recommendation to the governing body. Phillips himself states that the disciplinary committee's suspension of Bradley, a factually incorrect statement, was pending a recommendation to the governing body. Indeed, had the position been otherwise, it would have been inexplicable that a meeting of the governing body was convened to consider the matter and reach its own decision thereon.

The remaining question concerns the validity of the decision made by the governing body that Bradley be suspended pending the decision of the head of department on his expulsion. Insofar as Phillips may also here be relying on the alleged impropriety of Manser being a party to the deliberations of the governing body, the remarks made earlier apply *mutatis mutandis*. What was in terms relied upon was the contention that the governing body had in fact not itself held any hearing at all before reaching its decision; all that had occurred was that the minutes of the hearing held by the disciplinary committee were placed before it. The facts accordingly require to be analysed. Before doing so, however, I should advert to an argument raised by Mr *Rorke*. It was to the effect that, because in the preamble to section 9, the words "after a fair hearing" were both preceded and followed by a comma, the interpretation was that it was not necessary that the governing body itself hold the required hearing, and provided that a fair hearing was held by whichever body, the prescription of the section would have been complied with. I am not persuaded that the submission is a sound one. That is not to say, however, that it is essential that the hearing be held by the governing body in the sense of itself having, *inter alia*, to afford the learner and those representing him an opportunity of being heard and duly to consider any representations made. However, more about this aspect later. I consider that a disciplinary committee, constituted in terms of section 30, could legitimately undertake the hearing and that the governing body may thereafter act on what occurred at the hearing and reach its decision in the light thereof. Mr *Scott*, however, contended that even on that premise the decision of the governing body was vitiated for want of full information being placed before the governing body. He pointed to the fact that the minutes of the meeting of the governing body, annexure "PGM2", merely reflected that Manser had favoured the governing body, incorrectly referred to in the minutes as the

committee, with a summary of the events leading up to the proposal that Bradley be expelled from the school. Likening the governing body to the High Court hearing an appeal from the Magistrate's Court, he contended that a mere summary of the preceding events was insufficient. The governing body ought to have been placed in possession of all the facts; otherwise, so it was contended, the governing body could not have made an informed decision, one made on the basis of all the considerations that had to be weighed. However, Manser states initially that "ultimately the full governing body at an extraordinary meeting considered all the evidence, the representations by the applicant and those representing him, as well as the recommendations of the disciplinary committee". Later Manser added the following, in paragraph 24.1:

> "I was part of the Governing Body that deliberated for a lengthy period of time on the evening of 2 June 1998 regarding what steps, if any, should be taken against the Applicant. I confirm that the Governing Body unanimously, after an honest and careful consideration of all the available evidence, recommendations by the disciplinary committee and representations made by and on behalf of the Applicant, including representations by his then attorney, Mr Dietrich, decided to recommend to the Head of Department that the Applicant be expelled from school. The Governing Body viewed the Applicant's conduct in a very serious light and also had to consider the deleterious effects of his conduct on the hundreds of other learners at the school, as well as the general ethos and maintenance of discipline at the school."

And in paragraph 32.3:

> "As indicated above, the Governing Body spent considerable time considering the correspondence, evidence presented and consequences of the hearing before confirming the decision of the committee."

Phillips' replication thereto is along the lines of counsel's subsequent argument, namely that according to the minutes, a summary of the relevant events was merely placed before the governing body. I do not consider, however, that the minutes, which are no more than that, constitute sufficient ground to go behind Manser's clear statements under oath. I am not persuaded that it has been established that the governing body, seven of the members of which were members of the disciplinary committee, did not have before it for consideration all the material facts to enable it to reach a proper and valid decision. This is borne out by the contents of the letter dated 3 June 1998, annexure "RP8", addressed by McLaggan to Phillips' then attorney. A paragraph therein reads as follows:

> "The Governing Body of Alexander Road High School met last night at a special meeting to consider and review the findings and recommendations of the disciplinary committee into Bradley's conduct of the recent past. After careful and sympathetic consideration of all the relevant documentation and representations made on his behalf it was the unanimous decision of the Governing Body ..."

And then followed the details of the decisions arrived at by the governing body. I am also persuaded, on a conspectus of all the evidence, that the governing body did properly consider all of what was before it.

Although this aspect was not raised in argument, I will briefly refer to the fact that the governing body met without Bradley being represented thereat. In the circumstances of this case I do not consider that that feature rendered the

proceedings unfair. The preceding hearing by the disciplinary committee had been a fair and proper one and Bradley, together with Phillips, Mrs Adams and Mrs Peacock, had been afforded a full opportunity to make the representations they wished to. They utilised that opportunity. Thereafter Manser, per the letter of 28 May 1998, advised Phillips in comprehensive detail of the motivation and reasoning of the disciplinary committee in arriving at its decision in the matter. Phillips was advised not only at the conclusion of the disciplinary hearing but also in the letter, that the matter was being referred to the governing body for decision. The letter further intimated that if Phillips wished to discuss the matter with McLaggan, the chairman of the governing body, he, Manser, would make the necessary arrangements for such a meeting. The letter from Phillips' then attorney, dated 1 June 1998, annexure "RP7", reflects that Phillips was aware that the governing body would be meeting on the following day. The attorney would surely have advised Phillips to attend had the latter indicated any desire to do so. Instead, the attorney intimated that approaches would be made to the relevant education authorities with representations as to why, on the basis of grounds stated in the letter, details of which do not require to be set out, no steps should be taken towards the expulsion of Bradley.

In all the circumstances I am persuaded that the principles of natural justice were complied with.

An alternative argument invoked by Mr *Scott* was that in view of the period that had elapsed since the governing body reached its decision without thereafter a decision being forthcoming from the head of department, which period, it was contended, was unreasonable, it was proper for an order to be issued that Bradley be permitted to return to the school. When I queried whether such a ground was embraced in the papers, Mr *Scott* referred me to paragraph 46 of Phillips' founding affidavit. It reads in part as follows:

> "In view of the fact that my son is at present not attending school and it is uncertain when the Head of Department will arrive at a decision, I submit that this matter is urgent and requires the immediate attention of this Honourable Court. At the very least I would submit that my son should be permitted to return to the Alexander Road High School until the Head of Department has reached a decision or this Honourable Court has made a finding with regard to the correctness or otherwise of the procedures followed by the first and second respondents herein."

The reference to a finding by this Court on the procedures followed clearly referred to the interim relief sought when the application was filed. It is possibly too accommodating an approach to interpret the paragraph as sufficiently laying a basis for counsel's alternative argument, but for present purposes I will accept that that is the case. I am, however, unable to uphold the argument. The governing body did what was required of it in terms of the Act. It had arrived at its decision in a proper and fair manner. Of importance is the further fact, not disputed in these proceedings save for unelucidated denials of unspecified portions of the conduct attributed to Bradley, that the decision to suspend Bradley from attending the school was based on objectively sound substantive grounds. Thereafter the matter was properly referred by the governing body to the head of department. The ball, so to speak, was thereafter in the court of the head of department. If it was considered that the delay in the latter reaching a decision was unacceptable, that matter should have been taken up with him, not with the school which had reached its decision properly and on good grounds.

As indicated earlier, Phillips' attorney had intimated that representations were to be made to the education authorities. If it became necessary, Phillips could have threatened the head of department with, and launched, application proceedings for relief in the form of a mandamus that the head of department make his decision or, possibly, failing which, an order declaring that the head of department must be deemed to have decided that Bradley was not to be expelled. The fact that the code of conduct guidelines published by the Minister on 15 May 1998 contain a provision that a governing body may suspend a learner for a reasonable period not exceeding one week pending the decision of the head of department is of no assistance to Bradley. Those guidelines have not been adopted by the governing body. I would express the hope, however, that the head of department will now give immediate attention to this matter.

One final aspect requires short discussion. It is the contention that Bradley's constitutional right to a basic education has been infringed. It may be noted that in terms of the Constitution, basic education means schooling up to the age of 15 years or Grade 9, neither of which criteria is present in the present case. Be that as it may, the issue may be disposed of thus. Bradley has not been unlawfully or unfairly treated and no question of an infringement of his constitutional rights arises.

In the light of the decision at which I have arrived, it is unnecessary to consider whether in any event the costs of the postponement on 7 August 1998 ought to be paid by the applicant. An order that they be costs in the cause will have the same effect.

In the result, the following *order* will issue:

1. The rule *nisi* is discharged and the application is *dismissed* with costs, such costs to include the costs of the postponements on 7 August 1998, 3 September 1998 and 10 September 1998.
2. There will be no order for costs in respect of the application to strike out.

For the applicant:
SC Rorke instructed by *Rushmere Noach Incorporated*, Port Elizabeth

For the respondents:
PWA Scott instructed by *Robert J Martindale*, Port Elizabeth

Serfontein and another v Spoornet

SOUTH EASTERN CAPE LOCAL DIVISION
JENNETT J

Date of Judgment: 18 NOVEMBER 1998 Case Number: 527/96

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Delict – Culpa – Duty of care – Railway truck parked under live electricity line – Plaintiff climbing onto roof of truck and sustaining injuries as a result of electric shock – Defendant had a duty of care to provide warning signs of the danger of live electricity wire above the truck.