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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: BHISHO

CASE NO : 663/09

Heard on : 12/10/10

Delivered on : 02/11/10

In the matter between:

G[…] R[…] P[…] S[…] **Applicant**

and

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE **First Respondent**

THE HEAD OF DEPARTMENT,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE **Second Respondent**

C[…] D[…] **Third Respondent**

BONGIWE DALASILE **Fourth Respondent**

MQABUKI DALASILE **Fifth Respondent**

JUDGMENT ON COSTS

NHLANGULELA J:

[1] On 15 October 2009 the applicant brought this application seeking an order, *inter alia,* reviewing the decision of the second respondent not to expel the third respondent from the applicant school. At the time the third respondent was still a registered learner at the applicant school for the 2009 academic year. The third respondent did not renew his registration for the 2010 academic year. As a result both *Mr Clark* and *Mr Swartbooi*, counsel who appeared on behalf of the applicant and respondents respectively, conceded that no reason will be served by a judgment on the *merits* of the matter as any order thereon would be *brutum fulmen.*

[2] On the aforegoing, the question of costs is the only issue that must be decided. To that end, as correctly submitted by *Mr Clark,* the *merits* of the matter should be revisited so that it may be determined if, as submitted by *Mr Swartbooi*, an order that each party pay its own costs is justified. For the reasons that follow, I am of the view that denying costs to the applicant would be unjust. The necessary corollary to that view is that an order that each party pay its own costs would be unduly punitive to the applicant and beneficial to the respondents. The voluntary withdrawal of the third respondent from the school cannot be construed as a victory for the respondents. Implicit in such withdrawal was a realization, based on the facts of the matter, that the third respondent would not be entitled to be admitted in the 2010 academic year.

[3] The attack on the decision of the HoD was based on various grounds which are enumerated in section 6 of the Promotion Of Administrative Justice Act, Act No. 3 of 2000 (PAJA) and which, cumulatively, translate into a broad administrative law ground that the decision of the HoD was not reasonable within the meaning of s 6 (2)(h) of PAJA. In essence, the Court is being asked to decide if the decision of the HoD would have passed muster in terms of s 6(2)(h), which reads:

> "A court or tribunal has the power to judicially review an administrative action if —
>
> …

> (h) the exercise of power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."

[4] An examination of the factual scenario of the matter is necessary. During November 2008 the Disciplinary Committee of the applicant school charged the third respondent for gross/serious misconduct relating to behavioral infractions spanning approximately twelve months and for which the learner had received warnings that he would be expelled from the school unless he changed his behavior. He was summoned to appear before the Disciplinary Committee on 04 December 2008 to answer to the charge. The particulars of the charge were that the third respondent had regularly assaulted children (boys and girls) while in school uniform in class and after school; sexually molested the children in class and after school while in school uniform; threatened boys and girls if they would expose his misbehavior and used bad language to learners and teachers. Accordingly, the third respondent, in the presence of his parents, appeared before the Disciplinary Committee. At the conclusion of the hearing the third respondent was found guilty of gross/serious misconduct and sentenced to expulsion from the school. On 08 December 2008 the SGB of the applicant duly forwarded a recommendation of expulsion of the third respondent to the

department for confirmation by the HoD. The wording of the recommendation is the following: “Recommended (*sic)* learner be removed from GRPS and moved to another school. Parents reluctant to accept responsibility.” However, the District Director of the East London Education District informed the applicant that the expulsion of the third respondent was not acceptable. It did so by a letter dated 19 February 2009, which reads:

> “Kindly be advised that the decision of the school had not been upheld by the Superintendent-General and that C[…] D[…] should be re-instated to G[…] R[…] P[…] S[…] with immediate effect.”

On 10 March 2009 the HoD addressed a letter to the applicant school as follows:

> “Kindly be advised that the decision to expel the above learner from G[…] R[…] P[…] School is unlawful and a violation of both South African Constitution and South African Schools Act.”

Pursuant to these letters the applicant demanded reasons for the decision of the HoD. The HoD supplied no reasons; he being content only to indicate that the decision of the SGB was procedurally flawed and, therefore, a nullity.

[5] The stance adopted by the HoD was not satisfactory to the applicant. As a result the applicant approached this Court under Case No. 261/09 for an order reviewing and setting aside the decision of the HoD on the ground that it was unreasonable. On 08 September 2009 the matter under Case No. 261/09 served before Zilwa AJ. The learned judge granted the relief sought for failure to comply with the provisions of ss 9(1D), 9(8) or 9(9) of the Schools Act. A further order was made that the HoD must consider and deal with the recommendation of the SGB within 14 days.

[6] The provisions of ss 9(1D), 9(8) and 9(9) referred to in the judgment of Zilwa AJ read as follows"

> "**9. Suspension And Expulsion From Public Schools**
>
> …
>
> (1D) A Head of Department must consider the recommendation by the Governing Body referred to in sub-section (1C)(b) and must decide whether or not to expel a learner within 14 days of receiving such recommendation.
>
> …
>
> (8) If the Head of Department decides not to expel a learner as contemplated in sub-section 2, the Head of Department may, after consultation with

> the Governing Body, impose a suitable sanction on the learner.
>
> (9) If the Head of the Department decides not to impose a sanction on the learner, the Head of Department must refer the matter back to the Governing Body for an alternative sanction in terms of the code of conduct contemplated in Section 8, other than expulsion."

[7] In terms of a letter marked "KK" dated 25 September 2009, attached to the founding affidavit, the HoD gave reasons for its decision not to confirm the recommendation of the SGB. He did so for the first time since the recommendation of the SGB dated 08 December 2008. Briefly stated, the reasons given were that the expulsion would adversely affect the learner's positive response to psychological treatment; change of school will amount to passing the buck to the new school that is not in a better understanding of the learner; the department would provide necessary support measures, financial or otherwise, which the applicant school may require to assist the learner; the parents of the learner would play a great role in the counseling program which the child requires for behavior modification and the learner would benefit if the school were to change the conditions under which the learner received tuition from isolation in the laboratory back to a normal classroom environment where the learner would interact with other learners. The objection of the applicant to

these reasons is that they do not address the factual basis on which the recommendation was made, namely that the third respondent was a recidivist who had been found guilty of similar infractions in 2007, the third respondent refused to change his behavior despite assistance given by the school over the months leading to the second disciplinary enquiry in December 2008; the parents of the learner failed to co-operate with the Psychologist and the school in the implementation of counseling programmes which had been designed to help the learner, the counseling programmes had been terminated by the Psychologist due to failure to co-operate therewith by the parents of the learner, the department ignored the seriousness of the learner's behavior and the harm it was causing to other learners and teachers; and that the department showed bias towards the interest of the child at the expense of the competing interests of other learners, teachers and parents. The applicant felt that the department had abdicated its duty to provide counseling for the learner, his parents and teachers and to give guidance on how to deal with the learner in the event that all efforts on the part of the school to assist the learner failed. The validity of this objection is well illustrated by the HoD himself in paragraph 20.1 of his answering affidavit, where he said the following:

> "I am familiar with Annexure "K" annexed to the applicant's affidavit. I am not going to enter the fray as to whether the disciplinary enquiry was properly constituted or procedurally fair. We are now beyond this point. It is clear that the third respondent would be

assisted with psychological intervention in a normal environment with the applicant's school."

[8] It was contended on behalf of the applicant, correctly so, that the approach of the HoD shows indifference and a lack of appreciation of what the provisions of ss 9 (1D), 9(8) and 9(9) of the School Act enjoined him to do.

[9] In the circumstances I am of the view that a breach of the Schools Act by the HoD is established by the applicant. It was not open to the HoD to ignore the disciplinary process by taking an inordinately long time to respond to the recommendation, avoid effective consultations with the SGB on the decision he took not to expel the third respondent and refuse to impose a suitable sanction on the learner. The HoD was obliged to impose a suitable sanction or to remit the matter back to the SGB to impose an alternative sanction immediately upon rejecting the recommendation of the SGB. He failed to do so. For these reasons it cannot be said that the HoD complied with the provisions of s 9 of the Schools Act read with the Code of Conduct and the regulations framed in terms of s 8 of that Act. I would have set aside the decision of the HoD.

[10] *Mr Swartbooi* argued strenuously that the constitutional protection of children's best interest right and the right to education as encapsulated in ss 28(2) and 29 of the Constitution Act, Act No. 108 of 1996 ought to be applied in favour of the third respondent as these rights constitute over-arching

considerations in the decision whether or not to mulct the HoD in costs. It may well be so that in opposing the relief sought the HoD had good intentions of giving protection to the third respondent, a 13 years old child at the time. But the circumstances of this case very clearly called for the limitation of the rights of the third respondent in terms of ss 28 and 29 of the Constitution to the extent of the infractions for which he was found guilty. The HoD, as the public administrator, derived authority to do his business in terms of the Constitution and the law. In this regard the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC) at para. [85] said:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[11] Therefore, the submission by *Mr Swartbooi* that the applicant should pay its own costs of this application cannot be sustained. The first and second respondents should pay the costs. However, I am not amenable to ordering costs to be paid on the scale of attorney and client because a compelling case for punitive costs has not been made out on the papers. In an attempt to give protection to the constitutional rights of the learners in public school the administrators would be called upon to navigate dangerous curves as is the case here. In such a case the courts have to deal with issues of costs with circumspection and avoid being too ready to make punitive costs orders. It would be inappropriate to punish the HoD with a punitive cost order in a situation, such as the present, where his involvement in this application is not a malicious pursuit of selfish interest. I also take into account the fact that the HoD was authorized by law to reject the recommendation but, unfortunately, he misunderstood the manner in which such authority had to be exercised.

[12] In the result the following order shall issue:

> "**The first and second respondents be and are hereby ordered to pay costs of this application jointly and severally; the one paying and the other being absolved from liability."**

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv. S.C. Clark
Instructed by	:	Hutton & Cook KING WILLIAM'S TOWN (Ref: Mr G.C. Webb)
Counsel for the respondent	:	Adv. S. A.M. Swartbooi
Instructed by	:	The State Attorney c/o Shared Legal Services KING WILLIAM'S TOWN (Ref: Yako-652/09-P10)