



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 1816/2019

In the matter between:

THE SCHOOL GOVERNING BODY OF GREY COLLEGE

Applicant

and

**THE HEAD OF THE DEPARTMENT OF EDUCATION
FREE STATE PROVINCE**

1st Respondent

MEC FOR EDUCATION, FREE STATE

2nd Respondent

HEARD ON: 29 JULY 2019

CORAM: CHESIWE, J et MURRAY AJ

JUDGMENT BY: MURRAY AJ

DELIVERED ON: 19 SEPTEMBER 2019

- [1] This is an application by the Grey College School Governing Body (“the SGB”) to review and set aside the decision of the Head of the Department of Education in the Free State Province (“the HOD”) to withdraw the SGB’s *‘financial and related functions’* without prior notification and with immediate effect in terms of s 22(3) of the Schools Act, 84 of 1996 (the “Schools Act”).
- [2] The application was instituted on a semi-urgent basis on 18 April 2019, but the Court removed it from the roll on 26 April 2019 for lack of urgency. It then came before us on 29 July 2019. Adv G Engelbrecht, and with her Adv J Merabe, acted for the Applicant and Adv W R Mokhare SC appeared on behalf of the Respondents.
- [3] The application was based on the principle of legality, alternatively on s 6(2) of the Promotion of Administrative Justice Act No 3 of 2000 (“PAJA”). In its Founding Affidavit the SGB assailed the HOD’s decision as being contrary to the prescripts of administrative justice and the attributes/requirements of legality. Its implementation was called an abuse of power.
- [4] The SGB sought final relief, praying for the HOD’s decision to be declared unlawful and invalid and set aside. In the alternative, it asked for an interim order to interdict the HOD from implementing its decision, and to restore the normal performance and functions of the SGB pending the finalisation of the main review application.
- [5] Ms Engelbrecht argued, in essence, that although the SGB accepts that the HOD had the power in terms of s 22(3) to withdraw any of the SGB’s functions without prior communication in cases of urgency, subject to his giving reasons for his decision afterwards, such powers are only to be invoked in unusual, exceptional cases. In the SGB’s view, she submitted, in addition

to the absence of the ‘jurisdictional fact’ of urgency, there were no exceptional circumstances to justify the use of s 22(3) and accordingly there was no rational basis for the HOD’s decision. The HOD’s further non-compliance, she averred, lay in his failure to give reasons for his decision.

- [6] The HOD and the MEC opposed the application, disputing, first of all, its alleged urgency. The SGB set the application down again after its removal from the roll on 26 April 2019. The Respondents’ two further arguments were that the application for review was premature, firstly because it was instituted without the SGB first having exhausted all its internal remedies, without waiting for the MEC’s response to their appeal, and without waiting for the investigation into Grey Secondary’s financial affairs to be finalised, and secondly, because the HOD’s decision was not a final one which meant that it was not susceptible to review. All of these arguments were disputed by the SGB.
- [7] The SGB objected to the Opposing Affidavit’s being deposed to by Mr Bafana Cecil Ngwenya, the Acting Director: Legal Services of the Department of Education on behalf of the HOD and the MEC “with their knowledge and consent” in the absence of confirmatory affidavits from them. Ms Engelbrecht relied on **Arnaudov & others v Minister of Home Affairs & Another**¹ to aver that the Opposing Affidavit was not properly before Court since the HOD cannot simply delegate himself out of responsibility.
- [8] The circumstances in that case differ from this situation, however. In that case the deponent’s name did not appear in any of the correspondence or documents and the Court stated that the opposing affidavit was attested to by a person who did not even

¹ [2004] JOL 12901 (T)

allege that he had personal knowledge of or had any dealings with the applicant's representations. The Court, in the context of that case, stated that no-one else than the person who took the decision, could depose to the affidavit and that it could take cognisance of only those factors of which the deponent had personal knowledge.

- [9] That is not the situation in this matter. In the SGB's e-mail of 22 June 2018, Annexure "HB3" to the founding affidavit, the deponent, CB Ngwenya, is already copied. In the HOD's 11 April 2019 letter to announce the withdrawal of the SGB's financial functions, the SGB is requested to submit the representations to the Legal Department. Mr Ngwenya is the Acting Director thereof. In the Confirmatory Affidavit of Mr Maritz, the Registrar of Grey College financial division, he refers to the instructions which the Principal received from Adv Ngwenya that the operational management in relation to the finances of Grey College Secondary had to resume with immediate effect; the Principal's 16 April 2019 e-mail regarding the operational management is also addressed to Adv Ngwenya, and even the SGB's 12 April 2019 response to the HOD is copied to CB Ngwenya. In the Founding Affidavit, furthermore, Mr Ngwenya confirms that the facts attested to are within his personal knowledge.
- [10] And, significantly, furthermore, annexed to the Answering Affidavit, is Annexure "D", an internal report compiled by the Legal Services Department 'recommending the withdrawal of functions and a financial investigation by the Department's Internal Audit Committee to be conducted at Grey Secondary School which Mr Ngwenya himself signed. In the affidavit he stated that the HOD approved the report shortly thereafter on 11 April 2019.

- [11] It is therefore abundantly clear that Adv Ngwenya has personal knowledge of all the issues and has been personally involved in the dispute between the SGB and the Principal, as well as in the HOD's s 22(3) decision which was taken on his legal advice. The Applicant's reliance on the **Arnaudov**-decision to impugn Mr Ngwenya's authority to depose to the answering affidavit is therefore misplaced. In the circumstances there is also no reason to disregard the confirmatory affidavits which the HOD and the MEC later filed in response to the SGB's complaint.
- [12] The statutory framework within which the HOD and the school governing body need to function consists primarily of the Schools Act and the Constitution. The Constitutional Court in **Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another**² ("**Welkom (CC)**") stated that public schools are run by a partnership constituted of the state, parents of learners and members of the community. Each partner represents a particular set of relevant interests with corresponding rights and obligations, with the objective of "providing education services to learners".
- [13] The Court made it clear that the relationship and interactions, the checks and balances and accountability mechanisms, between the partners are closely regulated by the Schools Act. In **Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo**³ ("**Hoërskool Ermelo**") the Court summarised the nature of the statutory partnership as follows:

² (CCT 103/12) [2013] ZACC 25' 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013) at par [49]

³ [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at par [56]

“An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister of Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control of public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.”

[14] The Constitutional Court⁴ pointed out that sections 22 and 25 regulate situations where an HOD’s “supervisory authority manifests in the form of a direct intervention in a public school’s affairs”. As stated, s 22 thus “empowers an HOD, on reasonable grounds, to withdraw any function exercised by a school governing body, subject to certain procedural fairness requirements”. The Court added, furthermore, that “section 22 regulates the situation where a school governing body has purported to exercise its functions, but has done so in a manner warranting intervention, whereas section 25 obtains where a school governing body has failed to perform its functions, in whole or in part.”

[15] Section 22(1)⁵ of the Schools Act therefore authorises the HOD to withdraw SGB functions. The SGB contends that the HOD should

⁴ Welkom (CC), *supra*, at par [47].

⁵ “S 22 **Withdrawal of functions from governing bodies.** -

(1) The *Head of Department* may, on reasonable grounds, withdraw a function of a *governing body*;

(2) The *Head of Department* may not take action under subsection (1) unless he or she has –

have relied on s 22 (2) which determines that the HOD may withdraw SGB functions only on reasonable grounds, after having notified the SGB of such intention and the reasons therefore, and after having considered representations as to why he should not withdraw the SGB's functions.

[16] The Constitutional Court⁶, however, with reference to s 22(3) held that:

“In the event of an urgent need to withdraw a school governing body's functions, compliance with the procedural fairness requirements may be delayed until after the withdrawal has occurred, provided that the governing body is given sufficient opportunity at a later stage to make the appropriate representations to the relevant HOD.”

[17] As is evident from S 22(3), in cases of urgency the HOD is indeed allowed to only furnish reasons after the SGB's functions had already been withdrawn. The condition to do so, according to the

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- (a) informed the *governing body* of his or her intention so to act and the reasons therefore;
 - (b) granted the *governing body* a reasonable opportunity to make representations to him or her relating to such intention; and
 - (c) given due consideration to any such representations received.
- (3) In cases of urgency, the *Head of Department* may act in terms of subsection (1) without prior communication to such *governing body*, if the *Head of Department* thereafter –
- (a) furnishes the *governing body* with reasons for his or her actions;
 - (b) gives the *governing body* a reasonable opportunity to make representations relating to such actions; and
 - (c) duly considers any such representations received.
- (4) The *Head of Department* may for sufficient reasons reverse or suspend his or her action in terms of subsection (3);
- (5) Any person aggrieved by a decision of the *Head of Department* in terms of this section may appeal against the decision to the *Member of the Executive Council*.”

⁶ WELKOM (CC), *supra*, at par [47]

Constitutional Court⁷ is: “that the governing body [be] given sufficient opportunity at a later stage to make the appropriate representations to the relevant HOD” (*emphasis added*). After due consideration of the said representations, and should the HOD have found sufficient reasons to do so, he may then in terms of s 22(4) reverse or suspend the action which he took in terms of s 22(3).

- [18] On that basis, the Respondents contended, the HOD’s s 22(3) decision is not a final one, since it is susceptible to reversal or suspension upon good reasons being supplied. As Mr Mokhare submitted, it is then in the HOD’s discretion to decide, after due consideration of the representations made by the SGB and at a later stage in the process, whether sufficient reasons had been provided to justify a reversal or suspension of his decision to withdraw some or all of the SGB’s functions, or whether to confirm the withdrawal. At the time of the hearing, neither of these options has been implemented yet.
- [19] The Act, furthermore, in s 22(5) affords any person who is dissatisfied with any decision taken by the HOD in terms of s 22(3), the opportunity to appeal against that decision to the MEC. The Respondents contend that the SGB not only failed to make the representations which the HOD invited them to make, but also paid mere lip-service to the appeal-remedy that was statutorily at their disposal.
- [20] The Constitutional Court⁸ made it clear, furthermore, that “An HOD’s powers of withdrawal under s 22 are broad, and extend to “any function” conferred on a school governing body” and that

⁷ WELKOM (CC), *supra*, op cit.

⁸ WELKOM (CC), *supra*, at par [47]

once an HOD “withdraws a particular function, that function vests in his or her office and he or she is duty-bound to exercise it in furtherance of a specified goal permitted by the Schools Act”⁹.

- [21] It is therefore clear that the HOD was empowered in terms of the Schools Act to intervene in the functioning of the SGB if he considered it necessary to do so, and to do so in terms of s 22(3) if he considered the need for such intervention to be urgent. The Act does not require exceptional or extraordinary circumstances for the application of s 22(3).
- [22] The SGB admits that, as an organ of state, in governing the affairs of Grey College it may only perform the functions and obligations and exercise the rights conferred on it by the Schools Act and that it may only do so subject to the relevant provisions of the said Act.¹⁰ That its right to administer the school fund is not unfettered, is clear from S 37(1) which determines that the SGB must administer the school fund ‘in accordance with directions issued by the Head of Department’.
- [23] S 37(6) clearly determines, furthermore, that the school funds of a public school like Grey College must [emphasis added] be used only for *educational* purposes.¹¹

⁹ “S 25 Failure by governing body to perform functions-

- (1) If the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months.
- (2) The Head of Department may extend the period referred to in subsection (1), by further periods not exceeding three months, but the total period may not exceed one year.
- (3) If a governing body has ceased to perform its functions, the Head of Department must ensure that a governing body is elected in terms of the Act within a year after the appointment of persons contemplated in subsection (3).”

¹⁰ S 16 (1) of the Schools Act, 84 of 1996.

¹¹ S 37(6) “The *school* fund, all proceeds thereof and any other assets of the *public school* must be used only for-

- (a) educational purposes, at or in connection with such school;
- (b) educational purposes, at or in connection with another public school, by agreement with such other

- [24] The Schools Act does not authorise the SGB to use school or reserve funds for legal fees. It is only in the *Norms and Standards for School Funding*,¹² which has not been recognised as legislation yet, that it is mentioned that services to be paid for by the SGB under s 21(1)(d) may include legal fees. Logic dictates, however, in view of the prescripts of s 37, and especially of s 37(6), that the use of such money for legal fees would only pertain to matters where legal services are retained to serve an educational purpose, such as where the SGB needs to litigate or obtain legal advice on behalf of a learner or educator or the school. It is inconceivable that the legal services which the governing body utilised to defend itself against the school principal's application and for which it paid with funds belonging to Grey Secondary can rationally be regarded as having been used 'for educational purposes'.
- [25] The SGB admits that it stands in a position of trust towards Grey College. All the more reason then that it should be absolutely open, honest and trustworthy not only in its dealings with the money belonging to the school, but also in its dealings with the other partners involved in the so-called 'golden thread' running through the Schools Act. The provisions of which Act were held to be 'carefully crafted to strike a balance between the duties of the various partners to ensure an effective education system'.¹³
- [26] This current litigation needs to be viewed in its proper context since the history of this matter undoubtedly contributed to the

public school and with the consent of the Head of Department;
 (c) the performance of the functions of the *governing body*; or
 (d) another educational purpose agreed between the *governing body* and the *Head of Department*."

¹² Government Notice 869 (GG 2917) of 31 August 2006 as amended; as promulgated in terms of s 35 of the SASA, and regarding which it has not been declared to be legislation.

¹³ HOD, Department of Education, Free State Province, v Welkom High School and Others 2014 (2) SA 228 (CC) at par [36]

HOD's decision. The factual background to this application, in short, is that the SGB itself, as governing body of both Grey College Secondary School ("Grey Secondary") and Grey College Primary School ("Grey Primary"), in 2018 unilaterally recalled all delegated school governing body powers from Mr Scheepers, the principal of Grey Secondary ("the Principal"), and appointed the principal of Grey Primary as interim school manager to manage all Grey Secondary school activities with the exception of teaching and learning on behalf of the SGB.

- [27] The Principal instituted an urgent application ("the Scheepers application") to review and set aside the decision of the SGB. The SGB not only opposed the application but also filed a conditional counter-application, and filed a striking-out application against the intervening party, the SAOU,¹⁴ as well.
- [28] Both the Scheepers application and the requested SAOU-relief was granted. This Court, by way of Musi AJP (as he then was) and Van Zyl J, on 6 September 2018 dismissed the SGB's counter-application and ordered it to pay the costs of both Mr Scheepers and the SAOU. The SGB applied for leave to appeal, which application was dismissed, again with costs orders in favour of the Principal and the SAOU. The SGB then applied to the SCA, which granted leave. That appeal was yet to be heard when the SGB brought this review application.
- [29] On 27 February 2019 the SAOU informed the HOD that Grey Secondary's Financial Statement for December 2018 reflected two SGB authorised payments of R1 585 200.00 and R 163 490.00, respectively, for 'Legal Costs'. The SGB had authorised the said payments without their having been discussed with or authorised

¹⁴ The Suid-Afrikaanse Onderwysersunie, a union with 34,000 members, including the Principal.

by the Principal as Grey Secondary's executive and accounting officer. The SAOU requested the HOD to launch an urgent independent forensic investigation into the school's finances and the SGB's possible mismanagement of the Grey school funds by using the latter to fund its own litigation. The SAOU pointed out that neither the continued feud between the SGB and the Principal nor the use of school funds to further litigation was in the interest of the school or its learners.

- [30] The Principal on 20 March 2019 in accordance with s 16A(2)(k)¹⁵ of the Act formally reported to the HOD and to the SGB the '*maladministration and mismanagement of a financial matter*', namely that the R 1 585 200.00 which was paid to the SGB's attorneys was taken from Grey Secondary's school fund while the Scheepers application, in which both the SGB and the principal of the primary school were respondents, involved both schools. He averred that on 8 October 2018 the Chairperson of the SGB assured '*hundreds of concerned parents*' that the legal costs would

¹⁵ S16A provides for the principal to *inter alia*:

"(2)(h) assist the *governing body* with the management of the *school's* funds, which assistance must include –

the provision of information relating to any conditions imposed or directions issued by the *Minister*, the *Member of the Executive Council* or the *Head of Department* in respect of all financial matters of the *school* contemplated in Chapter 4; and

the giving of advice to the *governing body* on the financial implications of decisions relating to the financial matters of the *school*;

- (i) take all reasonable steps to prevent any financial maladministration or mismanagement by any staff member or by the *governing body* of the *school*;
- (j) be a member of a finance committee or delegation of the *governing body* in order to manage any matter that has financial implications for the *school*;
- (k) report any maladministration or mismanagement of financial matters to the *governing body* and to the *Head of Department*."

be paid from '*reserved school funds*', rather than from Grey Secondary's school funds.

[31] The Principal in his report to the HOD stated, furthermore, that:

“8. The High Court made four cost orders against the SGB (two cost orders in my favour and two cost orders in favour of the SAOU) in the current litigation, which I anticipate will have to be honoured in the near future by the SGB. For this reason, it is important that the HOD intervenes as a matter of urgency, in order to prevent similar maladministration and mismanagement.

9. I believe that the most transparent and fair process to be followed is that you have to be consulted before any further payments are to be made and approve the payments and that you deal with the payment already released in the way you believe to be appropriate.”

[32] It is therefore clear from the Principal's s 16A(2)(k) report, which was delivered to the SGB on 20 March 2019, that the HOD was indeed requested to act with urgency regarding this matter in view of the four costs orders against the SGB which still needed to be paid and the apprehension that such payments might also be made out of Grey Secondary's school funds.

[33] Of particular concern to the HOD, according to the Opposing Affidavit, was the fact that he had not been advised of either the payment resolutions or the payments made by the SGB. Even more so since that happened while the SGB was aware that the Scheepers matter, concerning which the SGB itself had held parents' meetings and had pronounced the HOD to be a necessary party in that litigation, was “a controversial one”.

[34] Acting on the advice of the Legal Services Department, the HOD on 11 April 2019 by letter informed the SGB of its decision in terms of s 22(3) of the Schools Act 84 of 1996 (“the Act”) to withdraw the financial and related functions of the SGB with immediate effect, pending an investigation into the financial administration of Grey College Secondary by the Department’s Internal Audit Committee. Paragraph 3 of the letter clearly stated:

“The SGB is afforded an opportunity to make representations, if it so elect, to the HOD as to why the action should be reversed or suspended.”¹⁶

[35] On the same day, 11 April 2019, the HOD appointed Mr Mokoena, the Director: Internal Audit of the FS Department of Education, to investigate Grey College Secondary, as follows:

“You are hereby appointed for the above as a matter of urgency. This is to collect and substantiate to [sic] the allegations of mismanagement of school funds and irregularities in the conduct of the Chairperson/SGB whose functions and duties had been withdrawn with immediate effect until your investigations are complete or the decision is reversed or suspended.”

As at the date of the hearing of this application, that investigation was still ongoing.

[36] It cannot be disputed, therefore, that the HOD in its 11 April 2019 letter explicitly invited the SGB to make representations as to why the said decision should be reversed or suspended. However, instead of accepting the invitation, the SGB, via its attorney, on

¹⁶ Paragraph 4 of the letter provided that written representations should be forwarded to “Legal and Auxiliary Services” of the Department.

Friday 12 April 2019 informed the HOD, *inter alia*, that his “*purported withdrawal of functions are unlawful and groundless*”.

The SGB letter stated, furthermore:

“You do not expressly allege that the matter is urgent and that you have grounds to act on an urgent basis as provided for in sec 22(3) Schools Act, yet you dare withdraw an important function such as the financial function outright.”

- [37] Besides containing several further accusations, such as that the HOD’s ‘*conduct ... tend [sic] to go beyond irrationality and was intended to embarrass, on the face of it was mala fide*’, annexed to the letter was an extract from the SGB’s 22 June 2018 letter to the HOD¹⁷ in which it had accused the HOD of ‘*irresponsibly*’ undermining the SGB’s activities by instructing the Principal to stop attending SGB meetings until further notice, and of the HOD’s ‘*unconditional loyalty to Mr Scheepers [which] in this instance comes at the expense of education at the school*’.
- [38] The SGB afforded the HOD 36 hours to withdraw the alleged ‘*unlawful, irrational and unconstitutional*’ decision conveyed in his 11 April 2019 letter, failing which they would bring an urgent application to review and set aside ‘*the purported withdrawal of functions, with an appropriate costs order*’.
- [39] The SGB was not satisfied with the response on behalf of the HOD on 15 April 2019, in which it was reminded that the HOD was awaiting the SGB’s representation, if any. On 16 April 2019 it then appealed to the MEC in terms of s 22(5) of the Act, complaining that there was no reason why the HOD could not have acted in terms of s 22(2) instead of s 22(3) and why it could not have given

¹⁷ Annexed to the Founding Affidavit as Annexure “HB3”

the SGB an opportunity to make representations before taking his decision. The SGB set out some of the financial management functions it has to attend to, then afforded the MEC one day to withdraw the HOD's letter of 11 April 2019.

- [40] When the MEC did not withdraw the HOD's decision, the SGB on 18 April 2019¹⁸ filed its application. In its Founding Affidavit it averred that "although the opportunity to make submissions exists, there is simply no time to entertain this option whilst the school is not properly administered from a finance point of view." The SGB averred, furthermore, that "In any event the withdrawal on an urgent basis constitutes unlawful conduct which must be set aside on the principle of legality alone."
- [41] In its rush to file the application, the SGB simply ignored the interim measures which the HOD had already instituted on 16 April 2019 to address the problems stipulated by the SGB in its and the MEC's letters to ensure the continued functioning and management of the financial affairs of Grey Secondary. By that time the Principal on behalf of the HOD had already specified the arrangements for the interim financial management of the school.
- [42] As interim measures pending an investigation into the financial management of the school, the HOD had mandated two senior Departmental officials, Messrs Moloi and Cicilie, to assist the principals of the primary and secondary schools with the operational and management challenges that might stem from the withdrawal of the SGB's financial functions. The Principal also on behalf of the HOD on 16 April 2019 instructed Mr Maritz, the Registrar and head of Grey Secondary's financial department, but

¹⁸ Over the Easter Weekend with its two public holidays

an SGB appointment, to resume the operational management of the financial affairs of the school with immediate effect.

- [43] From the said Registrar's undated Confirmatory Affidavit it appears that the continued operational management of the schools entails the continued payment of all the daily budgeted payments, and the pre-approval by the HOD of all unbudgeted payments or payments in excess of R10 000.00. Mr Maritz averred, however, that he had been advised that, because of the withdrawal of the SGB's financial functions, the SGB's financial policy as a 'related function' as well as all its decisions and delegations had also been undone. By implication, he averred, his financial functions in the employ of the SGB as well as his powers as Registrar, for instance to make and receive payments, to withdraw money from the school account and to have access to internet banking, were also terminated. In response to these allegations, the HOD on 23 April 2019 in writing confirmed his instructions to Mr Maritz to continue as before.
- [44] On 23 April 2019 the Internal Audit Directorate in writing informed the SGB of its intended investigation. The intended meeting to allow the SGB to air its views was confirmed in the Directorate's letter. The affidavit filed by the HOD's legal team confirmed the institution of the interim measures to facilitate the financial decisions and management of the school pending the outcome of the investigation. The affidavit clearly stated that the withdrawal of functions was 'not a final step' and that the SGB would have a full opportunity to present its version to the Internal Audit Committee in a meeting scheduled for the second week in May. In the affidavit it was made clear, furthermore, that the '*real conflict in the matter*' (namely the acrimonious public dispute between the SGB and the Principal) should be '*expediently resolved*'. Evidently then, the

withdrawal should be regarded in the context of the said public dispute.

- [45] Without waiting for the MEC's response to its appeal, and ignoring the HOD's interim measures, the SGB persisted with its application on 26 April 2019, alleging that its statutorily conferred functions had been withdrawn unlawfully and insisting that the *status quo ante* be restored forthwith. The SGB claimed final relief, alternatively interim restoration of its functions pending the outcome of the investigation. On 26 April 2019 the Court removed the application from the roll for lack of urgency and by 29 July 2019 its alleged urgency was academic.
- [46] The SGB alleges that it did not know which 'related' functions were withdrawn, and that, therefore, such withdrawal was unlawful. Apart from the Principal's letter in which the continued functions were stipulated, in the Opposing Affidavit it is explicitly stated that the HOD had instructed that the principals of Grey Secondary and Grey Primary must oversee their respective schools' financial functions; that the SGB has in the interim been precluded from making *ad hoc* financial decisions regarding expenditures that have not been budgeted for; and that the budgeted expenditures that had already been approved as at date of the suspension of the SGB's financial functions were to remain intact and could proceed.
- [47] There is no evidence in the SGB's founding papers of real financial prejudice that the school has suffered as a result of the HOD's decision, only averments of various financial tasks which the governing body potentially had to perform and/or approve payments for. But, in the Opposing Affidavit, it was clearly stated

that there were none of those that could not and would not be properly dealt with.

- [48] The SGB averred that the HOD was biased, or reasonably suspected of bias, when he took the decision to ‘*exercise the extraordinary step*’ of withdrawing the financial and related functions of the SGB without first investigating and/or providing the SGB an opportunity to make submissions when he himself had taken some time to make the decision.¹⁹ Apart from stating that the HOD’s use of s 22(3), which they called the ‘exception to the already exceptional procedure’ was unlawful and irrational, the SGB alleged that the HOD did not give reasons for his conduct. This despite the explanation that the withdrawal was urgent since the school was faced with continued litigation by the SGB.
- [49] It also alleged *inter alia* that the HOD’s action was procedurally unfair since there existed no urgent reason for the withdrawal of SGB powers in the absence of submissions, and since the HOD ‘patently’ had knowledge of the state of affairs ‘for a long period’ prior to taking the decision; that s 22(3) of the Act is reserved for unusual, extraordinary or exceptional circumstances; that the HOD took into account irrelevant considerations, such as the Principal’s non-attendance of SGB meetings on the HOD’s own instructions, and/or that the HOD refrained from taking into account relevant considerations such as the effect of his decision on the school. The SGB averred that the HOD’s exercise of his statutory power in terms of s 22(3) was so unreasonable that no reasonable person would have exercised that power. It also alleged that the HOD took the decision in bad faith and should have given the SGB an

¹⁹ On the Applicant’s version 15 business days. From the Opposing Affidavit, however, it is clear that the recommendation of the Legal Services Department was only signed on 4 April 2019 and the HOD’s decision issued within 5 business days thereafter.

opportunity to respond to the allegations and should not have been *‘moved to action on the say-so of the principal that is publicly known to be engaged in fractious legal disputes with the SGB’*.

[50] Based on all of the above, the SGB alleged that it was entitled to have the decision reviewed under the various provisions of s 6 of PAJA. In argument, however, the reliance on PAJA was largely abandoned, with Ms Engelbrecht concentrating on the alleged infringements upon the principle of legality. Mr Mokhare averred that this was because the HOD’s oversight function was executive in nature, not administrative, and therefore not reviewable under PAJA.

[51] In **Welkom (CC)**²⁰ the Constitutional Court indeed stated that: “it cannot be denied that the Free State HOD exercises executive control” over the two public schools relevant to that case. It has to be kept in mind that the application in that case succeeded because the HOD intervened in policy making without exercising his powers of intervention in terms of s 22 and without withdrawing governing body functions before appointing a committee to take over the governing body’s functions and enforcing his own policy decision. In those circumstances his action was described as usurping the policy-making power of the governing body. The Court made it clear that the Schools Act does not allow him to do so without having gone through a process in terms of s 22 or s 25, or without approaching a court for appropriate relief.

[52] The circumstances of this application are distinguishable. However, here the HOD did exercise his powers in terms of s 22(3), an option provided to him by the Schools Act. From the correspondence annexed to the Opposing Affidavit it is clear that

²⁰ *Supra*, at par [79]

he was requested and indeed advised to act urgently. On the SGB's own version there was a breakdown of trust between it and the Principal. On its own version the HOD requested that the dispute be kept out of the public eye. If the HOD's action is considered in the context of the history and nature of this public dispute between the SGB and the Principal, and in view of the damage it has already done to the school's reputation, I cannot find the decision to be either unlawful or unreasonable.

- [53] The SGB, presumably in an attempt to justify its actions, annexed correspondence with FEDSAS²¹ in which it asked whether the SGB had the power to decide to use the school's reserve funds "to initiate projects" (*'om projekte aan te pak'*). There is no evidence that FEDSAS was informed that the intended 'project' was actually to pay the SGB's legal costs incurred in opposing the Scheepers application, however.
- [54] It appears from an unidentified document, purportedly two pages of undated, unsigned minutes of a governing body meeting annexed to the Founding Affidavit that the SGB was then informed that it had to apply an unbudgeted line-item to pay for accumulated legal costs from the school's reserves in advance. The document indicates, furthermore, that the meeting was informed that according to FEDSAS the SGB only needed a majority decision to apply the reserves for anything it wished to, and that the members were told that the money would be repaid into the reserves should the case be won with costs.
- [55] There is no indication in the 'minutes' however, that such a majority decision was indeed taken, or indeed what 'case' it referred to. And according to the Principal's s 16A(2)(k) report,

²¹ The Federation of South African Schools

the SGB did not pay the legal costs from the reserve funds, as the members of the SGB and the parents were told, but from the Grey Secondary school fund. Notably the SGB does not deny the payment from the school funds but only denies any financial mismanagement. It is clear then why an investigation was needed and indeed warranted.

[56] The need for a proper investigation is further underscored in the SGB's own Supplementary Replying Affidavit in which it revealed that on 3 May 2019, that is after this application had initially been removed from the roll, it filed a formal complaint against the Principal in a matter which the SGB allegedly had initially decided 'to keep quiet'. In it the SGB accused the Principal of the unlawful and wilful mismanagement of finances at Grey Secondary, based on his payment of an increase in an employee's salary which had not been budgeted for and had not been approved by the SGB, and his claim for travelling expenses of R720 for his attendance of the Nedbank Golf Challenge which the Registrar refused to pay.

[57] The courts in **Mikro**²² and **Welkom** and **Harmony**²³ made it clear that school governing bodies and HOD's are organs of state. Three peremptory relevant functions of the *governing body* are set out in s 20, namely that it must:

(1)(a) promote the best interests of the school...

.....

(e) support the *principal, educators* and other staff of the school

in the performance of their professional functions; and

²² Minister of Education (Western Cape) v Mikro Primary School Governing Body [2006] 3 All SA 438 (SCA).

²³ Head of Department, Department of Education, Free State Province v Welkom High School and Another, Head of Department, Department of Education, Free State Province v Harmony High School and Another (Equal Education and Another as *amici curiae*) 2013 (9) BCLR 9989 (CC).

.....

(f) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels; but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy.

[58] And s 41 of the Constitution²⁴ requires all spheres of government and all organs of state within each sphere to cooperate. The Schools Act explicitly requires all the partners in education, the Minister, the MEC, the HOD, the Principal and the SGB to work together in the best interests of the school and the learners. The SGB relied heavily on this passage in averring that the HOD, in intruding into the sphere of the SGB and stripping it of some of its functions, was unlawfully disturbing the delicate balance intended by the Act. In doing so, however, the SGB lost sight of the fact that the same Act explicitly mandates the HOD to do just that where a need to step in arises in the circumstances of a particular case. Evidently the HOD considered the present matter to be just such a case.

[59] In my view the over-hasty institution of this application by the SGB without making the representations it was invited to make, and its stubborn persistence with the application despite all the interim measures which the HOD had put in place to ensure the continued proper functioning of the school until the investigation has been completed, was not only premature but failed to meet the standards expected from a body which is in a fiduciary relationship to the school and which is obliged by the Act to promote the best

²⁴ The Constitution of the Republic of South Africa, Act 108 of 1996.

interests of the school and to cooperate with the other partners in education.

- [60] In failing to make use of internal remedies afforded by the Schools Act, by ignoring the invitation to make representations, by failing to wait for a response from the MEC, and by disregarding the interim measures put in place by the HOD to obviate potential financial harm to the school, in my view, the SGB itself violated the principle of meaningful engagement in terms of the partnership model encapsulated in the Schools Act which it purported to rely on. In doing so, it failed to comply with s 41(1)(h)(vi) of the Constitution which provides that all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.
- [61] The SGB's own conduct, in my view, best serves to emphasise the rationale for the HOD's urgent intervention in the damaging public feud between two purported partners who are supposed to have as common purpose the serving of the best interests of the 'flagship' school Grey College.
- [62] Even should I be wrong about that, in my opinion the application was indeed premature in view thereof that at the time of its hearing the appeal in the Supreme Court of Appeal was still pending, and the investigation into the management of the Grey finances was not yet complete. Even more so since the HOD's decision can still be reversed or suspended, should the SGB provide it with sufficient reasons to do so.
- [61] The application therefore cannot succeed.
- [62] There is no reason to deviate from the normal order that costs should follow the outcome.

WHEREFORE I make the following order:

1. The application is dismissed with costs.

H MURRAY, AJ

I concur and it is so ordered.

S CHESIWE, J

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