IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO:6757/2007
DATE: 22 /11/ 2007

UNREPORTABLE

IN THE MATTER BETWEEN

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION, LIMPOPO **APPLICANT**

AND

THE MAGISTRATE, THABAMOOPO **FIRST RESPONDENT**

LENTING PRIMARY SCHOOL GOVERNING BODY **SECOND RESPONDENT**

J U D G M E N T

MAKGOKA, AJ

[1] The Applicant, Member of the Executive Council ['MEC'] of Education, Limpopo Province, seeks to set aside an order made by the First Respondent, who is a Magistrate in Thabamoopo, Limpopo Province. The First Respondent has not filed any opposing papers. The Second Respondent opposes the granting of the order sought.

[2] The brief factual background of the matter is the following: Lenting Primary School ['the school'] is situated in the rural area of Ga-Mphahlele in the district of Thabamoopo, Limpopo Province. Originally the school was situated on the outskirts of the villages of Kgoshi Mphahlele and Lenting. This caused children to walk approximately 6 kilometers to school. Quite apart from that, the school buildings were decaying. There were also security issues. In one incident, a pupil was raped in a nearby veld while in other incidents pupils were mugged, all on the way to or from school.

[3] As far back as 1993, the principal, the School Governing Body, *mantona* and the community of the Lenting village, had made representations to *Moshate* at Mphahlele Tribal Authority, that the

school be moved to the centre of the villages, mainly as a result of problems highlighted above. *Moshate* acceded to that request and petitioned the Area Manager, Mogodumo Circuit of the Department of Education. This apparently led to an inspection of the school by the Environmental Health Officer of the then Northern Transvaal Province's Health, Social Welfare and Pensions Department. In his report, dated 9 October 1997, the Environmental Health Officer made the following observations:

(a) the yard was bare and unfenced;

(b) there were no refuse receptacles nor refuse pots;

(c) there were no toilets facilities at the school, and that pupils used an open veld to relieve themselves;

(d) there were no source of water supply within the schoolyard. The nearest source of water was a borehole

situated approximately 6 kilometres from the school;

(e) In all classrooms there were bad potholes and cracks on the concrete floors;

(f) the walls were badly cracked and one block of two classrooms had cracks so big one could see through the wall;

(g) the timber purlings and rafters holding the roof were worn out and could collapse at any time. The roof leaked in all the classrooms.

[4] As a result of the above findings and observations, it was the recommendation of Environmental Health Officer that the school be demolished and be replaced by a new school near the village.

[5] As expected, the decision to relocate the school did not meet the approval of all the members of the community. It appears that initially the School Governing Body, the school management, as well as the some members of the community, were against the relocation. As a result of this dispute, the Department dissolved the School Governing Body with effect from 18 January 2006.

[6] Eventually a new school was built closer to the village and the relocation took effect in February 2006. The new school is situated within walking distance of the two villages.

[7] On 16 February 2006 the Second Applicant obtained an interim order, granted by the First Respondent which order reads as follows:

> "*1. That the Application be treated as urgent.*
>
> *2. The Respondent ordered to return the teachers and furniture from new Lenting Primary to old Lenting Primary school with immediate effect at their own costs.*
>
> *3. The Respondent ordered to show cause on the 08/03/06 why this order should not be made trial.*

4. Costs between attorney and client."

[8] The said application was not served on the MEC. The said interim order, however, was purportedly served upon ['MEC'] on 17 February 2006 through a clerk, a ***P Mamabolo***. On 8 March 2006, being the return day of the rule nisi, the Applicant was not represented at court nor were the other two Respondents therein. As a result, the *rule nisi* was confirmed, which later came to the attention of the Head: Legal Services, in the Department.

[9] It is this final order that the Applicant approaches this court to set aside In *limine*, the Second Respondent argued that the MEC had followed a wrong procedure in proceeding by way of review in this court. With no irregularities alleged on the part of either the First or Second Respondents in granting the order sought to be set aside, so the argument proceeds, the review proceedings are not competent. There is no merit in this argument, as it will appear later in this judgment.

[10] The thrust of the MEC's argument in this matter is the *locus standi* and authority of the Second Respondent to have brought the application before the First Respondent. The argument is two-fold. The MEC asserts that the School Governing Body that purported to act in those proceedings, as well as in this matter, had been dissolved already on 18 January 2006, by the Head of the Department. As a result the members of the Second Respondent, lacked the necessary authority to act for or on behalf of, or in relation to the school.

[11] The second leg, flowing from the first, attacks the *locus standi* of the deponent to the founding affidavit in those proceedings, namely ***Mr Lesetja Phillemon Lekgothwane***. ***Lekgothwane*** is also a deponent to the answering affidavit before this court. It is submitted that, the deponent, not being a parent at the school, was in any event, not competent to be elected to the School Governing Body.

[12] The Second Respondent's Answering Affidavit on the merits simply

joins issue with the allegations made on behalf of the MEC in its Founding Affidavit, mainly with regard to the *locus standi* of the Second Respondent, as more fully set out above.

[13] Before I consider the arguments relating to the *locus standi* of the Second Respondent, I must consider another aspect which I am of the view, is pertinent. Upon perusal of the papers and in particular the court order sought to be set aside, I formed a *prima facie* view that the order granted by the First Respondent, could well be *ultra vires* the magistrate court's competence, as same amounted to an order for specific performance, without an alternative claim for damages. This point was not addressed at all by either counsel in their Heads of Argument. I then requested both counsel to prepare argument, and to the extent possible, favour me with supplementary Heads of Argument, just on this point. I am grateful to both counsel, ***Ms. Barnardt*** and ***Mr. Phahlane***, for having complied with my request at such short notification.

[14] Section 46 [2] of the Magistrates' Courts Act, 32 of 1944 provides:

> *"[2] A court shall have no jurisdiction in matters-*
>
> *a)* …
>
> b) …
>
> *c) in which is sought specific performance without an alternative of payment of damages…"*

[15] Now it appears to me that the order granted by the First Respondent especially in relation to the pupils and teachers, is indeed an order for specific performance. The First Respondent is not competent to grant such an order. The said order is therefore *ultra vires* the power of the First Respondent. On that point alone, the order falls to be set aside. Even though the Applicant did not bring this application on that basis, this court has inherent power and jurisdiction to intervene as I intend to. As a result, I do not find it necessary for me to deal with the question of *locus standi* of the Second Respondent as outlined above.

[16] I also need to address a few issues relating to the conduct of the

Second Respondent, which would impact on the issue and scale of costs. It is common cause, that the Second Respondent, as a School Governing Body was dissolved on 18 January 2006 by the District Senior Manager. No appeal was noted against this decision. On the papers it is simply averred that the correct procedure was not followed in dissolving the School Governing Body. The significance of this omission to challenge the decision, is that such decision stood and should be complied with. One cannot simply ignore an official decision on the basis that it was supposedly wrongly taken.

[17] In the letter informing the School Governing Body of the decision of the Department, it was mentioned that:

> "…your School Governing Body is dissolved with immediate effect … [A]ny act performed by the School Governing Body after receipt of this letter shall be regarded as unlawful illegal."

Despite this warning, the Second Respondent, less than a month later, and without challenging the decision of the Department as provided

for in the South African School Act, 84 of 1996, proceeded to apply for the interim interdict on 16 February 2006.

[18] In that application, no mention was made whatsoever, of the letter from the Department dissolving the School Governing Body. On the contrary, it was asserted before the First Respondent that ***Lekgothwane*** was a member of the "School Governing Body". This was a misrepresentation to the First Respondent, who had he known the facts, would most probably not have granted the order. Secondly, the interim application was not served on the MEC. No reason was supplied whatsoever in the application why-

a) the matter was urgent;

b) the reason for non-service of the application;

c) the applicant does not allege any ownership of the furniture at the school, nor is there a basis laid for the Second Respondent's entitlement to have the teachers to

be "returned to the old Lenting Primary School"

[19] In deciding the issues in this matter, I am alive to the fact that I am dealing with the welfare and well-being of children from an apparently poor area. In the premises the law enjoins me to place their interests supreme to any other consideration. On the evidence placed before me, I am satisfied that the new building which accommodates the pupils, is a far much better institution than the old school. The new school is situated within walking distance of the villages, it boasts modern toilet facilities with septic tanks, a borehole and is properly fenced. Since relocation of the school to the new premises, no incidents of crime visited upon the pupils were reported.

[19] In any event, responsibilities, powers and functions to regulate education in the province, vests with the MEC. All schools in the province fall under the Applicant's jurisdiction. All teachers in the province are appointed by the Applicant. The Second Respondent has not provided, in the Court *a quo* nor before me, any shred of evidence

why it is entitled to have the teachers and furniture returned to the old school. The Second Respondent is not entitled, nor does any court have the competence, to dictate which of the two schools the teachers should teach at. That is solely in the discretion of the MEC. The MEC took a decision, a correct one in my view, to relocate the school to a new site. I do not understand the MEC to have forced any of the teachers to relocate to the new school. Should any of the teachers not be satisfied with the MEC's decision, they are free to terminate their services with the Department.

[20] As regards to the furniture at the school, similarly there is no basis whatsoever upon which the Second Respondent lays claim to the said furniture. In my view, I would not be *amiss* to venture that the Department supplies furniture and all equipment at public schools.

[21] Regard being had to the above, I am satisfied that it is in the best interests of the children of this poor, rural area, to be accommodated at the new school. The Second Respondent offered absolutely nothing

to rebut this view. I am not prepared to jeopardize the welfare, safety and well-being of these children at the altar of petty tribal politics. This application must succeed.

[22] As stated above, I take a dim view of the conduct of the Second Respondent in this matter, which I find irrational, spurious and ill conceived. I intend to mark the court's disapproval with a special costs order. This should also deter other would-be disruptive members of that community to desist from any malicious and self-centred conduct relating to the school. Because the Second Respondents is not a legal *persona,* the costs order I intend to make must be practical and capable of being given effect to. Therefore each person purporting to be a member of the Second Respondent, as well as their supporters must in *solidum,* be liable for the costs.

[21] In the premises I make the following order:

[21.1] The order granted by the First Respondent on 8 March 2006, in terms of which, inter alia, the Applicant is ordered to return the teachers and furniture from new Lenting Primary School to old Lenting Primary School, together with all its ancillary orders, is hereby set aside.

[22.2] The purported members of the Second Respondent, namely: Lesetja Phillemon Lekgothoane; Mahlomotja Lipson Shogole, E Mothapo, M S Kgwale, Linky Mapholo, as well as a parent, Lucy Thaba are ordered to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the others to be absolved.

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T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT

HEARD ON: 8 NOVEMBER 2007

FOR THE APPLICANT: Ms. JF BARNARDT

INSTRUCTED BY*: DAVEL DE KLERK KGATLA, POLOKWANE AND STATE ATTORNEY, PRETORIA*

NO APPEARNACE FOR THE FIRST RESPONDENT

FOR THE SECOND RESPONDENT: Mr DL PHAHLANE

INSTRUCTED BY: *THE LEGAL AID BOARD, PRETORIA*

DATE OF JUDGMENT: 22 NOVEMBER 2007