Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case Nr: 1177/2004
Case Heard: 07/02/2006
Date delivered: 24/02/2006

In the matter:

MEC OF EDUCATION: NORTHERN CAPE **1ST APPLICANT**
HOD: DEPARTMENT OF EDUCATION: NC **2ND APPLICANT**

versus

SEODIN PRIMARY SCHOOL **1ST RESPONDENT**
GOVERNING BODY OF SEODIN PRIMARY SCHOOL **2ND RESPONDENT**
KALAHARI HIGH SCHOOL **3RD RESPONDENT**
GOVERNING BODY OF KALAHARI HIGH SCHOOL **4TH RESPONDENT**

Coram: Kgomo JP *et* Williams J *et* Goliath J

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

KGOMO JP:

1. This is an application by the First to the Fourth Applicants for leave to appeal against our judgment reported *sub nom* **Seodin Primary School & Others v MEC of Education, Northern Cape & Others** 2006 (1) ALL SA 154 (NC). The Fifth and Sixth Applicants, Northern Cape Agricultural High School and its School Governing Body, respectively, are not a party to this appeal.

2. The Notice of the application for leave to appeal comprises an unwieldy 13 pages and traverses in essence our entire judgment and much more. The "much more" is encapsulated in these terms in the Applicants' Application for Leave to Appeal:

"14.3 If the Honourable Court is correct that these matters had become academic due to the expiry of time and the overtaking events:

14.3.1 the Applicants' application for leave to appeal dated December 2004 is still to be heard;

14.3.2 the Applicants have been deprived of their constitutional right in terms of the provisions of sec 34 of the Constitution, to have their disputes heard in a court of law;

14.4 At least in respect of costs, a finding as prayed for is essential since it will determine whether the Applicants were entitled to launch the application and if so, that the Applicants are entitled to their costs.

15. The Honourable Court erred in finding that the Applicants have not spelled out the reasons for couching their prevailing Notice of Motion as they did, in view of the fact that the notice of intention to amend filed during December 2004, was accompanied by an affidavit setting out the reasons for the amendment sought."

3. In his Heads of Argument Adv J I du Toit, for the applicants, contended in elaboration of para 2 (above) that the application for leave to appeal against the interlocutory judgment the *coram* whereof consisted of only myself and Williams J *"was made dependent on the outcome in the main application, since the judgment appealed against held, so the applicants understood it, that the applicants did not have a prima facie case to start with … (and that) … the condition for the first (the interlocutory) application for leave to appeal has been fulfilled, hence the necessity to have that application heard."*

4. What the Applicants are propounding is that because their main

application was eventually unsuccessful, therefore, that failure has triggered the resuscitation of the leave to appeal against the dismissed interim interdict that they sought pending the determination of the main application. The questions which arise are:

4.1 What were the terms of the interim relief that was sought?

4.2 what was the decision in that interlocutory application?

4.3 Are we **(Kgomo JP, Williams J and Goliath J)** competent to hear an application for leave to appeal against a judgment by **Kgomo JP** *et* **Williams J** in the interlocutory application?

5. We, the Full Bench as currently constituted, decided that the application for leave to appeal in respect of the interim interdict had to be heard by **Kgomo JP** *et* **Williams J** and struck that application for leave to appeal from the roll with costs. I deal first with the reasons for such decision.

6. The interim interdict was heard on the 30th November 2004. I can do no better than to reproduce extracts from the latter judgment. We stated:

"1. On the 22nd October 2004 the five applicants filed a Rule 53 Review application against the MEC of Education, Northern Cape, the Departmental Head (HOD), five affected schools and their School Governing Bodies and the principals of these schools. They seek an order that the following decisions be reviewed and/or set aside:

1.1.The decision of the MEC for Education taken on the 31st August 2004 that all single-medium Afrikaans schools in the Kuruman District, as well as Northern Cape Agricultural High School should from January 2005 convert to and function as double-medium Afrikaans-and-English schools; and

1.2.The decision of the HOD taken on the 1st September 2004 pertaining to the implementation of the MEC's decision mentioned in para 1.1 (above).

2.

.....

.....

3. This judgment deals with two matters:

3.1 The respondents' application for a postponement as they have been unable to file opposing papers timeously or at all;

3.2 The applicants' opposition to the postponement and a counter-application to the postponement which has as its aim an interim interdict which would prohibit the respondents from implementing the decisions in paras 1.1 and 1.2 above. In their own words:

"Hierdie beëdigde verklaring het 'n dubbele doel. Dit word aangebied ter opponering van die Respondente se aansoek om uitstel, en as funderende verklaring vir Applikante se voorwaardelike teenaansoek om 'n tussentydse interdik, sou die aansoek om uitstel toegestaan word."

4. - 7.

.....

8. A refusal to postpone the main application or to allow the hearing of the main application on the version of the applicants only would have had far-reaching implications, and would unquestionably have been prejudicial to the respondents. Such measure would also have been highly irregular. This matter is of great importance to both parties and the broader Northern Cape and indeed South African public. A Court must be loath and very slow to close a litigant's mouth by refusing a meritorious application for a postponement. See the principles enunciated in ***Myburgh Transport v Botha t/a SA Truck Bodies*** *1991 (3) SA 310 (Nm SC) at 314F-315J. .....*

9. - 13.

.....

14. I enquired from Mr Raath whether he could argue the interdict application without traversing the merits of the main application. He conceded that he could not. This concession was fairly made because the applicants have copiously borrowed from the main application to bolster the interdict application. For example under: "Benadeling en die balans van gerief" the deposition reads:

"38. Ek verwys in hierdie verband met eerbied na paragrawe 50 tot 56 van Eerste en Tweede Applikante se aanvullende funderende beëdigde verklaring (pp 190-194) saamgelees met aanhangsels "JCT49" en "JCT 50" (pp 308-314)".

15. This pattern is maintained throughout. When you cross-refer to the indicated pages of the main application there you are told to proceed elsewhere for further information. Only by shanting from pillar to post as directed do the pieces of the puzzle fall in place and by that time you shall have traversed the best part of the prolix record. If, therefore, the respondents availed themselves the opportunity of filing papers in opposition of the interdict they would have had to cover essentially the same grounds for that purpose as for the main application. I therefore appreciate Mr Olivier's submission that the so-called counter-application (the interim relief sought) should not be allowed to degenerate into a situation where the tail take centre stage and was wagging the dog (the main application).

16. - 19.

.....

20. On a conspectus of all the factors adverted to I am not satisfied that the applicants have made out a prima facie case for an interlocutory interdict. See Prest, ***The Law & Parctices of Interdicts****, 1996 Edition, pp 49 to 80. It is accordingly unnecessary to deal at this stage with the points in*

limine raised by Mr Olivier in para 12 supra. They may, of course, still be raised when the main application is heard. As regards the specific issues raised on both sides of the divide we find it undesirable and precipitous to express firm views or to make concrete finding thereon as it is more appropriate for the Court hearing the main application to do so. The interlocutory application therefore stands to be dismissed.

Order:

The applicants' (Seodin Primary School and Five Others') application for an interim interdict pending the determination of the main application (against the MEC (NC) and 13 others) is dismissed."

7. The conditional application for leave to appeal against the extrapolated judgment immediately above was made and filed in December 2004. That leave to appeal was made contingent upon the "main application" not succeeding. In December 2004 the "main application" was then the one quoted in par 6 of this judgment (viz par 1 of the interim interdict judgment). As will be seen from the main judgment the final relief that the applicants settled for was a declaratory order as distinct from the original review to set aside the decisions by the MEC and HOD. See par 5 of the main judgment which reads in part:

"5.1 The decision of the First Respondent (MEC for Education) of 31 August 2004 to the effect that all single-medium Afrikaans Schools at Kuruman, as well as the Agricultural High School Northern Cape shall from January 2005 function as double-medium Afrikaans-and-English schools is susceptible or amenable ("vatbaar") to being set aside;

5.2 The decision of the Second Respondent (the HOD) of 1st September 2004 concerning the implementation of the First Respondent's decision is susceptible or amenable to being set aside;" (My current emphasis)

8. In the preceeding par 4 of the main judgment we stated:

   "It would be an exercise in futility to deal with the second amended Notice of Motion because it has since been completely overhauled by the current amendment … which applicants only ushered in during the course of argument on the merits in May 2005. It suffices to state that the relief claimed in the second amendment was such a radical departure from the original Notice of Motion that was sought that we were constrained to allow the postponement sought by the respondents because it was necessary for them to deal in their Answering Affidavit with the then fresh points of departure."

9. The aforegoing passages are demonstrative of the fact that the Applicants deliberately and expressly waived their right to seek the setting aside of the Respondents' challenged decisions and they cannot now be allowed to revert to their original position as that amounts to blowing hot and cold much to the detriment of the other party. The Applicants applied for the amendment, which were on each occasion granted by consent and they conducted their case on the basis of such amendments to the end. In fact the original Notice of Motion has dissipated.

10. Adv Danzfuss submitted that the application for leave to appeal against the judgment in respect of the interim interdict be dismissed by us summarily with costs. We reckoned that such measure would be too drastic and decided to afford the applicants an opportunity to persuade the appropriate forum, if they can, that the decision by **Kgomo JP** *et* **Williams J** was not interlocutory and was therefore appealable and if so (in other words if the decision had the effect of a final judgment or order) why the leave to appeal was made conditional and not prosecuted for more than a year.

11. In respect of the main appeal Mr du Toit, normally combative but polite, without conceding that the appeal has no merits, understandably on this occasion intimated at the inception of the hearing that he abides by his Heads of Argument. His attitude is well taken because:

    11.1. Even if the Supreme Court of Appeal might come to a different conclusion in some of the findings that we made the immutable result is that the decisions of the MEC and the HOD will persist as they were not sought to be set aside;

    11.2. The hurdle that the affected children were not afforded the assistance of a *curator ad litem* to see to their best interests as section 28(2) of the Constitution decrees, remains. It is immaterial who the blame for this omission is attributable to. At best for the applicants the SCA could order that a *curator ad litem* be appointed for the children and that the matter be heard afresh. In that event par 11.1 (above) will then kick in and the whole purpose of such SCA order or exercise would still be frustrated and defeated.

12. The principle in the case of **Oudekraal Estates (Pty) Ltd v City of Cape Town & Others** 2004 (6) SA 222 (SCA) is apposite to this matter and in particular the scenario sketched in par 11 above. At pp 241G-242B (par 26) **Howie P** et **Nugent JA (Cameron JA, Brand JA** and **Southwood AJA)** concurring stated:

    "[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what

consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."
(My emphasis)

13. The Applicants' problems are further compounded by the fact that they also asked that First and Second Respondents "be ordered to review or revise their own decisions" in certain respects. See par 5.6 of main judgment. We could not do that because these functionaries have exercised the statutory power entrusted upon them as they deemed fit, as already described. They cannot now call their own decisions in question in the manner proposed by the Applicants because they are *functus officio*. See: **De Freitas v Somerset West Municipality** 1997 (3) SA 1080 (C) at 1082 and case there cited.

14. It remains to state that to deal with all the other grounds raised in the Notice would lead to the unnecessary rehashing of the judgment to no end, in that all those matters have been

adequately covered in the judgment. See: **S v Sikasana** 1980 (4) SA 559 (A) at 562H-563B.

The application for leave to appeal, far from it not having any reasonable prospects of success, is in fact devoid of any merits and must fail.

15. The Respondents have given notice of their intention to apply for leave to appeal to the Supreme Court of Appeal against the costs order only but on condition that we grant the Applicants leave to appeal on the merits. We ordered that each party pay its own costs. In the light of the decision that we have come to the need to adjudicate upon this issue has fallen away.

16. As far as the costs of the application by the Applicants for leave to appeal to the SCA is concerned the Applicants were well aware that they were flogging a dead horse. There is no reason for the costs occasioned hereby not to follow the result.

Order

1. **On the 7th February 2006 (the day of hearing) we struck the Applicants' conditional application for leave to appeal to the Supreme Court of Appeal in respect of the interlocutory application (interim interdict) (Kgomo JP et Williams J) from the roll with costs.**
2. **The Applicants' application for leave to appeal against the main application (Kgomo JP, Williams J et Goliath AJ) is dismissed with costs.**
3. **The Respondents' conditional application for leave to appeal against the Costs Order only has fallen away in the light of clause 2 (above) of this order. There is no order as to costs in respect of this**

conditional application.

4. **It is noted that the Northern Cape Agricultural High School and its School Governing Body have not sought leave to appeal and are therefore not affected by the costs order made against the Applicants.**

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F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur:

_____
C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

I concur:

_____
P L GOLIATH
JUDGE
NORTHERN CAPE DIVISION

For the Applicants:	**Adv J I du Toit**
Instructed by:	**van der Wall & Partners**
For the Respondents:	**Adv A F W Danzfuss, SC**
Instructed by:	**Haarhoffs**