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IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2009/52850

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

10 March 2010 ………………………...
SIGNATURE

In the matter between

E B	**FIRST APPLICANT**
H E B NO	**SECOND APPLICANT**
and	
BARBARA CREECY NO	**FIRST RESPONDENT**
ELIZE FRONEMAN NO	**SECOND RESPONDENT**
N HIGH SCHOOL	**THIRD RESPONDENT**
MARIUS SCHAFER NO	**FOURTH RESPONDENT**
J A C FOURIE	**FIFTH RESPONDENT**
RENETTE VILJOEN	**SIXTH RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns the status of a learner at a high school. The first applicant (who is assisted herein by his father, the second applicant) (also referred to in this judgment as E) is a learner at the N High School (the third respondent), an acclaimed and well-known Afrikaans medium high school in Krugersdorp. During July/August 2009, and while E was in Grade 11, he was elected as a member of the school's Representative Learners Council (Verteenwoordigende Leerderraad) (the RLC), and thereafter elected as deputy head boy of the school.

[2] Prior to their inauguration there then followed what apparently has been a long-standing tradition at the school, an initiation (Afrikaans "ontgroening" or, as it has also been referred to in the papers before me, a "team-building exercise") of the members elect of the RLC. The "purpose" of the exercise I am given to understand was to ensure bonding between members of the body, in particular those who were elected for the first time. As history has shown these kinds of orientations more often than not become a spectacle of that which would only satisfy those with a distorted sense of "fun" and "enjoyment" and, for that matter, "bonding". This initiation was no exception: it was marked by unruly and rowdy behaviour probably much to the delight and amusement of the onlookers but unfortunately so, to the dismay and humiliation of the victims. E, probably because he was the newly elected deputy head boy, states that he was singled out to be the victim of even harsher and more direct humiliating treatment. He had been diagnosed with generalised anxiety disorder, which further resulted in him experiencing the incident as "uiters traumaties". Instead of following the channel of complaining to the appropriate authorities at the school (as one surely would have expected a leader in his position to have done) he voiced his "frustrations" by posting several unacceptable, insulting and derogatory messages of and concerning the teachers and the school on the social internet network known as "Facebook". Those messages came to the notice of the school authorities. In the ensuing saga his parents, the principal of the school (the fifth respondent), his deputy (the sixth respondent) and the school governing body became involved and certain internal disciplinary steps were taken against him.

[3] Having endured what must have been a harrowing experience and its aftermath E says he eventually formed the view that the school and the governing body were all “against him”. During the early morning on 23 October 2009 the first applicant and his parents decided “dat ek die skool moes verlaat”. Later that morning he and his parents had a meeting with the principal at the school. His parents informed the principal of the decision that E would be leaving the school. The principal immediately accepted their decision and without more ado, there and then “declared” the first applicant to be promoted to Grade 12 for the 2010 school year (which the principal confirmed in a letter addressed to E’s mother dated 26 October 2009). The “promotion” apparently was regarded as justified on E’s excellent academic record: in the previous examinations he had attained no less than five distinctions and two B symbols in his respective school subjects. E indeed left the school and visited family in Germany with his mother hoping that this would provide some therapeutic benefit to him.

[4] The first applicant and his parents, one must assume, soon realised the drastic consequences of their decision: E, having left the school, was no longer a learner at N High School. They then sought legal advice from their attorney and the usual expected chain of correspondence ensued. In the first letter by the applicants’ attorney to the chairman of the Governing Body (the fourth respondent) the re-admission of the first applicant at the school for the 2010 school year was requested. The Governing Body refused the request. In a further letter by the applicants’ attorneys to the Governing Body it is stated that the parents of the first applicant had reconsidered their earlier decision to withdraw him from the school and that “hy weer gaan inskryf vir 2010 in Hoërskool N”. The necessary forms were completed for E’s enrolment in Grade 12 for 2010 and handed in but the application for enrolment was refused by the Body Corporate for the reason stated in a letter that “die skool is reeds vol en kan nie verdere leerders op hierdie stadium akkomodeer nie”. The letter further states that the application for enrolment had been referred to the Department for the possible allocation of another school where he could be accommodated. The first and second respondents (in their official

capacities respectively as a member of the executive committee, and the director of the Department of Education, Gauteng) were then approached, who reverted through the State Attorney that the first applicant would be allowed to return to N High school, but on condition that he would be permitted to enrol for Grade 11 during 2010 only. Further correspondence was exchanged between the applicants' attorney and the State Attorney, but nothing came of it.

[5] On 15 December 2009 the applicants' attorney in a letter addressed to the first and second respondents, lodged an appeal "to you to reconsider the enrolment" of the first applicant at the school (the appeal). On 18 December 2009 the present application was launched, on the basis of urgency, in which the applicants in essence seek, firstly, an order that the first applicant be enrolled at the school as a Grade 12 learner for 2010 and, secondly, confirmation of the first applicant's election as deputy head boy of the school and member of the RLC. On 12 January 2010 an *interim* order by agreement between the parties, was granted by Makhanya J in terms of which the first applicant was to be enrolled as a Grade 12 learner at the school for the current school year, pending the finalisation of the application (the rule *nisi*). The order further provided measures for maintaining the *status quo* in respect of the first applicant in that he was not to hold out in any way to be the deputy head boy or member of the RLC.

[6] On the return day of the rule *nisi* (2 February 2010), the matter came up for hearing before me. A full set of affidavits and, in addition thereto, a number of supplementary affidavits, with a "quadruplying affidavit by the first applicant" as the finale, had been filed. This culminated into an application extending into more than 500 pages. A point *in limine* was raised by the respondents in the answering affidavit. It is this: this Court's jurisdiction to determine the issue of the first applicant's enrolment as a Grade 12 learner at the school was challenged in view of the applicants' appeal which at the time of the hearing of this matter had not progressed any further than the letter I have referred to. At the commencement of the hearing, Mr *Mathibedi,* who appeared for the respondents, indicated that the point *in limine* was being persisted in. I ruled

that the issue be dealt with *in limine* upfront as a separate issue. During the course of his argument, Mr *Sieberhagen*, who appeared for the applicants, informed the Court that he on behalf of the applicants "withdraws" the appeal. The "withdrawal" of the appeal, however, did not have the desired effect of easing the argument counsel for the applicants' continued with. On the contrary, I required further argument on the question remaining, on the assumption that the appeal had properly been withdrawn, whether the applicants were not required to first exhaust the available statutory internal right of appeal (see s 5(9) of the South African Schools Act 84 of 1996) before this Court could exercise jurisdiction to determine the issue. As the argument progressed it became clear to me that the issue had neither been researched nor prepared properly so as to be of any assistance to the Court. I, in consequence, postponed the matter by extending the rule *nisi* and requested counsel to file supplementary heads of argument on the issue.

[7] The first applicant, it must be remembered, in the meanwhile was attending the school as a Grade 12 learner in terms of the interim order. It became clear to me that the continuation of the hearing of the matter in all probability was not going to take place before the end of February 2010. By then the first applicant would have been at school for almost 6 weeks with the uncertainty concerning his status hanging over his head. On reflection, shortly after the postponement of the matter, the interests of the first applicant, a young promising learner in his final, if not most important, school year becoming an almost certain casualty in a protracted legal battle, led me to conclude that some form of case management was called for to expedite this matter. I therefore called on counsel and their attorneys to approach me in chambers. At the meeting that followed it was informally agreed that the appeal, notwithstanding the "withdrawal" thereof, was to be regarded as still pending and ready for hearing, that the appeal would (stripped of all technicalities) be heard by the Gauteng Department of Education as soon as practically possible and that the hearing of this matter would then, after disposal of the appeal, continue on 26 February 1010. The rule *nisi* was accordingly further extended to this date.

[8] At the resumed hearing of the matter the applicants were in addition represented by senior counsel, Mr *Both* and, for the respondents, Mr *Mathibedi* was now assisted by Mr *Pheto*. I was informed from the Bar that the appeal in fact had been heard on 16 February 2010 with a positive outcome for the first applicant in terms of which he was promoted to Gade 12 at N High School. That effectively disposed of the main relief sought by the applicants except for costs to which I will revert later in the judgement.

[9] The hearing accordingly proceeded on the remaining relief sought which it will be remembered was for an order to confirm the first applicant's election as member of the RLC and deputy head boy of the school and then of course the costs of the application. It is at the outset necessary to consider the nature of the relief sought and for this purpose to quote in full prayer 2.3 in which it is set out as follows:

> *'[Dat die applikante aansoek] sal doen...om 'n bevel:*
>
> *1…*
>
> *2. Waardeur 'n interdik verleen word waardeur die respondente beveel word om alle noodsaaklike stappe te neem en handelinge te verrig sodat:*
>
> *2.1 …*
>
> *2.2 …*
>
> *2.3 die verkiesing tot, en aanstelling in, die amp van onderhoofseun as lid van die Verteenwoordigende Leerraad van die Derde Respondent, van die Eerste Applikant bevestig en bekragtig word.'*

The formulation of the prayer as it stands is anything but a model of clarity. At best for the applicants the relief sought seems to me to be in the nature of a declarator. That appeared to be also the understanding of counsel on both sides. The question immediately arising is how a declarator in the form sought would have assisted the first applicant on the facts of this matter. Mr *Both* was unable to advance any justification or relevance for the relief sought in the light of the facts of this matter. It is abundantly clear, as was readily and correctly conceded by Mr *Both* that the true relief sought was a reinstatement of the first applicant in the posts he had occupied prior to leaving the school. Counsel then from the Bar sought an amendment of prayer 2.3 to reflect

exactly that. Mr *Mathibedi* objected to the procedure that was followed. I upheld the objection and ruled that the normal rules applicable to amendments had to be followed. Mr *Both* in response disavowed any further reliance on the proposed amendment and submitted that the relief sought in the form it stands was wide enough in its terms to provide for an interpretation that the declarator was sought to apply to the first applicant as at the date of the granting of the order. Having heard further argument I, in view of the urgency of the matter, made the order appearing at the end of this judgment and indicated that I would furnish reasons for the order I had made, at a later date. What follows are those reasons.

[10] As a point of departure I will assume in favour of the applicants (without deciding) that a reinstatement of the first applicant in the posts mentioned was in fact sought. The first hurdle that had to be overcome was that the first applicant on 23 October 2009 as I have already dealt with, voluntarily left the school, thereby also abandoning or resigning the posts he had been elected for. Counsel for the applicants submitted that the decision by the first applicant to leave the school had to be considered in the context of the stressful situation he found himself in at the time. Accepting that to be so, it merely serves to soften the blow. The first applicant consciously and deliberately decided to leave the school. This becomes abundantly clear if regard is had to a further message he had posted on Facebook in which he defiantly explained his decision as follows:

> *'Soos meeste weet, het ek besluit om Norries (the school) te verlaat. Wil graag uitklaar dat ek NIE geskors is NIE, ek het uit eie vrye wil geloop hoor! …'*

The first applicant undoubtedly is bound by the decision. On leaving the school the posts became vacant and could only be filled again by following the election procedures provided for in the Act, the applicable regulations and school policy. Counsel for the applicants was seemingly unable to advance any sustainable argument to the contrary. While dealing with this aspect I pause to refer to an irreconcilable inconsistency in the applicants' case: in the founding affidavit the first applicant states that he was advised that the election procedures in terms of which he was elected "nie behoorlik

ooreenkomstig die Wet (the South African Schools Act) en die regulasies in terme daarvan uitgevaardig, was nie". Nothing further is said as to the reasons given for the contention. In the replying affidavit in an about turn the first applicant now submitted, without any reference to his earlier stance, that he was duly elected in terms of s 8 of the Act and the applicable regulations. In the view I take on this matter it is not necessary to comment any further on this aspect.

[11] One last observation concerning this issue: the applicants went to great lengths and spent considerable time and energy in an attempt to whitewash the first applicant. A report by a psychologist (dealing with the emotional effects of the initiation on the first applicant) was obtained and is annexed to the papers. Also annexed to the replying affidavit are the affidavits of three teachers (at N High School), an associate professor in penology and also ex teacher who also happened to be the mother of one of the first applicant's fellow learners (containing expert opinions) as well as a pastor, all having joined the choir grandiloquently singing the first applicant's praises. This was echoed in counsel for the applicants' heads of argument as the basis for his re-instatement in the leadership posts, which is clearly ill-conceived. What is glaringly absent from these reports is an objective, well-balanced assessment of the first applicant. In my view, and notwithstanding the academic excellence he has achieved and hopefully will maintain, he lacked one of the vital qualities of leadership which is to fearlessly take the lead in a time of crisis by setting an example, to diffuse emotions and effect reconciliation. In the crisis situation that had arisen his conduct in posting scandalous and, in some instances, highly inflammatory messages about the school on Facebook (he had posted messages in similar vein on Facebook months before the initiation), is reprehensible. Finally, the parental guidance he received is open to question: his father joined the fray in posting a Facebook message in which he described the teachers of the school as "morone wat in die verlede lewe".

[12] It follows that the applicants have failed to make out a case for the relief sought and that the application for the relief sought in prayer 2.3 of the Notice of Motion falls to be dismissed.

[13] Finally, it remains to deal with the costs of this application. In order to determine the liability for costs I have divided the application into two stages: first, from commencement until the appeal was decided, and the second, after that. In regard to the first stage a number of considerations arise. As for the applicants, the application in essence was premised on the principal's "promotion" of the first applicant. This resulted in ingenious contentions being raised such as that an agreement to promote the first applicant had been concluded and even a reliance on estoppel. Something regrettably has to be said regarding the principal's conduct in "promoting" the first applicant by the proverbial wave of the hand. He undoubtedly acted outside the scope of his authority. I am of the view that he could and should have dealt with the issue he was presented with on the morning of 23 October 2009 more responsibly. The principal simply ignored the procedures that were required to be followed upon consideration of the promotion of a learner and proceeded unilaterally to "promote" the first applicant to the next grade. This he confirmed in the letter I have referred to above, a few days later (the content of which is anything but easy to understand). The conduct of the principal had adverse consequences for the school as well as the applicants. The matter proceeded to Court with the obvious costs implication and the school was quite unnecessarily exposed to negative publicity in the public media. Had the principal properly taken control of the situation on 23 October 2009, the dispute inevitably could and would have been resolved. That being so, I seriously considered, as a mark of this Court's disapproval of the way in which this dispute was dealt with, to order the principal to pay a portion of the costs of this application. In the interests of justice I have, however, decided against such order.

[14] The crucial consideration in order to decide the liability for costs in my view is the appeal and the effect the result thereof had on this case. The applicants, except for having noted the appeal, did not take any further steps

to bring it to finality. The interim relief sought was not made subject to the outcome of the appeal. The appeal, moreover, was “withdrawn” in Court and had to be resurrected by this Court’s intervention. The respondents (the Department of Education) are also not free from blame: when the matter was before this Court in February 2010, which was well after the first school term had commenced, not a single step had been taken to advance the appeal. In these circumstances a costs order either way would not have been appropriate. In the exercise of my discretion, having considered all the relevant facts, I have come to the conclusion that an order for each party to pay his or her own costs in respect of the first stage of the proceedings, would be just and fair.

[14] As for the costs of the second stage of the proceedings I propose to follow the general rule of costs following the result. It follows that the applicants must pay these costs, such to include (as agreed between counsel) the costs of two counsel.

[15] In the result, the following order was made on 26 February 2010:

1. The application for the relief set out in prayer 2.3 of the Notice of Motion is dismissed.
2. The applicants jointly and severally the one paying the other to be absolved, are ordered to pay the costs of this application from 16 February 2010 to date of this judgment, such costs to include the costs consequent upon the employment of two counsel.
3. As for the remainder of the costs, each party is to pay his/her own costs.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANTS — **ADV J BOTH SC**
ADV P SIEBERHAGEN

APPLICANTS' ATTORNEY	**LYNETTE STEYN**
COUNSEL FOR THE RESPONDENTS	**ADV TF MATHIBEDI** **ADV AM PHETO**
RESPONDENTS' ATTORNEYS	**THE STATE ATTORNEY**
DATE OF HEARING	**4 & 26 FEBRUARY 2010**
DATE OF JUDGMENT	**10 MARCH 2010**