

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED.	
7/7/2010	<i>[Signature]</i>
DATE	SIGNATURE

Case No: 25748/2009

Date heard: 27/05/2010

Date of judgment: 07/07/2010

In the matter between:

Bernice Diedrehsen

APPLICANT

and

The Independent Examinations Board

1ST RESPONDENT

John Brand

2ND RESPONDENT

Cornwall Hill College

3RD RESPONDENT

JUDGMENT

DU PLESSIS J:

In circumstances that will become apparent, the first respondent has caused two decisions adverse to the applicant to be made. In this application the applicant initially sought orders reviewing and setting aside the two decisions. Mr Vorster, who appeared for the applicant, informed the court that the applicant did

not persist in seeking such orders. The applicant did persist in seeking alternative orders to the effect that the respective authors of the two decisions “had no right to make any ruling which is binding on the applicant”. Accordingly, this judgment concerns the authority of the relevant decision makers to make the decisions in question.

The first respondent (“the IEB”) is an association not for gain registered under section 21 of the **Companies Act, 61 of 1973**. The IEB is an independent assessment agency that offers, amongst other things, national senior certificate examinations for client schools. The IEB is accredited by Umalusi, a statutory body responsible for quality assessment of examinations. The quality and integrity of IEB examinations are held in high esteem, both nationally and internationally. Teachers who teach senior certificate (grade 12) students at client schools act as sub-examiners (markers) of senior certificate examination scripts. The IEB also requires such teachers objectively to assess their grade 12 students’ work during the grade 12 academic year.

The applicant is an accounting teacher. She is employed by the Cornwall Hill College, the third respondent, where she has been teaching accounting to grade 12 students since 2002. Cornwall Hill College is one of the IEB’s client schools.

Since 2006 the applicant has acted as a sub-examiner for accounting. In December 2008 she, and others all sitting around a table, marked one question in the accounting 1 paper. On about 5 December 2008, while the marking was in progress, allegations were made that scripts from the third respondent's students have been tampered with. The applicant was asked to make, and made, a statement in regard thereto.

In January 2009 the applicant received a letter from the IEB. The latter informed her that the IEB had conducted "a full investigation" into the alleged irregularities. According to the letter the conclusion of the investigation was, summarised, that the relevant scripts had been altered in a handwriting that was the same as that of the applicant. According to the letter, the "IEB Irregularities Committee has considered the case and has ruled that (the applicant) ... will not be permitted to carry out any work associated with the IEB examination. This ruling not only covers activities carried out under the direct management of the IEB e.g. marking, but also all activities associated with IEB examinations." I shall refer to this as "the first decision". In the letter the applicant is also informed that she has a right to appeal against the decision and "the associated penalty". A copy of the IEB's letter was forwarded to her employer, the third respondent.

Through her attorneys the applicant informed the IEB that she intended to appeal against the first decision. Her attorneys sought information pertaining to the nature and procedure of the appeal. Before furnishing the required

information and without consulting the applicant, the IEB decided to conduct a further inquiry into the matter. In a letter dated 4 March 2009 the IEB's attorneys informed the applicant's attorneys of the intended "formal hearing into the allegations against" the applicant. The applicant was invited to arrange a suitable date for the "formal hearing". The applicant's attorneys' response was that the applicant did "not wish to commit herself to any further hearing".

Without consulting the applicant, the IEB requested Tokiso Dispute Settlement (Pty) Ltd, an independent dispute resolution agency, to appoint an independent third party to conduct a hearing. Still without the applicant's consent, the second respondent was appointed to conduct a hearing so as to determine whether the applicant "tampered with some of the accounting scripts of the Cornwall Hill College". The hearing was scheduled for 30 March 2009. The applicant did not attend the scheduled hearing. After he had unsuccessfully attempted to secure her attendance, the second respondent proceeded with the hearing in the applicant's absence. After consideration of the evidence before him, the second respondent found as follows: "Accordingly I determine that, on a balance of probabilities, Ms Diedrehsen interfered with the scripts of her students in the 2008 IEB accounting 1 exam". I shall refer to this as "Brand's decision".

On 8 May 2009 the IEB's attorney notified Cornwall Hill's attorneys of Brand's decision. The IEB sought the school's confirmation that the applicant

would no longer be used as an assessor for grade 12 students. In the absence of such confirmation, the IEB's attorney wrote, her client would "re-assess its relationship" with Cornwall Hill. Cornwall Hill thereafter suspended the applicant as an assessor. The school has also informed the applicant that it intends to conduct a disciplinary hearing against her. The applicant has indicated her willingness to participate in the intended hearing.

As I have pointed out, this case concerns the authority of respectively the IEB's Irregularities Committee and the second respondent to make the decisions in question. Particularly as regards Brand's decision, the question is not whether Brand had observed the rules of natural justice before making the decision. The question is not whether the respective decisions were made after a fair procedure had been followed. The question is not whether the respective decisions were right or wrong. Before getting to a consideration of such questions, there is a threshold-question: Did the Irregularities Committee or Brand have the power to make the relevant decisions? This case concerns the threshold-question.

It is common cause between the parties, and rightly so, that neither the Irregularities Committee nor Brand purported to exercise public power. It is the IEB's case that the decisions were made pursuant to and in accordance with a contractual power to make the relevant decisions. In the circumstances it is clear that if no such contractual power existed, the decisions cannot be binding on the

applicant. The question is by no means academic because, as the summary of facts show, the IEB insists that Brand's decision affects the applicant's rights and, in particular, her contractual relationship with her employer. In addition, the IEB insists that the decision affects its contractual relationship with the third respondent. I shall now deal with each of the decisions in turn.

The First Decision

Before starting to act as a sub-examiner for the 2008-examinations, the applicant, at the instance of the IEB, signed an "acceptance and declaration of confidentiality". Paragraph 2 of the document provides as follows:

"I agree to comply with the rules and regulations relating to this examination issued by the IEB".

It is the IEB's case that, by signing this document, the applicant bound herself to Annexure C to the IEB's Memorandum and Articles of Association ("Annexure C"). I assume in the IEB's favour that this is so. Annexure C contains a "Procedure for dealing with irregularities". Under clause 2 of Annexure C, an Irregularities Committee is established. The bulk of Annexure C deals with irregularities committed by examinees. In terms of clause 3 it is the function of the Irregularities Committee to identify an irregularity, to investigate it, to confirm an irregularity, that is, to conduct a hearing "to establish guilt or innocence and to allow the accused person to state their case." Finally, clause 3 provides that the Committee may make a recommendation regarding the particular irregularity.

The procedure that the Irregularities Committee must follow is set out in clause 4 of Annexure C. The IEB rightly points out that only clause 4.4 is presently relevant. The remainder of the clause deals with irregularities that examinees might commit. Clause 4.4 reads:

“All irregularities involving examination officials should be handled in terms of the disciplinary procedures applicable to misconduct by employees/educators.”

The IEB does not contend, rightly so, that in arriving at the first decision, the Irregularities Committee complied with clause 4.4. I shall assume in the IEB's favour that clause 3 of Annexure C affords to the Irregularities Committee another power, distinct from that afforded to it in terms of clause 4.4. On that assumption, clause 3 of Annexure C empowers the Irregularities Committee to “confirm an irregularity” committed by a sub-examiner by conducting a hearing. There is no doubt that in terms of clause 3 the Irregularities Committee must afford accused persons the opportunity to state their case.

In this case the Irregularities Committee did not give the applicant an opportunity to state her case. On that basis alone, the power that the Irregularities Committee purported to exercise did not conform to the procedure that the parties had agreed to when the applicant signed the “acceptance and declaration of confidentiality” that incorporated Annexure C into their contract.

In terms of Annexure C, and thus the parties' contract, the Irregularities Committee only had authority to recommend the "action to be taken with regard to particular irregularities" (Clause 3(d)). It had no authority, as it purported to do in terms of the first decision, to rule that the applicant would not be permitted to carry out any work associated with the IEB examination.

It is concluded that, being unauthorised, the first decision is not binding on the applicant.

Brand's decision

In terms of clause 4.4 of Annexure C the parties agreed that alleged irregularities by officials are to be dealt with in terms of the "disciplinary procedures applicable to misconduct by employees/educators". Nowhere in the papers does the IEB identify those procedures nor does the IEB contend that there is a disciplinary procedure applicable to employees and educators in general. In the result the hearing before the second respondent cannot be said to have been one "in terms of the disciplinary procedures applicable to misconduct by employees/educators". In so concluding I do not pronounce on the quality of the hearing. In the absence of evidence as to the hearing that clause 4.4 envisages, it is futile to attempt to consider whether the hearing that Brand conducted was qualitatively the same as or better than that envisaged in clause 4.4.

The IEB contends that it was implied in the contract between it and the applicant that it could appoint "another person or body to conduct an enquiry into the conduct of the applicant" and to make findings on its behalf. There can be no doubt that the IEB must and is entitled to do all in its power to ensure the integrity of its examinations. That does not imply, however, that it may unilaterally determine a binding procedure to decide whether a sub-examiner has committed an irregularity.

In a nutshell, the contract between the applicant and the IEB did not authorise the procedure that led to Brand's decision.

The applicant sought in the notice of motion a special costs order against the IEB. Although the IEB tended to ride roughshod over the applicant's procedural rights, its conduct was not reprehensible to the extent that a special costs order is warranted. The applicant employed senior counsel. In view of the importance of the case to her, such step was warranted.

In the result the following orders are made:

1. It is declared that the Irregularities Committee of the First Respondent had no right to make any ruling which is binding on the Applicant with regard to the alleged interference by the Applicant with the scripts of the NSC Accounting paper 1 in 2008 and that the said Committee had no right to

impose any penalty which is binding on the Applicant in connection therewith.

2. It is declared that the Second Respondent had no right to make any decision which is binding on the Applicant with regard to the alleged interference by the Applicant with the scripts of her students in the 2008 IEB Accounting 1 exam.
3. The first respondent is ordered to pay the applicant's costs, including the costs of senior counsel.



B.R. du Plessis

Judge of the High Court

On behalf of the Applicant:

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