

Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **1981/2015**
DATE HEARD: **09/02/2016**
DATE DELIVERED: **12/02/2016**

In the matter between:

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR EDUCATION IN THE
NORTHERN CAPE**

1st Applicant

**THE HEAD OF THE DEPARTMENT OF
EDUCATION IN THE NORTHERN CAPE
PROVINCE**

2nd Applicant

**THE DISTRICT DIRECTOR: FRANCES BAARD
DISTRICT OF THE DEPARTMENT OF
EDUCATION IN THE NORTHERN CAPE**

3rd Applicant

and

SCHOOL GOVERNING BODY: NORTHERN CAPE

1st Respondent

NORTHERN CAPE HIGH SCHOOL, KIMBERLEY

2nd Respondent

ANNELIE FOURIE

3rd Respondent

KAREN RHEEDER

4th Respondent

CARMEN TAYLOR

5th Respondent

MILTON VAN HEERDEN

6th Respondent

WINNIFRED VAN WYK

7th Respondent

LUKE AIYER

8th Respondent

MELANIE CLARKE	9 th Respondent
PETRUS DU TOIT	10 th Respondent
MOGAMAT FREDERICKS	11 th Respondent
CHARLES HENDRICKS	12 th Respondent
MZIMKHULU JELE	13 th Respondent
SALMON ROBERTS	14 th Respondent
PETER MAMABOLO	15 th Respondent
ALDRIN MASDOLL	16 th Respondent
BENEDICT MODISE	17 th Respondent
VINCENT NOSI	18 th Respondent
MKULULEKO NQUMASHE	19 th Respondent
MARILDIA PANKER	20 th Respondent
THUBEKA TAWO	21 st Respondent
ELTONJON TOPKIN	22 nd Respondent
FAIZA VAN DER MERWE	23 rd Respondent
DAVID VAN DER MERWE	24 th Respondent
LAWRENCE VAN ROOYEN	25 th Respondent

In re

CASE NO: **1981/2015**

SCHOOL GOVERNING BODY: NORTHERN CAPE	1 st Applicant
NORTHERN CAPE HIGH SCHOOL, KIMBERLEY	2 nd Applicant
ANNELIE FOURIE	3 rd Applicant
KAREN RHEEDER	4 th Applicant
CARMEN TAYLOR	5 th Applicant
MILTON VAN HEERDEN	6 th Applicant
WINNIFRED VAN WYK	7 th Applicant

LUKE AIYER	8 th Applicant
MELANIE CLARKE	9 th Applicant
PETRUS DU TOIT	10 th Applicant
MOGAMAT FREDERICKS	11 th Applicant
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ELTONJON TOPKIN	22 nd Applicant
FAIZA VAN DER MERWE	23 rd Applicant
DAVID VAN DER MERWE	24 th Applicant
LAWRENCE VAN ROOYEN	25 th Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION IN THE NORTHERN CAPE	1 st Respondent
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THE HEAD OF THE DEPARTMENT OF EDUCATION IN THE NORTHERN CAPE PROVINCE	2 nd Respondent
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**THE DISTRICT DIRECTOR: FRANCES BAARD
DISTRICT OF THE DEPARTMENT OF**

Coram: Olivier J

JUDGMENT : APPLICATION FOR LEAVE TO APPEAL

Olivier J:

- [1.] The third to eighth, tenth to fourteenth and sixteenth to twenty-fifth respondents are all parents who had applied for the admission of their children, as learners, to the second respondent, the Northern Cape High School ("*the school*"). The first respondent is the School Governing Body of the school.
- [2.] The third applicant, the District Director (Francis Baard District) of the Department of Education, Northern Cape, had refused to admit the children to the school and the internal appeals against those decisions had been dismissed by the first applicant, the Member of the Executive Council for Education, Northern Cape Province. The second applicant is the Head of the Department of Education, Northern Cape Province.
- [3.] On 4 December 2015 I ordered that the children be admitted to the school, pending the finalisation of an application¹ by the respondents for the review of those decisions and of the decisions to dismiss the appeals, as well as for a (final) order that they be admitted to the school for the 2016 academic year should they so

¹ Part B of the notice of motion.

wish, and that the third respondent during that period be prohibited from filling the vacancies that had resulted from the refusal of the initial applications for the admission of the learners. The applicants were ordered to pay the costs of the first part of the application, in other words, the part in which the interim relief was granted².

[4.] The applicants now apply for leave to appeal against those orders. The grounds of appeal are set out in more than 50 paragraphs and sub-paragraphs, the contents of most of which amount to argument, and also to a considerable extent repetition, rather than a concise statement of grounds of appeal³. Before considering any of the grounds of appeal that can be discerned from the notice, however, it has to be considered whether the orders made by this court on 4 December 2015 are indeed appealable.

[5.] For an order or decision of this court to be appealable to the full bench of this court or to the Supreme Court of Appeal it *“must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties and ... it must have the effect of disposing of at least (a) substantial portion of the relief claimed in the main proceedings”*⁴.

[6.] These requirements or principles, however, *“are neither exhaustive nor cast in stone”*⁵ and the overriding requirement is that it has to

² Part A of the notice of motion

³ Compare **S v Mapani** 2012 JDR 0884 (Nm); **Uniform Rule** 62(3).

⁴ Compare **International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others** 2010 (5) BCLR 457 (CC) para [48]

⁵ **Ibid**, para [50]

be in the interests of justice to allow an appeal against orders which *"have no final effect and that are susceptible to reconsideration ... when final relief is determined"*⁶.

[7.] *"(W)hat the interests of justice require depends on the facts of each particular case"*⁷. An important factor would be *"whether irreparable harm would result if leave to appeal is not granted"*⁸.

[8.] The form of the orders of 4 December 2015 is clearly that they are to apply only until the review is decided and on the face of it they would therefore have only interim effect, but the question would remain whether they nevertheless are final in effect and in substance⁹. In paragraph 11 of the notice of application for leave to appeal the submission is indeed made that *"Although this order is called an interim relief (sic), it has the effect of a final order, therefore the applicants are entitled to appeal same"*.

[9.] The effect of the orders of 4 December 2015 are that, should the decisions of the third and first applicants not be set aside on review, the temporary *"admission"* of the learners to the school will lapse, as will the temporary prohibition of filling the vacancies.

[10.] Whether the particular learners would in such an event be allowed to stay on in the school or not, is neither in form nor in effect determined by the orders of 4 December 2015. Prayer [2] of part B of the notice of motion is, as already indicated, a prayer for an order

⁶ Ibid, para [50]; *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) para [20].

⁷ *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) para [28].

⁸ *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) para [24]; Compare *International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others*, *supra*, para [55]

⁹ Compare *Jacobs and Others v Baumann NO and Others* 2009 (5) SA 432 (SCA) para [9]

that the learners be admitted to the school permanently, at least for the 2016 academic year, should they so wish.

[11.] Counsel for the applicants argued that, in the event of the respondents failing in their application for review, it would not be “feasible” or “practical” to have these learners removed from the school, and that the interim relief is therefore indeed final in effect. While it may be argued that it would be undesirable to do so, there is no evidence to the effect that it would not be possible.

[12.] In any event, and again as already pointed out, the question whether the learners should stay on in the school after the expiry of the interim order is the subject of the application in part B of the notice of motion. The particular prayer in part B is simply for the (final) admission of the learners for the 2016 academic year. It is not qualified by any reference to the result of the application for the review of the decisions made by the first and third applicants.

[13.] In **Minister of Home Affairs and others v Johnson and others; Minister of Home Affairs and another v Delorie and others**¹⁰ the court *a quo* had granted orders suspending the operation of declarations that the respondents were “undesirable persons” who could not return to South Africa, and of the directive in terms of which those declarations had been made, and allowing them to return to the country pending the review of the directive and of the declarations. On appeal it was held that the orders were “only temporary in nature and did not finally dispose of any factual or

¹⁰ 2015 (6) BCLR 707 (CC).

legal issues” and that, because the orders were directed at the two respondents only, it would not be in the interests of justice to entertain the appeal¹¹.

[14.] The interim orders in the present matter are in my view also clearly temporary in nature, and the relief is also limited to the parents and learners in the present matter and to the vacancies resulting from the non-admission of these particular learners.

[15.] The review court will, in effect and in considering the relief sought in prayer [2] of part B of the notice of motion, be reconsidering the temporary or provisional admission of the particular learners, and that court will, in granting or refusing that relief, in effect either confirm or discharge the interim orders.

[16.] The orders are also clearly not definitive of any of the rights concerned here. They do not dispose of any part of the relief claimed in part B of the main application.

[17.] Keeping in mind that it is normally regarded as not in the interests of justice *“to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a Court when the final relief is determined”*¹², the question would then be why this case should be an exception and whether the interests of justice in this case require such a piecemeal approach¹³.

¹¹ *Ibid*, para [7].

¹² *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene)* 2012 (11) BCLR 1148 (CC).

¹³ Compare *International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others, supra*, para [50].

- [18.] On the evidence there is no indication that the present applicants will suffer any prejudice at all, let alone irreparable prejudice, should the interim orders remain in place pending the application for the relief sought in part B of the notice of motion. No clear submission to this effect can even be discerned from the contents of the notice of application for leave to appeal.
- [19.] In the notice it is contended that, in making the interim orders, this court encroached upon the terrain of the applicants. I disagree. The orders are, as already pointed out, only temporary in effect and they are not definitive of the rights of any of the applicants. In this regard the facts of the present matter are entirely distinguishable from those in the **National Treasury** case referred to above¹⁴, where there was clear evidence *“that the impact of the temporary restraining order (was) immediate, on-going and substantial”*¹⁵. There is simply no evidence to this effect in the present matter.
- [20.] In deciding an appeal against the interim orders on the grounds advanced in the notice of application for leave to appeal *“the appellate court would in effect usurp the role of the review court”*, something which should be avoided as far as possible¹⁶.
- [21.] In my view the interim orders in the present matter are therefore not appealable, making it unnecessary to consider the grounds of appeal in any detail.

¹⁴ Paragraph [17] and footnote 12 above.

¹⁵ **National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene)**, *supra*, para [27].

¹⁶ *Ibid*, para [26]

[22.] There is no reason why costs should not follow the result and the following order is therefore made:

**THE APPLICATION FOR LEAVE TO APPEAL IS
DISMISSED WITH COSTS.**



**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

**For the Applicants:
Instructed by:**

**ADV T C TSHAVUNGWA
MJILA & PARTNERS**

**For the Respondents:
Instructed by:**

**ADV J G VAN NIEKERK SC
ENGELSMAN MAGABANE INC.**