FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1821/2013

In the matter between:-

LERATO RADEBE	1st Applicant
LEHLOHONOLO RADEBE	2nd Applicant
SELLOANE MOTLOUNG	3rd Applicant
EQUAL EDUCATION	4th Applicant

and

PRINCIPAL OF LESEDING TECHNICAL SCHOOL	1st Respondent
CHAIRPERSON OF THE SCHOOL GOVERNING BODY, LESEDING TECHNICAL SCHOOL	2nd Respondent
DISTRICT DIRECTOR, LEJWELEPUTSWA DISTRICT	3rd Respondent
HEAD OF DEPARTMENT, BASIC EDUCATION, FREE STATE	4th Respondent
MEC FOR EDUCATION, FREE STATE	5th Respondent
MINISTER OF BASIC EDUCATION	6th Respondent

HEARD ON: 17 MAY 2013

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 30 MAY 2013

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[1] On 17 May 2013, the applicants applied, on an urgent basis, for, among others, an order declaring the first and second respondents' conduct in banishing the first applicant ("the learner") from her classroom during school hours to constitute a suspension and to be unlawful and discriminatory.

[2] After the hearing, I granted the hereinafter mentioned orders and indicated that my reasons will follow later. These are my reasons for doing so.

[3] The applicants sought the following orders:

> "1. Dispensing with the forms, service and time limits prescribed in the Rules of Court and granting leave for this application to be heard as a matter of urgency;
> 2. Declaring the First and Second Respondents' conduct in banishing the First Applicant ("the learner") from her classroom during school hours to constitute a suspension and to be unlawful and discriminatory;
> 3. Declaring the failure of the Third to Sixth Respondents to intervene to remedy this course of conduct to be unlawful and discriminatory;
> 4. Declaring that the First and Second Respondents' requirement that the learner may only attend school if she cuts off her dreadlocks discriminates unfairly against her on the basis of her religion.
> 5. Declaring that the Respondents' conduct towards the First Applicant violates her constitutional rights to, amongst others, equality, dignity, education, and the

freedoms of religion, belief, opinion, expression, association, and culture.

6. Interdicting and restraining the First and Second respondents from preventing the First Applicant from participating fully as a Grade 8 learner at their school, and from harassing, disadvantaging, victimising her or discriminating against her in any way;
7. Ordering the First and Second Respondents to allow the learner to participate fully as a grade 8 learner at their school, with immediate effect;
8. Ordering First to Third Respondents to meet with the learner and the Second and Third Applicants (her parents) within five school days of the date of the Order, to assess what learning she has missed since January 2013 and to draft or implement a suitable program of extra tuition to enable her to catch up;
9. Ordering the First, Second and Third Respondents to ensure that a majority of the officials and employees under their direction participate wholeheartedly in an education and relationship building workshop to be provided by the Human Rights Commission within one month of the date of this Order;
10. Ordering the First and Second Respondents to explain their error in banishing the learner from her classroom, and their improved understanding of the religious and cultural rights of learners, to a full assembly of the learners and educators of the Leseding Technical High School within one month of the date of this Order;
11. Ordering those Respondents who oppose this application to pay the costs hereof; and
12. Further and/or alternative relief."

[4] I then granted the following orders:

"1. Leave is granted for this application to be heard as a matter of urgency;

2. First and Second Respondents' conduct in banishing the first applicant ("the learner") from her classroom during school hours, is unlawful and discriminatory;

4. The first and second respondents' requirement that the learner may only attend school if she cuts off her dreadlocks discriminates unfairly against her on the basis of her religion;

5. The respondents' conduct towards the first applicant violates her constitutional rights to, amongst others, equality, dignity, education and the freedoms of religion, belief, opinion, expression, association, and culture.

6. First and second respondents are interdicted and restrained from preventing the first applicant from participating fully as a Grade 8 learner at their school, and from harassing, disadvantaging, victimising her or discriminating against her in any way;

7. First and second respondents must allow the learner to participate fully as a grade 8 learner at their school, with immediate effect;

8. First to fourth respondents to meet with the learner and the second and third applicants (her parents) within five school days of the date of the Order, to assess what learning she has missed since January 2013, and to draft and implement programs of extra tuition to enable her to catch up. The programme must be drafted, implemented and completed on or before the 16th of July 2013;

11. The respondents to pay the costs of the application, individually and severally, the one to pay, the others to be absolved."

URGENCY

[5] The respondents contended that the matter was not urgent, based on three grounds, namely:

5.1 That the applicants, without any reasons, did nothing about the matter from 26 February until 25 April 2013. This is a self-created urgency, so the argument goes, by simply waiting for several months.

5.2 The second ground is that the applicants are seeking final relief, which is detrimental to the respondents in not having sufficient time to respond to the application.

5.3 The third and final ground is based on the fact that the matter has become moot insofar as the Leseding Technical School is concerned. This ground also became the respondents' main ground of opposition to the relief sought by the applicants on the merits.

5.4 I will deal with the first ground purely for the purpose of urgency and the last two grounds when I deal with the merits.

[6] **SELF-CREATED URGENCY**

6.1 The applicants, in their heads of argument, attached a document detailing the chronology of events and dates from the 9th of January 2013, up to the date of instituting these

proceedings. I do not intend to repeat these events as they are also clearly set out in the second applicant's founding affidavit, much of which is not disputed by the respondents.

6.2 Suffice it to say that during the months of March and April 2013, the second applicant discussed his child's exclusion from classes at Leseding Technical School with various officials, including Mr Ndlebe (Director: Education Management & Governance, Department of Education; the Director and Chief Director, Mr Mokhobo; Mr Leepo and Mr Havenga, from the district office and the South African Human Rights Commission. On 29 March 2013, the second applicant lost his job as a result of poor attendance at work whilst attending to his daughter's exclusion from education.

6.3 Based on the above, I cannot find that the applicants did nothing about the matter during the said period.

6.4 In any event, it is not the respondents' case that the delay was caused by the first applicant and I find that, solely on the basis hereof, the respondents cannot succeed on this ground.

[7] 7.1 Section 28(2) of the Constitution of South Africa, 1996, provides that in every matter affecting the child, the child's best interests are paramount.

7.2 The serious invasion of the first applicant's (a child's) right to basic education occurs on an on-going basis

and every day that passes by without her being in class, receiving education.

7.3 It is, therefore, incumbent upon this Court to grant the child urgent protection. To force her to await relief in the ordinary course will be tantamount to dereliction of duty.

7.4 On the basis hereof, I find that this matter is urgent.

FACTS

[8] As every governing body of a public school must adopt a code of conduct for its learners, Leseding Technical School also has a code of conduct. Paragraph 4.3.3 of the code of conduct reads as follows:

> "Hairstyle must be neat and short. No elaborate style (such as parting, shaven paths, steps, dyes, fizzes, dreadlocks and hairpieces) are allowed. Girls may have long hair or simple braids, but long hair must be tied back out of the face." (My underlining.)

Paragraph 5 of the said code deals with the procedure to be followed when the code of conduct has been infringed.

[9] It needs to be said from the beginning that the validity, reasonableness or constitutionality of the code of conduct, is not challenged by the applicants.

[10] 10.1 The main contention of the applicants is that the second applicant, his wife, the third applicant and his three children, including the first applicant, belong to the religion of Rastafari and that they are members of the Rastafari House of Nyahbinghi.

10.2 It is further their contention that members of this religion wear their hair in dreadlocks, which they do not cut, and they use natural products to wash and condition their hair.

[11] The respondents attempted to gainsay the fact that the first applicant is of Rastafarian religion based on what the first applicant's grandmother purportedly told the first respondent. The applicants objected that this is inadmissible hearsay evidence and the respondents abandoned the said contention. This left the court with the uncontroverted evidence of the applicants that the first applicant is a member of the Rastafarian religion.

[12] On the 17th January 2013, the first applicant was excluded by the first respondent from school and she was sent home, because she was wearing dreadlocks, in contravention of the school's code of conduct. From then onwards, until May 2013, the first applicant would attend school and she would be removed from the classroom and made to sit alone in the staffroom, until it was time for her and other learners to go home. She was therefore excluded from receiving education.

[13] 13.1 It is the contention of the applicants that the code of conduct prevents the wearing of dreadlocks as a hairstyle, but that the first applicant is wearing dreadlocks, because of her religion. The instruction that she should cut her hair is an instruction to violate her faith. The applicants contend that:

- by preventing the first applicant from attending class, the respondents were treating her differently from other learners in that class;
- such differentiation is based on her religion;
- it is unfair discrimination; and
- that it is in breach of her constitutional right to equality.

13.2 The applicants further contended that whilst the governing body has the power to suspend a learner and that the Head of Department may expel a learner, this may only be done after following due processes, complying with natural rights of justice and only after a fair hearing.

13.3 They further argue that there is no provision in law that empowers a person to send a child home, away from school, unless the child has been lawfully suspended and that no provision in law empowers a person to exclude a child from her classroom and to require her to sit in the staffroom during learning hours, for weeks, thereby depriving him/her of education.

13.4 They contend that all these actions of the respondents are unauthorised by law and unlawful in that they did not even follow the procedure of their own code of conduct. I must at this stage emphasise that no attempt was made by the respondents to contradict these allegations and submissions.

[14] 14.1 The respondents, instead, argued that the first applicant was admitted at Thotagauta Secondary School, Welkom, pursuant to the request of second applicant and an agreement between him and a certain Mr Ishmael Berry Tshabangu, the Deputy Chief Education Specialist, district office, on 23 January 2013.

14.2 They further argued that since the first applicant was admitted at Thotagauta Secondary School on 23 January 2013 and deregistered at Leseding Technical Secondary School as a result, the matter became moot as far as Leseding Technical School is concerned.

14.3 Their further submission is that it was Thotagauta Secondary School which had to hold a disciplinary enquiry before it excluded the first applicant from attending school and, therefore, that the applicants should have brought these proceedings against the said school (Thotagauta).

[15] It is clear from the record that at no stage did the first applicant attend school at Thotagauta Secondary School and there is no confirmation from the principal of the said school that the first applicant was ever admitted there. The third applicant met with the principal of Thotogauta on 24 January 2013, who told her that the school does not accept Rastafarian learners. It is also clear that the first applicant continued to attend school at Leseding after she was allegedly admitted at Thotagauta. At no stage were the applicants told that the first applicant had been deregistered at Leseding as she was admitted at Thotagauta by any of the respondents, until on 3 May 2013, in a letter by fourth respondent to Equal Education. In the said letter, the fourth respondent states that Mr Radebe (second applicant) registered Lerato (first applicant) at Thotagauta Secondary School. This is clearly factually incorrect, as the first applicant was never registered at Thotagauta, let alone by the first applicant.

[16] The only basis of the respondents' contention that the first applicant was admitted at Thotagauta Secondary School is a letter dated 23 January 2013, written by a certain Mr S.R. Leepo of the Department of Education in the district office, to the principal of Thotagauta. I quote from the said letter:

> "Kindly note that the Department has been obligated to ensure that the following learner is admitted in your school." (The learner being the first applicant.)

[17] The respondents argued that once the Head of Department has decided that a learner is admitted at a certain school in the province, no further action or registration is required and no consent is needed from the principal of that school. It is clear that this contention cannot be correct, as the cooperation and requirements of the school must be met before a learner can be admitted at any school. No learner can just be imposed on a school.

[18] The respondents conceded that this decision could not be made by the district office, but only by the Head of Department. They contended, however, that the Head of Department has delegated this power to the district office and that both the Court and the applicants' legal representatives will be given the copies of the document in respect of such delegation, before the end of the day (17 May 2013). A week later, at the time of writing of this judgment, I have as yet not been provided with the said document. In the absence of such document, I must find that Mr Leepo acted *ultra vires* his powers and that the said decision is invalid.

[19] On the basis of the above findings, I find that the first applicant was never admitted at Thotagauta Secondary School, but that she is still registered as a learner at Leseding Technical School and therefore the contention of the respondents that the matter has become moot in respect of Leseding Technical School, is dismissed.

FINAL INTERDICT

[20] The requirements for the grant of a final interdict are set out in the case of **Setlogelo v Setlogelo** 1914 AD 221 at 227, as follows:

(a) There must be a clear right on the part of the applicant.

In casu, it is clear that the first applicant has a clear right to basic education. She has a right to be in class and receive education. Section 3(6)(b) of the South African Schools Act provides that any person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or imprisonment. This illustrates how seriously the legislature views a learner's right to attend school. I, therefore, find that the applicants have established a clear right.

(b) An injury committed or reasonably apprehended.

I have already found that the first applicant has been unlawfully excluded from receiving education and for every day that she is so excluded, the injury continues. I, therefore, find that the injury, *in casu*, is not only apprehended, but is actually committed and continuing.

(c) The absence of any other satisfactory remedy available to the applicant.

I have already found that this matter must be dealt with as one of urgency, as delaying it only causes more harm to the first applicant. Maybe it is apposite to deal with this issue at this juncture.

(c).1 The respondents argued that the first applicant could be placed at Unitas Secondary School in Welkom, as, primarily, among other reasons, this school does not have a code of conduct regarding hairstyle.

(c).2 The respondents stated that, on the 10th of February 2013, the first respondent called a parents' meeting. At the said meeting, the parents were unanimous that the Rastafarians, as part of their religion, use cannabis as part of their spiritual and inspirational religious purposes. It was unclear to them how a child can be allowed to observe this religion and it was highly upsetting. Based on this (the use of cannabis), the code of conduct of the school should not accommodate the one learner. This is not entirely correct, as in the case of **Prince v President of the Law Society of the Cape of Good Hope and Others** 2002 (3) BCLR 231 (CC) at paras [19] and [55], it was stated that

cannabis is not used by Rastafarian women and children. In any event, there is no allegation nor any evidence that the first applicant is using cannabis.

(c).3 Be that as it may, this clearly illustrates that the school and the parents are at cross-purpose with each other. Whereas the school's code of conduct prevents the wearing of dreadlocks as a hairstyle, it is clear that the parents are against it as part of the Rastafarian religion. (My own emphasis.)

[21] It cannot be overemphasised that religion is a very sensitive issue and that religious intolerance can ruin the whole country. One needs not look at the whole world, as good examples of what religious intolerance can do, can be found in our own African continent, as in Northern Mali and Northern Nigeria.

The courts of this country must be alert and proactive and root out the evil of religious intolerance in any form. They should nip it in the bud wherever and whenever it raises its ugly head.

[22] Now, acceding to the submission that the first applicant be admitted at Unitas Secondary School, because it does not have a code of conduct on hairstyle, would be a perpetuation of the discrimination based on religion. I am not prepared to

do that, but, on the contrary, I would appeal to the respondents and the powers that be, to educate and make our people aware of the importance and advantages of accepting our religious diversity.

[23] I am, therefore, satisfied that all the requirements for the granting of a final order have been established by the applicants.

[24] In conclusion, I was advised by counsel for the respondents that although this does not form part of the papers, he has been asked to convey to the court that Leseding Technical School is full and cannot admit an extra learner. Counsel for the applicants stated that she had just taken instruction and the first applicant has informed her that every day she goes to class, she sits in her own desk, before being removed and taken to the staffroom. Her space is therefore still available. I do not find it necessary to deal with this issue, in the light of the order that I have already made. I, therefore, granted the orders that I did, in the light of these reasons.

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N.W. PHALATSI, AJ

On behalf of applicants: Adv S. Harvey
Instructed by:
Equal Education Centre
Care of Legal Aid South Africa
BLOEMFONTEIN

On behalf of respondents:	Adv J.Y. Claasen SC Assisted by: Adv M Mopeli Instructed by: State Attorney BLOEMFONTEIN

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