

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 828/2010

In the matter between:

DEVARAJH MOODLEY

Applicant

and

THE KENMONT SCHOOL

First Respondent

THE KENMONT SCHOOL GOVERNING BODY

Second Respondent

PROVINCIAL HEAD OF THE DEPARTMENT

OF EDUCATION

Third Respondent

MEMBERS OF THE EXUCUTIVE COUNCIL

Fourth Respondent

MATSIE ANGELINA MOTSHEKGA NO

Fifth Respondent

JUDGMENT

Delivered: 30 March 2012

[1] This application concerns Remano Moodley, a boy born on 8 July 1993. (“the boy”) His father, Devarajh Moodley, a captain in the South African Police Services is the applicant and brought the application in his representative capacity as such. I will deal with the application that is presently before me in due course

BACKGROUND TO THE APPLICATION

[2] The boy was at all material times a scholar at the Kenmont School in Durban, KwaZulu-Natal, a school designated for children with specific learning disabilities (“the school”). The boy was enrolled at this school during the year 2004 and during January 2010 he was “excluded” by the school from further attendance and this led to the protracted litigation which has sprouted into four (4) ring binder files crammed with affidavits and documentary evidence. I better tell this tale from the beginning in an abridged manner. In order to do that I need to mention the respondents cited by the applicant.

[3] The first respondent is the school, the second respondent is its governing body and third to fifth respondents, the Provincial Head of Education, the MEC for Education and the National Minister of Education, respectively. No relief was sought against the third to fifth respondents and at all times they indicated that they would abide the judgment of the court, but they were drawn into the application and an affidavit was filed on their behalf and they were represented by counsel during the hearing of the application.

[4] During this judgment I will at times refer to “the school” when it should be a reference to either the first or second respondents.

[5] On 4 June 2009 the boy and his parents were served with a Notice of a Disciplinary Meeting by the principal of the school in connection with an incident that

is alleged to have taken place on 3 June 2009 involving an alleged assault by the boy on other boys with a pair of scissors. The hearing was scheduled to take place on 12 June 2009. On that date the hearing commenced but was adjourned for further evidence until 17 June 2009 and on that date further adjourned to 24 June 2009. By then the witnesses to the event had all testified and so did the boy. The matter could not be finalised and was adjourned to 7 August 2009.

[6] At the end of July 2009 the applicant brought an urgent application in the High Court, KwaZulu-Natal, Durban, under Case No. 10947/2009 and sought to interdict the school from isolating the boy from other learners and to allow him to interact with other learners during the school breaks. The applicant alleged that the boy told him on 23 July 2009 that the principal of the school decided that he be made to sit on the stairs in front of the principal's office during school breaks and was not allowed to mix with other learners. The applicant's representations on behalf of the boy were ignored and apparently the principal intended to enforce the boy's isolation pending the outcome of the disciplinary hearing. The school opposed this application and the principal deposed to an affidavit in which she sought to justify the isolation of the boy on the basis that he represented a danger to other learners. What one gathers from her affidavit is that it was being alleged at the disciplinary hearing that the boy attacked another boy by the name of Anele with a pair of scissors on 3 June 2009 and that Anele sustained injuries to his hand and arms as he warded off the blows. Two other two boys who tried to intervene were also injured. The principal conceded that there were no serious injuries sustained by anyone during this altercation but that she viewed the matter in a very serious light as her responsibilities extended to other learners. I must also add that according to the boy he acted in self-defence and

was being attacked and it is common cause that the boy was also injured during this altercation.

[7] I do not want to involve myself with this application as obviously I am in no position to judge what happened at the school between the boy and Anele on 3 June 2009. I also do not want to be seen to make light of the decision by the principal to isolate the boy in the manner that she did. Mr Marais S. C. who appeared on behalf of the first and second respondents referred me to the case of **Jacobs v Chairman, Governing, Body, Rhodes High School And Others¹ 2011 (1) SA 160 (w)** where a principal of a school ignored a threat made by a learner with near fatal consequences. Suffice it to say that I doubt if the isolation of the boy in this manner was warranted. I say this because the principal also disclosed that prior to the alleged attack on Anele the boy also “held a knife to Bianca, a fellow learner’s neck” She does not say when this incident took place and why it was not the subject of a disciplinary enquiry or at the very least a charge as a separate count to the one concerning the attack on Anele. There are other averments in the principal’s affidavit that somehow detracts from her assertion that she was genuinely of the view that the boy constituted a danger to fellow learners. She says “even though we attempted to keep him (the boy) under supervision, he continually slipped away” and elsewhere in her affidavit, “I deny the allegation that he cannot utilise the toilets during school breaks because he is always in the toilet and has to be continually called from the toilet” Also worth a mention is the principal’s remarks that “attempts to keep him under supervision during lunch breaks have been unsuccessful in that he does not obey his teachers and simply slips away when he is able to”. If the boy was roaming

¹ 2011(1) SA 160

around despite the fact that he was ordered to sit outside the principal's office during breaks, then it rather defeats the whole object of the exercise and the impression is created, and I put it no higher than that, that the boy was being made to sit outside her office as a form of punishment pending the outcome of the disciplinary hearing. Lastly, it needs to be mentioned that the boy had been a learner at the school since 2004 and if he had these violent propensities, surely the principal would have said so in her affidavit.

[8] This urgent application was due to be heard by Shepstone A J on 3 August 2009 but the parties apparently reached an agreement and an order was taken by consent. I quote this whole order (with grammatical errors) without comment:

"IT IS ORDERED

1. *That the respondent is directed to appoint a member of staff to supervise the school activities of Remano Moodley during school which shall be of the discretion of the principal of the respondent. But which shall not be exercised in such manner as to have the effect of isolating Remano outside the principal's office, and which shall exercise in such manner as to allow Remano reasonable freedom of movement and reasonable interaction with his peers.*
2. *That the respondent is directed to hear and conclude the disciplinary enquiry presently in progress by the 20 August 2009.*
3. *That the matter is adjourned sine die."*

[9] Although this application was adjourned *sine die* I have no doubt that the parties were of the view that the matter was now finally put to rest and that the disciplinary enquiry would be concluded by 20 August 2009. This application was not reinstated but merely featured as an annexure to the present application.

THE PRESENT APPLICATION

[10] The applicant brought the application as one of urgency. The relief being sought that is pertinent to this application is contained in paragraphs 2.1.1, 2.1.2 and 3 of the “Perfected Notice of Motion”. These paragraphs read as follows:

“2.1.1. Directing the Respondents’ to immediately reinstate Remano Moodley to normal classes at Kenmont School.

Alternatively

2.1.2 An order reviewing, setting aside and correcting the First and Second Respondents’ decision/action not to re-admit Remano Moodley to Kenmont School and directing that Remano Moodley immediately be admitted or reinstated to Kenmont School.

3. Pending the return date, the provisions of paragraph 2.1.1. operate with immediate and interim effect, pending the outcome of the Main Application.”

[11] I will continue with the events that are alleged to have occurred after the order had been granted by Shepstone AJ before commenting on the application itself.

[12] On 7 August 2009 when the disciplinary enquiry was due to proceed a Mr Viren Singh, the attorney representing the boy on instructions from the applicant, and one Mr Thami Majola an attorney then representing the school entered into settlement negotiations about the disciplinary enquiry against the boy. The outcome of all this was that Mr Singh drafted a settlement agreement in manuscript. The

settlement agreement appears as an annexure to the papers before me and it reads as set out below:

*“IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA*

CASE NO: 10947/2009

In the matter between:

DEVARATH MOODLEY

Applicant

And

THE KENMONT SCHOOL

Respondent

Settlement Agreement

Whereas Respondent has instituted disciplinary proceedings against Remano Moodley, the Applicant's son.

and

Whereas Applicant has instituted legal proceedings under the aforesaid Case Number;

NOW THEREFORE IT IS AGREED AS FOLLOWS:-

1.

The disciplinary proceedings against Remano Moodley are hereby abandoned.

2.

In the event of violent physical conduct on the part of Remano the Respondent shall be entitled to approach the High Court under this Case Number for urgent interim relief.

3.

Remano shall voluntarily leave the school at the end of the 2009 academic year. In the interim all restrictions on the freedom of movement and interaction with his peers will be uplifted and removed in respect of Remano.

4.

The principal of the Respondent, Elizabeth Kloppers, shall arrange a transfer to another suitable school of Remano, on the recommendation of the committee referred to in paragraph 5 infra.

5.

Within 1 month of date hereof a meeting shall be commenced by the said Elizabeth Kloppers of all role players, including a psychologist and high ranking official at the Department of Education, to chart the way forward in respect of the further education of Remano. The Respondent undertakes to abide by and implement the decisions of the committee envisaged in this paragraph which will constantly monitor progress.”

[13] What is immediately apparent is that this agreement purported to settle the application that came before Shepstone AJ. It also incidentally purported to bring closure to the disciplinary proceedings against the boy. Of all the other considerations referred to in this document the salient feature thereof was that the disciplinary proceedings against the boy would be abandoned against the undertaking by the applicant that the boy would be relocated to another school by the end of the 2009 academic year. This agreement was not signed by or on behalf of either the applicant or first and second respondents and in the papers before me the status of this document is in dispute. The applicant states that this so called settlement agreement was drafted by his attorney and given to the representatives of the school for “further perusal and consultation and amendment”. The deputy principal of the school deposed to the answering affidavit on behalf of the first and

second respondents and remains adamant that a compromise had been reached that is lawful and binding on the applicant and the boy and that the present relief that is being sought is directly in conflict with the compromise reached.

[14] I accept without any reservation that from the perspective of the school this agreement was thought to bring finality to the disciplinary process, otherwise it is highly unlikely that it would have agreed to abandon the disciplinary proceedings against the boy. What is equally apparent is that during the months following the comprehension by the school that the applicant was suggesting additional terms to the settlement agreement the school's attorneys participated in these negotiations. In a letter dated 3 November 2009 addressed to the applicant's attorney by the attorney acting on behalf of the school, reference is made to "pending settlement negotiations" and certain suggestions are then made on what the settlement agreement should contain. The letter ends with an expression to the effect that it is hoped that the applicant will carefully consider these proposals. At the stage when this letter was written it was still common cause between the parties that whatever further conditions were being negotiated the one certainty was that an agreement had been reached that the boy would not return to the school the following year. My impression of the correspondence is that the school would go to any length to ensure that it would not have to put up with the boy in 2010. Its attorneys demonstrated this by the contents of a letter addressed to the applicant's attorneys dated 17 November 2009. It reads as follows:

" We point out that it was agreed (in terms of a Settlement Agreement) that Remano Moodley would leave the Kenmont School at the end of the 2009 academic year.

This letter is written to avoid any misunderstanding and to indicate to your client that our client stands by this agreement.”

[15] On 9 December 2009 applicant’s attorneys addressed a letter to the first and second respondents’ attorneys advising them that the boy would in fact be returning to the school during 2010 and that his clients have consistently denied that any settlement had been reached. The letter concluded with a warning that if the boy is refused permission to the school in 2010 an urgent application would be brought in the High Court.

[16] On the probabilities the contents of this letter must have caused the school anguish and dashed any hopes that it may have had that it could get rid of the boy through negotiations. Moreover, the date by which Shepstone AJ had directed that the disciplinary process should be concluded namely 20 August 2009 had come and gone.

[17] Mr Marais SC relied on the settlement agreement and argued that if it is accepted that this agreement was a binding agreement it disposes of the application as the relief being sought is in direct conflict with its contents. I will deal with this argument in due course.

[18] Paragraph 3 of the settlement agreement allowing as it does for all restrictions on the freedom of movement of the boy to be lifted also seems in conflict with the principal’s earlier assertion that the boy posed a danger to fellow learners. Why, one may ask, does the boy cease to be a danger to other learners simply because his parents agreed not to return him to the school the following year?

[19] The school responded to this new development and in a letter from its attorneys dated 17 December 2009 addressed to the applicant's attorney informed the applicant that it has amended its Admission Policy and purported to invite the applicant to make representations whether to re-admit the boy to the school in 2010. It stated that the school believed that the boy should not be re-admitted as he no longer qualified to be admitted regard being had to the provisions of the amended Admission Policy and in particular paragraphs 4.2. 4.2.1, 4.2.2, 4.3 and 4.5 thereof. The relevant paragraphs of the Amended Admission policy are the following:

"A learner who has been admitted to Kenmont School will automatically qualify for annual re-admission, unless:

4.1.....

4.2 The learner has demonstrated behavioural problems or conduct which

4.2.1 seriously interfered with education of the other learners

4.2.2 endangered the psychological health of the other learners or educators;

4.3 The Governing Body decides on information disclosed to it, that there is reason to believe that a learner may behave in the manner described in Clause 4.2.

4.4 The learner is likely to benefit from the specialised education offered by Kenmont School;

4.5 It is not in the interest of the learner or the other learners for the learner to be re-admitted."

[20] The applicant declined to respond to the invitation to make representations and on 12 January 2010 a communication was addressed to the applicant's attorney

to the effect that the second respondent had met and after considering its admission policy determined that the boy do not qualify for re-admission to the school. The boy nevertheless went back to school and after some futile correspondence between the respective attorneys; the boy was removed from the school premises on 20 January 2010.

[21] This resulted in the urgent application for the relief that I set out above with the matter on the roll for hearing on 26 January 2010. I am informed that on that day Van Zyl J heard the application in chambers and directed that the third, fourth and fifth respondents should file answering affidavits and the matter was adjourned for that purpose to 18 February 2010.

[22] The deputy principal of the school then filed an answering affidavit on behalf of the first and second respondents and defended the decision of the school to refuse to allow the boy back for the 2010 school year on the basis that the settlement agreement provided that he would not be back for the 2010 school terms and that a decision had been taken by the second respondent, as he claimed it was entitled to do, in terms of the amended Admission Policy. In this affidavit the deputy principal justified the decision not to allow the boy back to the school by referring to the altercation that took place between Anele and the two other boys to which reference has been made and to a number of other alleged offences that did not appear in the affidavit of the principal in the affidavit filed in that other application. I quote from his affidavit:

- “(b) Apparently had a knife at school during the week of 28 May 2009, which was reported to me by BIANCA MILTON the following week.
- c) Aggressively shoved a female learner, CHANEL HEPBURN, twice, on 28 August 2009. (The first incident was witnessed by HICKMAN and the second by a learner, MICHAEL PENTECOST).
- d) Struck and attempted to strangle other learners until an educator intervened (ACKERMAN).
- e) Used a glue gun to pour hot glue onto another learner’s arm (VAN WYK).
- f) Threw stones at another learner (VAN WYK).
- g) Told other learner’s and educators “I WILL FUCK YOU UP” and said “FUCK YOU” (SMITH, CHETTY).
- h) Was seen carrying a kitchen knife on the playground and then passed it to a child in Grade 7 (reported to JACOBS by several learners including SARAH KENNEDY and BIANCA MILTON).
- i) Attempted to strike other learners with a divider (mathematical instrument with very sharp ends) until an educator intervened (SMIT).

20.

REMANO is volatile and unpredictable. Educators and learners fear for their safety. Given that he, inter alia, inflicted stab wounds on other learners with large sharp scissors, I submit that such fear is reasonable.

21.

Less serious incidents happened continuously. The teachers aforesaid confirm that **REMANO**:

- a) is generally aggressive and confrontational;
- b) regularly -
 - (i) talked, shouted loudly or sang during classes;

- (ii) *knocked over desks;*
- iii) *kicked anything in the classroom out of his way;*
- iv) *clicked his tongue when reprimanded;*
- v) *interfered with the learning activities of other learners;*
- c) *was openly defiant, impervious to any disciplinary attempts and a law unto himself.*

22.

While these incidents did not physically endanger learners or educators, they were so frequent that they caused a material disruption to classes. This is unfairly prejudicial to other learners.

23.

It is clear that REMANO has a behavioural problem apparently emanating from his life at home.”

[23] The matter once again came to be heard and was allocated to Msimang DJP, as he then was. An interim order was put into place by Msimang DJP and I record below paragraph 3 of this order dated 18 February 2010 :

“3. *Pending the hearing of the application on the Opposed Roll.*

(a) the First and Second Respondents are directed to make available to Remano Moodley (the minor child):

i.an office on the Kenmont School premises for the minor child to receive specialised education;

ii.existing educators to teach the minor child his computer and Afrikaans subjects;

(b) the Third and Fourth Respondents are directed to employ

an educator individually to educate the minor child in the remaining subjects, in such office at the school premises;

(c) the minor child shall enjoy breaks at different times to that enjoyed by other learners, so as to ensure that he does not interact with the other learners.”

[24] The effect of this order was that the boy was allowed back to school but separated from the other learners in circumstances that must have been traumatic to him to say the least. I have no doubt that Msimang DJP was influenced to make this order in the light of the barrage of allegations made by the deputy principal against the boy which I referred to above. It also appears that the parties themselves drafted the order and I do not know to what extent this was on account of directions or suggestions from Msimang DJP. I think it needs to be mentioned that where the safety of learners are concerned any court will prefer to err on the side of caution. What I do not understand is why all these allegations against the child did not feature in the affidavit made by the principal when she deposed to the affidavit in the earlier case.

[25] During February 2010 the applicant filed an affidavit to complain about the circumstances of the boy's isolation in terms of the order granted by Msimang DJP and this drew another answer from the deputy principal and a subsequent reply from the applicant. I do not want to go into the details of this dispute but it was probably considered by Pillay AJ on 21 May 2010 when the matter came before him. Pillay AJ directed that the Department of Education urgently investigate and report on the suitability of the physical circumstances in which the boy was currently being

educated at the school and directed the Society of Advocates for KwaZulu-Natal to appoint an advocate as curator ad litem for the boy with a view of interviewing the boy and to file a report in due course.

[26] In response to this order third to fifth respondents filed a joint report by a number of education specialists on 8 June 2010. Predictably it was found that the environment of the small room where the boy was receiving his education in isolation was not conducive for effective learning and impacted negatively on the boy's socio-emotional development. It was also suggested that the boy was of sufficient intelligence to enter mainstream schooling.

[27] I have thus far said little about the applicant himself. He obviously agreed to take the boy out of the school at the end of the 2009 academic year provided that the disciplinary proceedings against the boy are abandoned. When he achieved this objective he reneged on the agreement. The deputy principal gave letters to be delivered to the applicant and these were returned to the school defaced with written comments like *"Go and sleep" and sweet dreams" and more abrasively, "Verwoerd is dead"*. The applicant did not deny that he wrote these remarks and passed them on to the school but sought to justify what on the face of it appears to be immature conduct by saying that the school was trying to push the boy out of the school because he is black and that the school was unfairly and improperly acting against the boy.

THE ATTITUDE OF THE THIRD TO FIFTH RESPONDENTS

[28] These respondents abided the judgment of the court but were directed to file an answering affidavit and an affidavit was filed on behalf of these respondents collectively, represented by the Director of the Department of Education, Umlazi District. The attitude of third to fifth respondents is that the amended Admission Policy of the school is *ultra vires* and not reconcilable with both the provisions of the South African Schools Act, 84 of 1996 (SASA)² and the National Education Policy Act, 27 of 1996 (NEPA)³

[29] In this affidavit reference is made to clauses contained in Government Notice GG 19377 of 19 October 1998 by the Minister of Education which is a Schedule that provides for a policy in respect of admissions to ordinary public schools and promulgated in terms of section 3(4) of NEPA. (the policy) Sections 9 and 12 of the policy read as follows:

“9. The admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an application for admission.

12. The name of a learner must be removed from a school’s admission register when the learner-

(a) leaves the school after grade 12 or after completing the compulsory school attendance period, or is granted exemption from compulsory attendance according to section (4) of the South African School Act;

(b) applies for a transfer to another school and the transfer is

² Act 84 of 1996

³ Act 27 of 1996

effected;

(c) *is expelled from school; or*

(d) *dies.”*

[30] According to the deponent of this affidavit the intention was clear; that once a learner has been admitted to a public school he or she can only be removed from the school if one of the facts listed in clause 12 of the policy occurred. It was therefore implied that although the admission policy of a school is entrusted to its governing body by section 5(5) of SASA, such admission referred to the first time admission of the learner. According to the deponent of the affidavit a governing body is not entitled to require learners to apply for admission on an annual basis as this would lead to chaos at schools and this is precisely what clause 12 of the policy precluded a governing body from doing.

[31] If the deponent to this affidavit is correct it will dispose of the reliance by the first and second respondents on the amended Admission Policy of the school as the amended Admission Policy offends against the contents of clause 12 and would be *ultra vires*

[32] Mr Marais SC had an answer to this apparent obstacle which I will explain in due course.

[35] What is plain however is that the First and Second respondents did not have the support of Third to Fifth Respondents in their opposition to the relief being sought

by the applicant.

THE SUBSEQUENT EVENTS

[33] The application was argued before me whilst I was still an acting judge on 12 April 2011. The last occasion it received judicial attention was in May 2010 when Pillay AJ was seized with it. I assumed that whatever urgency there may have been, no longer existed and reserved judgment with leave to the applicant's counsel, Mr Moosa, to file further heads of argument. Mr Moosa filed further heads of argument on 17 May 2011.

[34] I started to work my way through the ring binder files but the transition from a practising attorney to a judge took its toll on my time and then I developed a condition that required surgery, hospitalisation for over a month and an extended absence from chambers.

[35] To my horror I discovered that the matter was in fact on the roll for hearing before Ntshangase J during November 2010 but had to be adjourned because volume 3 of the papers went missing from the court file.

[36] It never occurred to me during the argument stage of this application to pertinently ask counsel if the boy was still at the school in 2011 and whether there was therefore urgency for me to prepare the judgment.

[37] All I can do now is to sincerely apologise to the parties for my delay in bringing about this judgment and to hope that my initial impression about the absence of urgency was the correct one.

THE ISSUES TO BE DECIDED

[38] It seems to me that three issues can be identified that requires to be addressed to bring about a result:

- (a) Whether or not the dispute has been compromised by the settlement agreement;
- (b) If not, whether the third to fifth respondents are correct in saying that the amended Admission Policy of the school is *ultra vires* SASA, NEPA and in particular the policy; and
- (c) If not, whether there are sound reasons to review and set aside the decision taken by the second respondent to bar the boy from attending the school in 2010.

I will deal with each of these issues in turn.

[39] A compromise (*transactio*) is an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them. It is most closely related to a consent judgment.

GOLLACH & GOMPERTS (1967) (PTY) LTD v UNIVERSAL MILLS & PRODUCE CO (PTY) LTD AND OTHERS⁴

[40] The settlement agreement was not signed by any of the parties and was clearly designed to receive judicial ratification. In short the case had to be enrolled again for a judge to make the agreement an order of court for it to become effective. This did not happen.

[41] Even assuming that the settlement agreement was not required for judicial ratification to become effective, neither of the parties appeared to be bound by the terms of this agreement as is evidenced from proposals and counter proposals being made after this settlement agreement was concluded between the respective attorneys acting on behalf of the parties.

[42] The second respondent elected in January 2010 to treat the boy as a returning learner in accordance with the amended Admission Policy and invited the applicant to make representations in terms of that policy. This is wholly inconsistent with any intention or belief that the settlement agreement was in force.

[43] On a conspectus of these facts I am satisfied that the settlement agreement was not intended to be a compromise despite the fact that it was the applicant's attorney who caused it to be drafted in manuscript form.

⁴ 1978 (1) SA 914 AD

[44] The fact that I am persuaded that the applicant undertook not to enrol the boy at the school in exchange for the disciplinary charges to be dropped is of no relevance as this undertaking is not severable from the settlement agreement. The settlement agreement as a whole is either a *transactio* or it is not one. In my judgment it falls short of the legal requirements and I will not hold the applicant bound by it.

[45] On the issue of the amended Admission Policy being *ultra vires* NEPA and in particular clause 12 of the policy, Mr Marais SC argued that the policy was not applicable to the school as the school is a public school for learners with special education needs and not an ordinary public school. Section 12(3) of SASA in fact provides that a public school may be an ordinary public school or a public school for learners with special education needs.

[46] Sections 23 and 24 of SASA moreover distinguish between the membership of the respective governing bodies of an ordinary public school and that of a public school for learners with special education needs.

The heading to the policy reads” ADMISSION POLICY FOR ORDINARY PUBLIC SCHOOLS”

Sections 1, 2, 3 and 4 of the policy reads as follows:

“Interpretation

1. *In this policy any expression to which a meaning has been assigned in the National Education Policy Act, 1996 (Act 27 of 1996) and the South African School Act, 1996 (Act 84 of 1996), has that meaning.*

Scope

2. *This policy, read with the age requirement for admission to ordinary public schools, published in the same government notice, applies uniformly in all provincial departments of education and ordinary public schools.*
3. *The admission of an ordinary public school must be consistent with this policy.*

Purpose

4. *The purpose of this policy is to provide a framework to all provincial departments of education and governing bodies of public schools for developing the admission policy of the school.”*

[47] On an ordinary interpretation of the wording of these sections of the policy it appears to bear out the submission made by Mr Marais SC that the policy was not intended to have application in respect of schools for learners with special needs. It would have been very easy for the Minister to expressly provide that the policy also applies to schools for learners with special needs or simply to regulate that the policy should apply to public schools, which would have included by definition a school for learners with special needs (section 12(3) of SASA). The fact that the policy is at pains to regulate admission for ordinary public schools only, must of necessity mean that it was not intended to cater for a public school for learners with special education needs.

[48] I therefore conclude that third to fifth respondents are wrong in the interpretation that they place on the policy and that the amended Admission Policy of

the school is not *ultra vires* for the reasons given by third to fifth respondents.

[49] With no legal obstacle in the way for the adoption by the second respondent of the amended Admission Policy there is no reason to find that it was not properly adopted and enforceable by the school. Section 5(5) of SASA expressly provides that the admission policy of a public school is to be determined by the governing body of the school. There is nothing contained in the amended Admission Policy of the school on the face of it that requires judicial censure and the third respondent has not invoked section 22 of SASA to curtail or withdraw any functions of the second respondent to implement the amended Admission Policy such as was done in the case concerning the language policy of the Ermelo school.

MPUMALANGA DEPARTMENT OF EDUCATION v HOERSKOOL ERMELO⁵ 2010 (2) SA 415 (CC).

[50] What remains to be considered is whether the decision taken by the school in terms of the amended Admission Policy of the school to exclude the boy from the school in the beginning of 2010 should be reviewed and set aside. In deliberating on this question I cannot even begin to assess the decision on its merits. The papers bristles with factual disputes about whether the boy is the menace that he is painted to be by the school or simply being the scapegoat of prejudice on the part of the school.

⁵ 2010 (2) SA 415 (CC)

[51] There are, however, certain findings that I can make on the papers without any difficulty on a balance of probabilities, that may have a bearing on this question and I list the facts that I find to be incontrovertible below:

- (a) The boy was never convicted of any misconduct by a disciplinary hearing.
- (b) The school was desperate to get rid of the boy for the 2010 school year as evidenced by its willingness to compromise the disciplinary process to achieve that objective.
- (c) The school was distraught when it appeared that the applicant was not going to abide by the agreement for the boy not to be accommodated by the school during the 2010 school year.
- (d) The school only came to know about the *volte face* of the applicant (concerning the undertaking to remove the boy from the school) in December 2009 and there would not have been time to resume the disciplinary hearing.
- (e) The amended Admission Policy was implemented by the school with the boy in mind and designed to be used as a tool to preclude the boy from admission to the school during 2010. The amended Admission Policy was first mentioned in correspondence on 17 December 2009 and the school admitted that the boy was the only learner affected by this policy for the beginning of the 2010 school year.

[52] Section 6(2) (e) of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA)⁶ provides *inter alia* for the review of administrative decisions taken for an

⁶ Act 3 of 2000

ulterior purpose or motive or taken in bad faith.

[53] The amended Admission Policy of the school was implemented in bad faith and for the ulterior motive of excluding the boy from attending the school in 2010 without having to go through the rigours of a disciplinary hearing. The fact that the amended Admission Policy in itself may have been within the powers of the school to adopt cannot hide the sinister reason behind its adoption and offends against PAJA. Section 3 of PAJA enjoins a court to treat each case on its own merits and in my judgment the decision to refuse the boy entry to the school in 2010 offends against administrative fairness and ought to be reviewed and set aside.

[54] I therefore grant an order in terms of paragraph 2.1.2 of the “Perfected Notice of Motion” appearing at page D30 in volume 4 of the papers, which reads as follows:-

“An order reviewing, setting aside and correcting the First and Second Respondents’ decision/action not to re-admit Remano Moodley to Kenmont School and directing that Remano Moodley immediately be admitted or reinstated to Kenmont School.”

For clarity I make the following order:

- (a) The decision/ action of the First and Second Respondents not to re-admit or re-instate Remano Moodley to Kenmonth School, Durban, is hereby reviewed and set aside.
- (b) The First and Second Respondents are directed to immediately admit and re-

instate Remano Moodley to Kenmont School, Durban, with immediate effect.

- (c) The costs of this application are to be paid by the First and Second Respondents jointly and severally, including the reserved costs but excluding the costs incurred during November 2010 when the matter came before Ntshangase J.

MBATHA J

Date of Hearing:	13 April 2011
Date of Judgment:	30 March 2012
For the Applicant:	Adv M. Moosa
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For the First & Second Respondents: Adv J. Marais SC

Instructed by:

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For the Third, Forth & Fifth Respondents:Adv M. De Klerk

Instructed by:

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