

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

(Consolidated Case Numbers: 2839/2023 and 2354/2023)

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

12 August 2024

[SIGNED]

DATE

SIGNATURE

Case No: 2839/2023

In the matter between:

RODGERS MKHONTO AND 62 LEARNERS

Applicant

and

MINISTER OF BASIC EDUCATION

First Respondent

**DIRECTOR GENERAL: DEPARTMENT OF
EDUCATION**

Second Respondent

MEC: DEPARTMENT OF EDUCATION

Third Respondent

UMALUSI

Fifth Respondent

In the matter between:

KGOTATSO NEO MOLOPO

First Applicant

ARCHIEBOLD THABANG MATHEBULA

Second Applicant

JABULILE MABASO AND 384 OTHERS

Third Applicant

and

MINISTER OF BASIC EDUCATION

First Respondent

**DIRECTOR GENERAL: DEPARTMENT OF
EDUCATION**

Second Respondent

MEC: DEPARTMENT OF EDUCATION

Third Respondent

UMALUSI

Fifth Respondent

This judgment shall be handed down electronically by distributing same to the parties by email and by publication on SAFLII. Judgment shall be deemed to have been delivered at 13:00 on 12 August 2024.

JUDGMENT

Roelofse AJ:

Introduction

[1] This application concerns 448 learners from a number of schools in the Mpumalanga Province who sat for their National Senior Certificate Examinations

(“the examinations”) during October/December 2022 (“the learners”).

[2] The learners’ examination results were withheld and declared null by the Mpumalanga Department of Education (“the Department”) because the Department determined at the marking phase of the learners’ scripts and pursuant to an investigation that the learners had committed irregularities during the examinations in respect of certain of the examination subjects and at certain schools. Simply said, the Department was of the view that the learners cheated when they wrote certain of the examination papers.

[3] The papers are voluminous, the applicants and the challenges they raise are many, the response to those challenges are few and without much detail, the law is settled and the decision is easy.

[4] In essence, the learners are the applicants in these proceedings. These proceedings consist of two applications that were joined by virtue of an Order of Court as the overall facts, issues and relief sought are similar in both applications. The first application was issued under case number: 2354/2023 and the second application was launched under case number: 2839/2023. I shall refer to these applications as “the first application” and “the second application” respectively.

[5] The first to fourth respondents, are cited as: The Minister of Education (“the Minister”); The Director General of the Department of Basic Education (“the Director General”) and the MEC and Head of the Mpumalanga Department of Education (“the HOD”), oppose the application. UMALUSI is cited as fifth respondent. UMALAZI did not participate in the proceedings. Despite the

respondents being named in the heading of this judgment, I lay emphasis on them because the learners are seeking relief against all of the respondents.

Relief sought by the learners

[6] In the both applications, the learners approach the court under the provisions of Rule 53 of the Uniform Rules.

[7] In both applications, the learners seek the review and setting aside of the Respondents' decision dated 31 March 2022 “....*to nullify the examination results of the above cited Applicants* [the learners]”, that the learners' results be released with immediate effect¹ and costs.

[8] I shall refer to the decision of 31 March 2022 as “the decision”.

Common cause

[9] Most of the facts are common cause.

[10] It is common cause that: the court has jurisdiction; the learners sat as candidates in the National Senior Certificate examination that was written in October/November of the 2022 Grade 12-year as conducted by the Department of Basic Education; the learners sat at the different examination centres (schools) and in the subjects referred to in the notice of motion; the Department, through its legislative structures and in terms of Regulations for the Conduct, Administration and Management of Assessment for the Senior Certificate Examination

(Government Regulation Notice No. R872, Government Gazette No. 31337 of 29 August 2008) (“the Regulation”) acted upon the alleged irregularities; both the learners and the Department are bound by the Regulation; Annexure M to the Regulation provides for examination irregularities and how same must be resolved; that the decision was taken; the decision constitutes an administrative action; the learners received letters on 31 January 2023 wherein they were informed that their results were withheld and that they were given an opportunity to re-write the exams in June 2023; the learners were invited by notice to a disciplinary hearing; and that they were informed of the outcome of the disciplinary hearing on 31 March 2023.²

Disputed facts

[11] This is where the parties mainly diverge and where the issues lie: the learners deny any wrongdoing during the examinations and therefore “...*that there exists no foundation for such arbitrary resolution* [the decision] ...”³; the decision was “...*predicated on irregular and disconcerting procedures.*”⁴; the lawfulness “...*through their* [the respondents’] *unfathomable actions*...”⁵ of the withholding of the examination results amounting to “...[an] *vexatious act perpetrated by the Respondents*....”⁶; no adequate reasons were given for withholding the examination results⁷; and that the Department had abused its power⁸.

The learner’s pleaded grounds for review

[12] The learners, under paragraph 6 in their amended founding affidavits, plead that the grounds of their review are that the records of the disciplinary hearing that were indeed furnished by the Department in terms of the Procedure under Rule 53 do not support the decision.

[13] In respect of procedure⁹, the learners proceed to plead that the charges of irregularities were baseless because they were charged under a paragraph of the Regulation that does not exist¹⁰ and therefore it “.....*hampers our ability to mount a robust defence...*” to the extent “....*that the charges are ambiguous and cause undue embarrassment, as they ought to have been classified in accordance with section 2(1) of the Regulations.*”¹¹; and that the Department’s records fail to specify the nature of the irregularities for which the learners were being accused.¹²

[14] The learners proceed to plead the provisions of Annexure M to the Regulation. In this regard, they plead: the provisions of paragraph 5(8) of Annexure M which provides for the procedure for the conducting of irregularity proceedings which provides that a written notification must be submitted to a candidate involved in the alleged examination irregularity, or to the parent or guardian in the event that a candidate is under the age of 18 years, as well as the Principal. The learners allege that “.... *Despite this, the respondents overlooked this fact and sent written notifications concerning alleged examination irregularity directly to us, the minus, instead of informing our parents or guardians.*”

and

“It’s important to note that this section is peremptory, implying it demands strict adherence. the respondents’ failure to comply with this section constitutes a breach of the regulations and the violation of procedure of fairness under the Promotion of Administrative Justice Act (PAJA).”

[15] The learners plead paragraph 5(8)(b) of Annexure M that provides that the notification of the irregularity hearing must be forwarded by registered mail or be delivered to a particular individual who has to acknowledge receipt of the notification. The learners say that the Department has failed to comply with this requirement, which is mandatory, and therefore “...*the Respondents have been disregarding regulations and procedures, particularly mandatory regulations. the respondent has been acting in their own interest, with no regard to the regulations.*”¹³

[16] The learners also plead paragraph 5(8)(b) of Annexure M which provides that all candidates suspected of examination irregularity must be allowed to opportunity to respond to the invitation to attend the irregularity hearing within 10 working days of being notified of irregularity hearings. The learners allege that they received the written notification on 22 February 2023 and that in terms of the notification, an irregularity hearing was scheduled for 28 February 2023 and therefore “*Contrary to the stipulated 10 days’ notice period, we were given a mere 6 days. It is evident that we will not accorded the requisite ten-day notice to respond, resulting in procedural unfairness and a breach of regulations [sic].*”¹⁴

[17] Paragraph 5(8)(b) of Annexure M provides that a candidate under the age of 18 years of age may be accompanied by his or her parent or guardian, the school principal or any other representative. The learners allege that the record reveals the candidates who were minors represented themselves during the hearing and that this contravenes the Regulation and the candidates’ constitutional rights.

[18] The learners plead (paragraph 5(8)(b) of Annexure M) that all hearings must be recorded and that the recording must be kept until the matter is finalized. This has not happened according to the learners and constitutes a further procedural violation.

[19] Lastly, in respect of the Regulation, the learners plead that the “nullification letter” did not inform them of their right to appeal the decision and that this violated the learners’ right in terms of the Constitution to appeal an administrative decision.

[20] The learners proceed to attack the findings of the disciplinary irregularity hearings that were held at the schools with the learners that were implicated. The main gist of the attack is: the procedure that were followed; the time that were given to the learners about the nature of the irregularities and the hearings; the investigations that were conducted do not indicate what type of irregularities were committed as provided for in the Regulation; the disputes for purposes of the hearings were incorrectly determined; and the recommendations themselves.

The respondents’ defence

[21] Only the MEC and the HOD filed and delivered an answering affidavit. The Minister, Director-General, MEC and HOD delivered a single heads of argument wherein reliance is placed on the answering affidavit.

[22] The MEC and HOD raise preliminary defences. They allege that the learners have not complied with the Rules in that the urgent application that was launched by the applicants they abused the court process. In my view, the urgent court had

already decided on this when it struck the learners' urgent applications from the roll. The MEC and HOD plead that the learners' application has become moot because the time sanction imposed upon them as sanction after the findings and recommendations at the hearings had elapsed. I dispose of this defence at once. The learners' applications are not moot for if the relief they seek is granted, their results must be issued without them writing one further exam.

[23] With regards to the merits, the MEC and HOD plead that: the irregularities were discovered at the marking phase and that the learners were notified that the irregularities were discovered during the marking of the scripts; irregularities were detected and scripts were subjected to further scrutiny; and a panel of specialists found that some of the marks may not be approved as some answers lacked originality and therefore not authentic. The MEC and HOD disclose the a notice for the hearing of candidates suspected of being involved in the examination irregularities was addressed to the learners wherein they were given notice to attend a hearing in terms of Annexure M. The MEC and HOD allege that the learners were informed of that their results were blocked and of the process that would be followed. Meetings were held between the respondents and the parent of the learners. The respondents plead that in some instances the learners appealed but before the appeals could be dealt with, the learners launched the applications.

Analysis

[24] The learners allege that the records that were discovered by the respondents do not support decision. I am of the view, having regard to the record that is before me that indeed the irregularities were committed as found by the Department. The decision was the correct one.

[25] The manner in which the decision was arrived at after the irregularities were investigated is amiss. I now turn to this issue. A convenient place to commence with this issue is to examine the statutory framework through which this dispute must be resolved.

[26] There is no question, and it is common cause that the decision constitutes administrative act as defined in the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and that the decision affected the learners.

[27] Administrative action that affects any person must be fair. Section 3 of PAJA reads:

“Procedurally fair administrative action affecting any person.—

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

- (a) obtain assistance and, in serious or complex cases, legal representation;
 - (b) present and dispute information and arguments; and
 - (c) appear in person.
- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
- (c) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
- (i) the objects of the empowering provision;
 - (ii) the nature and purpose of, and the need to take, the administrative action;
 - (iii) the likely effect of the administrative action;
 - (iv) the urgency of taking the administrative action or the urgency of the matter; and
 - (v) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.”

[28] Irregularities are dealt with under Regulation 45 of the Regulation. Regulation 45(5) to (7) reads:

- “(5) The following steps must be followed regarding the issuing of a National Senior Certificate to a candidate who wrote the public National Senior Certificate examination suspected of committing an irregularity:
- (a) It should be established whether the irregularity was caused by the conduct of the candidate or that of another person.

- (b) If the irregularity pertains to one of the examination question papers of a subject, the results of the subject as a whole will not be released, but this will not affect the release of the results of other subjects.
 - (c) If the irregularity was not caused by the candidate's actions and the candidate did not gain any advantage, the examination answer script must be marked and marks must be allocated as set out in the marking memorandum and the results must be released.
- (6) A candidate who attends an irregularity hearing may have legal representation.
- (7) Should a candidate decide to have legal representation, the provincial education department must be informed of this intention three (3) working days before the hearing, in order to allow the Department of Education to ensure appropriate departmental representation at the hearing.
- (8) If an official is required to present him or herself at a disciplinary irregularity or hearing, a union representative may attend such a hearing as an observer.”

[29] The Department has established that the irregularities were caused by the learners' conduct. Therefore, the provisions of Regulations 45(6) and (7) applied, especially that the learners had a right to be represented at their irregularity hearings.

[30] Annexure M of the Regulation further clearly seeks to adhere to the provisions of section 3 of PAJA.

[31] Paragraph 4(5) of Annexure M provides for irregularities that may occur during the marking process. Irregularities during the marking process relate to irregularities identified by markers of examination answer scripts, and any other acts

committed by examination officials and markers, which are in contravention of the national and provincial regulations.

[32] Paragraph 5 of Annexure M provides for the procedures in respect of examination irregularities identified during the marking process.

[33] Paragraph 5(7) provides for the procedures in respect of investigations into examination irregularities. This paragraph does not provide for mandatory participation by learners under investigation for examination irregularities. Paragraph 5(7)(c) provides for a discretion to be exercised by the PEIC to involve certain persons, including learners, in the investigation process. Paragraph 5(7)(c) reads:

“The PEIC may call upon any official in the service of the relevant provincial education department, or any candidate or candidates to appear before the Committee or the two-person team delegated to carry out the function, and it may also question any candidate accused of an alleged irregularity.”

[34] The position is therefore this. The Department suspects that examination irregularities at the marking stage. This triggers a decision to investigate the suspected irregularity. The PIEC committee investigates and finds that an examination irregularity occurred. The PIEC is therefore entitled to find that an irregularity had taken place without informing a candidate that an examination irregularity is being investigated.

[35] After it is concluded by the investigation committee that an irregularity had occurred, a disciplinary hearing may follow summarily. Paragraph 5(8) provides for hearings into examination irregularities. It reads:

“Should the relevant irregularity committee decide that a hearing must be held, such hearing must be held in terms of the following procedure:

- (a) The hearings must be lawful, reasonable, timely and procedurally fair, and no rights of the individual should be infringed. The principle of openness and transparency of administrative action must be adhered to.
- (b) The following procedure must be followed in respect of hearings:
 - (i) Procedures for hearings vary according to circumstances and persons involved.
 - (ii) A written notification must be submitted to the candidate involved in the alleged examination irregularity, or to the parent or guardian in the event of candidates being under the age of 18, as well to the Principal or centre manager of the institution. The following procedure must be followed:
 - (aa) The written notification must be forwarded either by registered mail or be delivered to a particular individual who must acknowledge receipt of the notification.
 - (bb) The written notification must state clearly that the absence of a reply will not delay the hearing in respect of the suspected examination irregularity.
 - (cc) Where a candidate, who is alleged to have committed an examination irregularity, or his or her parent or guardian or representative cannot be contacted, the principal or centre manager of the institution will be required to assist with contacting the candidate. If the Principal or centre manager of the institution is unable to contact the candidate, he or she must accordingly inform the secretary of the PEIC in writing. The inability to make contact with the candidate concerned, or with his or her parent or guardian

or representative, should not unnecessarily delay the processing of the irregularity.

- (dd) All candidates suspected of an examination irregularity must be allowed the opportunity to respond to the invitation to attend a hearing regarding the alleged irregularity, within 10 working days of being notified of an irregularity investigation.
- (ee) Candidates who do not wish to attend a hearing, have the option of making an admission of guilt in the form of a declaration, which must be forwarded to the secretary of the PEIC within 10 working days of being notified of an irregularity investigation.
- (ff) In the event where a candidate is under 18 years of age, the candidate may be accompanied by his or her parent or guardian, the school principal, or any other representative.
- (gg) Should the candidate or his or her parent or guardian choose to make use of legal representation during the hearing, this will be allowed and the chairperson of the PEIC must be so informed at least three (3) working days prior to the scheduled hearing.
- (iii) All hearings must be recorded and the recording must be kept until the matter has been finalised.
- (ivA) If the Head of a province is not satisfied with the NEIC report, and the dispute cannot be resolved, the MEC of that province must make a final decision.
- (v) Decisions and consequent recommendations by the PEIC, as approved by the Head of Department or his or her representative, must be communicated, in writing, to the person, school or learning institution under investigation, within 30 working days of the completion of the hearing.

[36] The learners plead a failure by the Department to strictly adhere to the procedure provided for in Annexure M. I find that the Department has failed to follow the prescripts of Annexure M. In this regard, the Department did not answer

in its papers to the learners' challenge that the notices of the hearings were defective. If the notice was defective, and in this instance, all else further is tainted. To hold otherwise would offend the learners' right to fair administrative action. The Department also did not rebut the learners' allegation that the disciplinary hearings were in group form. Annexure M does not provide for disciplinary hearing to be held in group form. By conducting the hearings in group form, the Department has offended the learners' right to a fair hearing. No recordings of the hearings were discovered as part of the record.¹⁵ I accept that there are none.

[37] I have no doubt that the learners have cheated and had deserved to be punished as they were. However, they were entitled to the prescribed procedure and fairness in in the process of the Department arriving at the decision. This did not happen. The learners must succeed. However, what the learners must appreciate is that cheating does not pay. Because they have cheated, they have lost two years.

Costs

[38] The applicants were successful however they cheated in their exams. The Respondents had no other option but to react. For this reason, I am of the view that each party pay their own costs.

[39] In the premises, I make the following order:

[26.1] The First to Fourth's respondent's decision dated 31 March 2022 is hereby reviewed and set aside.

[26.2] The first to fourth respondents are hereby ordered to release those examination results of the schools and subjects listed in the notices of motion under case numbers: 2839/2022 and 2354/22.



Acting Judge of the High Court

DATE OF HEARING:

23 July 2024

DATE OF JUDGMENT:

12 August 2024

APPEARANCES

For the Applicants:

Case No: 2839/23 Mr Khambako,

Case No: 2354/23 Mr Sibuyi

For the First to Fourth Respondents

Ms. Baloyi-Mere

¹ The notice of motion mentions each school and each subject in respect of which the decision was made. This appears from an amended notice of motion that was filed on 17 May 2024 after the consolidation of the first and second applications.

² In respect of the last mentioned three common cause facts, not all documents in support of those facts were part of the papers before court. The court does however rely on the common trend that appears from the papers that were indeed before court.

³ Para. 4.3 of the “AMENDED FOUNDING AFFIDAVIT Rule 53: Application for Review” at p. 223.

⁴ *Ibid* EndNote 2.

⁵ Para. 4.6 at p. 226.

⁶ Para. 4.7.

⁷ Para. 5.4 at p. 227.

⁸ Para. 5.16 at p. 229.

⁹ Under paragraph 7 of the amended founding affidavits.

¹⁰ Allegedly, paragraph 45 of Chapter 10 of the Regulations whereas the learners were bound and the irregularity proceedings should have been under paragraph 45 of Chapter 10 of Annexure M to the Regulations.

¹¹ Para. 7.2 at p 267.

¹² Para. 7.2 at p 266.

¹³ Para. 7.9 at p. 268.

¹⁴ Para. 7.13 at p. 269.

¹⁵ Paragraph 5(8)(iii) of Annexure M.