



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<u>19 November 2025</u>	
DATE	SIGNATURE

APPEAL CASE NO: A70 / 2024

In the matter between:

MINISTER OF BASIC EDUCATION

FIRST APPELLANT

**DIRECTOR GENERAL: DEPARTMENT OF
EDUCATION**

SECOND APPELLANT

MEC: DEPARTMENT OF EDUCATION

THIRD APPELLANT

**HEAD OF DEPARTMENT:
DEPARTMENT ODF EDUCATION**

FOURTH APPELLANT

And

RODGERS MKHONTO AND 62 LEARNERS

FIRST RESPONDENT

KGOTASO NEO MOLAPO

SECOND RESPONDENT

ARCHEOBOLD THABANG MATHEBULA

THIRD RESPONDENT

JABULILE MABASO AND 300+ OTHERS

FOURTH RESPONDENT

CORAM: RATSHIBVUMO DJP, MAYET et FOURIE AJJ

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down is deemed to be on 19 November 2025 at 08H00.

THE COURT:

[1] Introduction.

It is often said that education is what remains after one has forgotten what they learned at school.¹ In South Africa, the bridge from those learning years is marked by the National Senior Certificate examinations. This is the ultimate test that assesses learners' level of education after 12 years of learning. This bridge should be approached with great care, as it can be traumatic for learners, knowing it could be a barrier to their careers and future. Equally important is the vetting process that ensures that the

¹ A phrase attributed to Albert Einstein, a theoretical physicist (1879-1955).

examinations were qualitative and untainted. The role played by the Department of Basic Education (the Department) in safeguarding this process cannot be overstated, given the significant contribution learners make to the nation after completing National Senior Certificate examinations.

- [2] Among the thousands of learners who sat for their National Senior Certificate examinations in 2022 in South Africa, there were eight hundred and ninety-six (896) learners from various schools across Mpumalanga, whose results in specific papers that they wrote were withheld by the Department after it was alleged that they were involved in mass cheating during the final National Senior Certificate examinations.
- [3] Their results were withheld following disciplinary hearings conducted by the Department. They were, however, allowed to rewrite after their sanctions had lapsed in March 2023. As of the date of this judgment, four hundred sixty-seven (467) learners, including some of the 510 who brought the review application, had rewritten the examination over the years, starting in 2023, the most recent group having done so in June 2025. There are still those who registered to rewrite later this year, 2025.
- [4] Five hundred and ten (510) learners instituted review proceedings in terms of the Promotion of Administrative Justice Act, 2000 (No. 3 of 2000) (PAJA) against the Appellants (respondents before the court *a quo*), seeking an order compelling them to release the results of the papers that were withheld.
- [5] On 12 August 2024, Roelofse AJ of this Division (court *a quo*) handed down the judgment in the following terms:

“1. The First to Fourth Respondents’ decision dated 31 March 2022² is hereby reviewed and set aside.

2. 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.”

[6] The Appellants now appeal against the order above. The court *a quo* granted leave to appeal this order to the Full Court of this Division. The Respondents oppose the appeal.

[7] Point *in limine*: The appeal having lapsed.

It was submitted on behalf of the Respondents that the appeal has lapsed and that, in the absence of condonation for its reinstatement, the Court should make a declaration to that effect. The consequence of the declaration to the effect that the appeal has lapsed would be the execution of the court *a quo*’s order. The Appellants argued in turn that there is no basis for reinstating the appeal, as it has not lapsed.

[8] Counsel for the Respondents based their submission on Rule 49(6) of the Uniform Rules of the High Court, which provides,

“(6)(a) Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party, the appeal and cross-appeal shall be

² The court *a quo* must have meant 31 March 2023, as that is the date reflected in the Notice of Motion and the Amended Notice of Motion in pages 3 & 207 of the appeal bundle.

deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.”

[9] From the above, it is clear that the Appellants had to prosecute the appeal within sixty days after noting the appeal. The Appellants did not address this aspect in their heads of argument, thereby rendering the task of calculating the dies that lapsed from the date an appeal was noted tedious. In the appeal, this point *in limine* was raised for the first time in the Respondents’ heads of arguments, which were filed with the Registrar on 5 November 2025, just over a day before the hearing of the appeal. It was too late for the Appellants to address this point as their heads of argument were filed on 31 October 2025.

[10] It is, however, common cause that the appeal was noted on 30 October 2024. An appeal is prosecuted by applying in writing to the Registrar of the court of appeal, on notice to all other parties, for a date of hearing.³ None of the parties indicated the date upon which the sixty-day period expired. Counsel for the First Respondents submitted that the Appellants had until 30 January 2025 to prosecute the appeal.⁴ It is also common cause that this appeal was scheduled to be heard before the Full Court of this Division on 31 January 2025,⁵ but could not proceed. Form F is not very helpful, as it does not include the date it was submitted to the Registrar.

³ *Hall v Van Tonder* 1980 (1) SA 908 (C) at 910.

⁴ See paragraph 3.1 of the First Respondents’ heads of argument.

⁵ See Form F that was completed by the Appellants in compliance with the Practice Directives at the time, on p. 40 of Bundle E.

[11] The details of what transpired on 31 January 2024 are unclear. The affidavit filed on behalf of the Second to Fourth Respondents titled, “the Respondents' joint reply to the Appellants’ explanatory affidavit” gives some glimpse where it states, “failure to provide a complete and orderly record is precisely what resulted in the matter being removed from their role on the eve of 31 January 2025 through an e-mail send (sic) to the legal representatives from the Judges' secretary.”⁶

[12] It would appear, therefore, from the above, that this appeal was removed from the roll of 31 January 2025 because the record was incomplete. The removal was contained in a letter sent by the Secretary of the Appeal’s panel to the parties. When this appeal was finally assigned the date of 7 November 2025, Form D, an equivalent to Form F under the current Practice Directives of this Division, reflects that it was completed on 5 September 2025, 32 days before the allocated date.⁷

[13] If the same number of days had lapsed since the date of 31 January 2025 was allocated by the Registrar, it would mean the appeal was prosecuted towards the end of December 2024. If the submission by counsel for the First Respondents, to the effect that the Appellants had until 30 January 2025 to prosecute the appeal, the calculation by this court becomes unnecessary, as the end of December 2024 is about a month before the due date.

[14] With the above, the Court finds that the prosecution of this appeal was carried out within the sixty days required by the Rules. The question as to whether the record was complete on the date the appeal was prosecuted is a

⁶ See paragraph 6.3 of Adv DJ Sibuyi’s affidavit titled “the respondents' joint reply to the Appellants’ explanatory affidavit.”

⁷ See page 18 of Ms. Mdluli’s affidavit titled, “First to Fourth Appellants’ explanatory affidavit.”

different one altogether and has different remedies and recourse available to the Respondents. To demonstrate this, Rule 49(7)(d) provides,

“(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7)(a) the other party may approach the court for an order that the application has lapsed.”

[15] When an appellant neglects to file the required documents after prosecuting the appeal, as appears to be the Respondents’ argument in this case, they could have applied for an order that the appeal has lapsed. There was, however, no such application before the appeal court. It appears that such an application was instead brought before the urgent court on 16 September 2025. The urgent court did not grant that relief, and the Respondents did not appeal the decision.

[16] It is important to note, however, that the Appellants, through the explanatory affidavit filed on 23 October 2025, requested condonation for the late filing of the appeal record, providing complete details of their actions from the date the appeal was noted. At the time the urgent application was brought, the Respondents were not privy to this information, as it was only furnished later. The Respondents could have brought an application for an order declaring the appeal to have lapsed to be heard together with this appeal. They chose not to do so, a decision we regard as wise, given the explanation provided under oath regarding the delay in filing the complete appeal record. For the reasons above, the Respondents’ point *in limine* must be dismissed.

[17] Incomplete record.

The Respondents' argument that the record remains incomplete to this date deserves some remarks. The missing part they refer to is the record required for purposes of review as opposed to the appeal record. As in any appeal, the decision of the appeal court is limited to the record from the court *a quo*, and not any additional information that was not initially presented as evidence. The exception would be when an application to present new evidence is made and allowed in terms of the common law, as outlined in section 19(b) of the Superior Court Act 10 of 2013.⁸ The Respondents' argument is therefore misplaced on this point. Condonation for the late filing of the appeal record is therefore allowed.

[18] New evidence during the argument on appeal.

Before addressing the substantive grounds of appeal, it is necessary to address a further issue that has arisen, which requires attention before considering the merits. During the hearing of this appeal, the Respondents sought to advance, for the first time, an argument in their written submissions concerning the acquittal of a teacher implicated in the alleged examination irregularities. The Respondents submitted that the “*prime instigator*” had purportedly been “*exonerated three days ago.*” This development was not part of the record before the court *a quo* and appeared for the first time on appeal in the Respondents' written submissions and in oral argument from the bar.

[19] It is necessary to emphasise that strict statutory and common-law requirements govern the admission of new evidence on appeal. Section 19(b) of the Superior Courts Act No. 10 of 2013 permits the admission of further evidence on appeal only when it is relevant, credible, material, practically

⁸ For more on new evidence being led on appeal, see paragraph 18 below.

decisive, and could not, with reasonable diligence, have been procured earlier. The requirements are stringent, recognising the need for finality and the undesirability of fragmenting appeals. A party seeking to introduce new evidence on appeal must therefore bring a formal application, supported by an affidavit, satisfying the well-established criteria.⁹

[20] In the present matter, the Respondents did not file an application in terms of section 19(b) to introduce the new evidence of the exoneration, nor did they place any sworn material before the Court to establish its relevance, credibility or necessity. Without such an application supported by affidavit, the Court is deprived of the procedural basis to consider the material. Allowing the admission of new evidence without proper procedural safeguards would not only be contrary to the statutory scheme but would also be unfair to the Appellants, who would be deprived of the opportunity to verify, counter, or contextualise the allegations.

[21] The Supreme Court of Appeal (the SCA) reiterated these principles. In *Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality and Another*¹⁰ the court reaffirmed the narrow circumstances in which new evidence may be admitted on appeal, endorsing the cautionary approach set out in *Colman v Dunbar*:¹¹

“...the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice.”

⁹ *S v De Jager* 1965 (2) SA 612 (A) at 613A–C read with Uniform Rule 49, which governs the noting, prosecution and hearing of civil appeals.

¹⁰ (894/2016) [2017] ZASCA 23; [2017] 2 All SA 677 (SCA); 2017 (6) SA 360 (SCA) (24 March 2017) at paragraph 22.

¹¹ 1933 AD 141 at p. 161-3

[22] These considerations apply equally here. The Respondents' reliance on assertions from the bar cannot be elevated to evidence capable of supplementing the appeal record. Assertions from the bar lack evidentiary significance, cannot supplement the record, and do not cure non-compliance with section 19(b). As the High Court explained in *Maboho and Others v Minister of Home Affairs*,¹²

“Argument is not evidence and it is not given under oath. It is merely a persuasive comment made by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence. *In casu*; the heads of argument do not serve as the answering affidavits of the respondent.”

[23] Furthermore, even if the alleged evidence of exoneration were accepted, it would constitute a supervening event. It would therefore be irrelevant to determining whether the court *a quo*'s order was correct when made. This approach is consistent with the principle articulated in *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another*,¹³ where the SCA held that an appeal court must assess the correctness of the order of the court below based on the facts as they existed at that time:

“The issue on appeal is whether the order granted by the court below was correct at the time it issued. Supervening events cannot affect the answer, although they might conceivably affect enforceability on the ground of supervening impossibility.”

¹² (833/2007, 1128/2007) [2011] ZALMPHC 4 (28 November 2011) at paragraph 13.

¹³[2010] ZASCA 13 at paragraph 17.

[24] In light of the above, the purported new evidence of the exoneration does not form part of the evidentiary matrix upon which this Court may rely and is disregarded for the purposes of determining this appeal. The approach by the South African courts has been observed and practised internationally.¹⁴

[25] The court *a quo*'s findings on facts.

A further submission advanced by the Respondents during argument relates to the factual findings of the court *a quo*. The Respondents sought to categorise the conclusions of the court *a quo*, which held that the procedural irregularities occurred during the examination and that the implicated learners were guilty of cheating, as “*just a comment and [is] not part of the judgment (sic)*”.¹⁵ The record cannot sustain this conclusion. It is necessary to clarify this issue, as it bears directly on the nature of this appeal.

[26] The Respondents’ attempt to recharacterise the court *a quo*’s factual narrative appears designed to sidestep the inconsistency of upholding the order directing the release of the results, while simultaneously disavowing the factual findings on which it rests.¹⁶

[27] This is impermissible for a fundamental procedural reason: Respondents in an appeal may only support the order appealed against on any ground that appears from the record.¹⁷ In the absence of a cross-appeal against the findings made by the court *a quo*, this Court cannot engage with the

¹⁴ See *Dr Lim Boon Ping v Sun Pharmaceutical Sdn Bhd* [2020] MLJU 1645, where the Malaysian High Court remarked that the statement was made from the Bar in the Written Submission: “The Defendant’s written submission at paragraph 30 in fact appears to be a statement from the Bar and as such to be ignored...” and *Pernas Construction Sdn Bhd v Sykt Rasabina Sdn Bhd* [2004] MLJU 759, Mokhtar Sidin JCA said, “Obviously, this is merely a statement from the Bar table. This is no evidence.”

¹⁵ See paragraph 14.1 of the First Respondent’s Heads of Argument and paragraph 10.22 of the Respondents’ Joint Heads of Arguments.

¹⁶ *Ncane v Lyster NO and Others* (DA27/15) [2017] ZALAC 1; (2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 (LAC) (10 January 2017) at paragraph 19.

¹⁷ *Gent and another v Du Plessis* [2021] JOL 49250 (SCA) at paragraph 16 referred with approval in *Vodacom (Pty) Ltd v Makate and Another* (CCT 51/24) [2025] ZACC 13 at paragraph 99.

merits.¹⁸ The caution emphasised in *Phiri v Phiri and Others*¹⁹ is apposite in this matter, namely that parties may not fashion grounds of appeal *ex improviso* during argument, nor marshal cross-appeal grounds from the bar.

[28] Accordingly, in the absence of a cross-appeal, the findings of the court *a quo* stand, not because they are beyond scrutiny, but because the Respondents elected not to challenge them by way of a cross-appeal.²⁰ The Respondents are bound by these findings for the purposes of this appeal.

[29] The role of courts in review applications.

It is settled that the application before the court *a quo* was brought under the auspices of PAJA. The Court didn't need to determine whether the decisions complained of constituted administrative action as defined by PAJA. It was generally accepted by the parties that, when the matter was heard, it would be determined within the confines of PAJA, as the action was indeed an administrative one.

[30] Section 7(2) of PAJA provides,

“7. Procedure for judicial review

“(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

¹⁸ *Hare-Bowers v Mauer* [1978] 1 All SA 29 (E) at p. 36.

¹⁹ 39223/2011) [2016] ZAGPPHC 341 (14 March 2016) paragraph 10.

²⁰ *Shatz Investments (Pty) Ltd v Kalovyrrnas* [1976 (2) SA 545 (A)] at p. 86-87 referred with approval in *Vodacom (Pty) Ltd v Makate and Another supra* – see footnote 17 above.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[31] Evaluating this jurisdictional requirement, no Court shall review an administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted. Section 7(2)(b) further provides that it is peremptory for a Court that is not satisfied that any internal remedy referred to has been exhausted to direct that the persons concerned must first exhaust such remedy before instituting proceedings in a Court or tribunal for judicial review in terms of PAJA.

[32] Section 7(2)(c) places a provision on the footsteps of a Court that it may, in exceptional circumstances and on application, exempt a person from the obligation to exhaust any internal remedy if it finds it to be in the interest of justice. The rationale for Section 7(2) is to safeguard the Court, attributing to itself superior wisdom in relation to matters entrusted to other branches of government or administrative bodies and to ensure that Courts do not assert functions of administrative agencies.

[33] Aspects such as judicial deference within the doctrine of separation of powers become applicable. Courts need to demonstrate a judicial willingness to recognise the legitimate and constitutionally ordained role of administrative agencies, to acknowledge the expertise of those agencies, and to be sensitive to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.²¹ The involvement of courts in reviewing administrative decisions ought to be

²¹ See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC); at paragraphs 67 & 82.

shaped by a conscious determination not to assert the functions of administrative agencies and not to cross over from review to appeal.²²

[34] At least to some degree, the exhaustion of internal remedies discourages a proposition where litigants avoid dealing with administrators and instead approach the Court as a first step in the process rather than as a last resort. Such a proposition would not only overburden the Courts but also lead to an absurdity in which the observance and utilisation of internal measures would become entirely unnecessary and obsolete.

[35] Internal remedies are designed to provide immediate and cost-effective relief, allowing the executive to utilise its own mechanisms to rectify irregularities before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid. First, approaching a court before exhausting the existing mechanisms of a higher administrative body undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a “fair” procedure will depend on the nature of the administrative action in the circumstances of the

²² See in this regard *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); See also Hoexter “*The Future of Judicial Review in South African Administrative Law*” (2000) 117 SALJ 484 at 501-2; See also *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paragraphs 42 and 45.

particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.²³

[36] It might be, however, that exceptional circumstances exist that make it impossible or unnecessary for internal remedies to be exhausted. Section 7(2)(c) makes provision for this position. The position was explained as follows in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd*:²⁴

“The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish “exceptional circumstances”. Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature, and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. Differently put, the duty to exhaust internal remedies defers the exercise of the court’s review jurisdiction for as long as the duty is not discharged.”

[37] To succeed in circumventing the exhaustion of internal remedies, an applicant claiming such needs to:

- a. Make an application to the court
- b. Establish exceptional circumstances; and
- c. Proof that it is in the interest of justice that the exception be given.²⁵

[38] As the Apex Court stated in *Koyabe*,²⁶

²³ See *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) (*Koyabe*) paragraphs 35-36.

²⁴ [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) paragraph 116.

²⁵ *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA); [2006] 1 All SA 589 (C) paragraph 15.

²⁶ *Supra* at paragraphs 37-39.

“Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same hold true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record. The duty to exhaust internal remedies is therefore a valuable and necessary requirement of our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.”

[39] In *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Plotz NO and Another*,²⁷ the SCA held,

“It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under s 7(2)(c) PAJA. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.”

²⁷ [2017] ZASCA 175 at paragraphs 20.

[40] In the absence of internal remedies being exhausted, an application to be exempted from the provisions of PAJA is compulsory. Regardless of the facts leading up to the administrative decision, when the Appellant ultimately made it, it is accepted that the Regulations regarding the conduct, administration, and management of the National Senior Certificate examinations, as outlined in Annexure M, became applicable. Section 5(11) of Annexure M provides,

“(11) Appeals

- a) Should a candidate or his or her parent or guardian be dissatisfied with the way the hearing has been conducted, an appeal may be lodged to the Head of Department via the channels provided by the relevant Provincial Education Department.
- b) A candidate may appeal to the MEC against the decision of their Department within 14 (fourteen) days of receipt of the written pronouncement of the Judgment or Sanction if the candidate was present at the hearing.
- c) All appeals must be in writing and must include reasons in support of the appeal.”

[41] The evidence presented by the Respondents did not suggest that they believed the appeal process outlined in Section 11 above was not available to them. The Appellants contend that, in approaching the court for review, the Respondents failed to exhaust the internal remedy of appealing against the Department's decision.

[42] The Respondents contend that the language of the relevant sections is permissive rather than mandatory, indicating that the word “may” signifies a discretionary right. Although the language may be permissive insofar as it relates to Section 5(11) of the relevant regulations, it remains an internal remedy available to the Respondents. The exhaustion of internal remedies under PAJA is peremptory.

[43] It is common cause that the two applications, which ran concurrently, were grouped into two bundles, with 62 learners in the first bundle and 448 learners in the second. The first bundle of learners who approached the Court in the first application filed a document titled “Appeal 62 Learners, Lamolelani High School on 8 May 2023” with the Fourth Appellant. This group of learners reported that they did not receive any feedback on their appeal beyond an acknowledgement that it had been received. No evidence was presented to suggest that they took any steps to pursue an appeal in accordance with subsection 1, which addresses appeals as stated above.

[44] Regarding the second group of learners who brought the other application, which was heard alongside the first, a letter was addressed to the Fourth Appellant on their behalf on 4 May 2023. The essence of this letter is that the learners sought certain records of the disciplinary process to enable them to launch an appeal. The letter advanced cannot be equated to an appeal and, at best, represents a preliminary step in anticipation of or consideration for an appeal. The case for the learners in this regard is that no response was received from the Appellant, which led to the application being launched before the court *a quo*. These learners failed to indicate the follow-up measures taken and the manner in which they pursued their internal remedies.

[45] At the appeal hearing, the Court was informed that 510 learners had filed the review application. It appears that only 101 of those learners took any steps in internal processes. Specifically, 39 learners advanced a letter seeking information, and 62 learners filed what was phrased as an appeal. None of the learners pursued the internal appeal processes to completion, so the internal appeal process was not exhausted. That process could have been

undertaken, firstly by advancing an appeal to the Fourth Appellant and, thereafter, to the Third Respondent as articulated in the regulations.

[46] The high-water mark for the learners is that, because the Appellants did not respond, they decided to approach the Court. At the appeal hearing, and when the point was raised, it was clear that the Respondents relied on the Court's discretion to relax the requirement to exhaust internal remedies, given what they considered to be exceptional circumstances of the case.

[47] In the worst-case scenario, the Respondents could have relied on the Department's non-responsiveness as grounds for seeking an exemption from exhausting internal remedies, but they chose not to do so. In *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Plotz NO and Another*,²⁸

“The court *a quo* appears to have been satisfied that the required ‘exceptional circumstances’ were present since ‘the trust attempted to exhaust internal remedies by noting an appeal’ and that it was in the interest of justice that the exemption be given, because of ‘the trust’s prospect in respect of the review application’. These do not, for the reasons that follow, establish exceptional circumstances within the meaning of s 7(2)(c) of PAJA nor has it been established that it was in the interest of justice that the exemption be given.”

[48] When the review application was launched, it was not accompanied by an application for exemption from exhausting internal remedies. Without such an application, the court *a quo* was barred from evaluating whether any factors prevailing at the time constituted exceptional circumstances that would qualify the Respondents for an exemption.

²⁸ *Supra* in paragraph 22.

[49] Equally, it was the Respondents' duty to state before the court *a quo*, when the matter was brought, whether no internal remedies were available to them and if they had exhausted them. If internal remedies were available but not exhausted, they were obliged to apply for exemption from exhausting them. In that case, they would need to demonstrate that exceptional circumstances justified the court's exemption.

[50] The starting point for an application for exception in terms of Section 7(2)(c) of PAJA would, at the very least, be for an Applicant to acknowledge that internal remedies have not been exhausted and to apply for the exemption simultaneously. To put forward factors now on appeal, for this court to consider them as exceptional, it to attempt to cross a bridge way too far and maybe impossible to cross. This Court cannot consider factors that were not placed by way of an application for exemption before the court *a quo*. It is too late to address such issues on appeal now.

[51] The court cannot, in the absence of such an application, evaluate the strength of an Applicant's case and, after assessing the case, decide, without an application, whether it would still be just for it to hear the review application. The evaluation under section 7(2) should occur at the outset of a review application, not after all the evidence has been considered. By following this approach, it defeats the very purpose of avoiding overburdening the courts with applications that should otherwise be dealt with in other forums.

[52] As per the matter of *Nichol*,²⁹ the following is relevant:

“Moreover, as was pointed out for counsel by both sets of Respondents, Nichol's contention in this regard “puts the cart before the horse”. It is based

²⁹ *Supra*, paragraph 24.

on the proposition that Nichol is entitled to be exempted from complying with the requirements of Section 7(2)(a) of PAJA and exhausting his internal remedies merely because – so it is contended – his case on the merits of the main application is strong. This cannot be so. Taken to its logical conclusion, such an approach would defeat the purpose of Section 7(2), which requires an Applicant for judicial review to have exhausted his or her internal remedies before resorting to review proceedings. Allegations of procedural or substantive administrative irregularities per se are not “exceptional” in review proceedings.”

[53] The case for the respective learners is that some issued an “attempted appeal”, others advanced a letter during the early days of May 2023, while others took no steps. Approximately three weeks later, the application before the court *a quo* was launched.³⁰ None of the learners acknowledged in their papers that internal remedies had not been exhausted, and none sought exemption from exhausting the internal remedies. The *modus operandi* of the respective learners was evidently that they sought the immediate release of the results, and they had no intention of exhausting the internal processes afforded to them in the relevant regulations. Even on the Respondents’ own

³⁰ In the founding affidavit, the first group of learners stated, “Endeavours have been made by me and the Applicants to get their result to be released but same toils just when in vain, in fact the first five respondents have failed and/or refused to release the results to the Applicants hence this application for review and setting aside. A copy of the letter of appeal is attached hereto marked Annexure “LHS172” – “LHS176” which to date still remains unanswered. It is submitted with due respect that do date that the Applicants are still without their 2022 Matric Results (sic).”

In their founding affidavit, the second group of learners stated, “5.8. On or about 5 May 2023, my legal representative sent a letter to the Respondents detailing my concerns and wanting answers as to why our matriculation results were being withheld. Even to date, the Respondent have failed to furnish those reasons. The letter to the Respondents is herein attached as Annexure “A11” for the Court’s attention.”

5.19. On or about on 5th of May 2023, the Respondents responded to our letter dated the 4th of May 2023 stating that they acknowledge the receipt of our letter and that the engagement on the letter would be done accordingly. The acknowledgement email is herein attached as Annexure “A12” for the Court’s attention.”

“5.20. We awarded the Respondents almost a month to revert back to us or partake in any sort of engagement with us but our efforts were met in vain (sic).”

“5.21. Our legal representatives has acted with such exigency in order to afford the Respondents an adequate time to settle the matter outside of Court but they had no interest in engaging with us (sic).”

“5.22. On the 29th of May 2023 we then approached this Honourable Court on an urgent basis to settle this matter on the 27th of June 2023. However the Court found no urgency in our application. The Court Order is hereto attached as Annexure “A13”. ”

version, the application was launched within the initial 30 days they afforded the Appellant to reply to the Notice of Appeal.

[54] Absent the Respondents seeking an exemption from the court in this regard and showing exceptional circumstances, this Court cannot evaluate the conspectus of evidence and, as an afterthought, grant an exemption at this stage. The court *a quo* was not advanced any evidence or argument suggesting that the purported irregularities with the administrative process, as enunciated by the Respondents, would not be capable of adequate consideration and resolution through the available internal remedies.

[55] Even without the exemption application, much was argued both in submissions and affidavits regarding exceptional circumstances and the interest of justice. At the heart of the matter are irregularities by learners in the matric examination, arguably the most important exam that learners in schools across South Africa will undertake during their schooling. To maintain the integrity of the matriculation examination and its results, all necessary steps must be taken carefully to identify and eliminate any irregularities in its administration. Allowing irregularities in the matric examination process may encourage learners to resort to unlawful means to obtain their matric certification, rather than through honest, hard work and study. Hard work and diligent study remain the keys to obtaining a matric certificate.

[56] Equally important is the duty to see to it that every matriculant is treated fairly and not painted with the same brush used for the transgressors. That duty is on the Appellants and would be safeguarded by the courts to ensure that every learner gets a fair opportunity to sit for Senior Certificate examinations. Any irregularity that is proved should be frowned upon and

corrected. This would also apply to irregularities in disciplinary processes, appeals and/or review applications.

[57] For all the reasons stated herein and in particular, that the internal remedies available to the Respondents have not been exhausted, the appeal stands to be upheld.

[58] Costs.

The Appellant has been successful. The Court was not addressed by the Respondents on any aspect as to, if the appeal succeeded, what cost order should follow. This Court is mindful that the Respondents are young people starting in life, and the possibility that a cost order might burden them unnecessarily.

[59] The Appellants did not seek costs in their Notice of Appeal. Similarly, having regard to the nature of the matter and the parties involved, the Court does not intend to make a cost order outside of the ambit of what is prayed for in the Notice of Appeal.

[60] The Order.

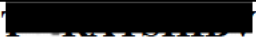
The following order is made:

60.1 The appeal is upheld.

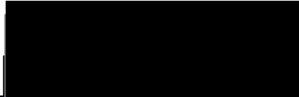
60.2 The Order of the Court *a quo* is set aside and substituted with the following:

The application is dismissed.

60.3 No order as to costs.


UMO
DEPUTY JUDGE PRESIDENT


N MAYET
ACTING JUDGE OF THE HIGH COURT


HF FOURIE
ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT:

ADV. HOR MODISA SC &

ADV. E BALOYI-MERE SC

ADV. T VUKEYA

ADV. NNC NKOSI

INSTRUCTED BY:

STATE ATTORNEYS

MBOMBELA

FOR THE 1st RESPONDENT:

MR. E KHAMBAKO

INSTRUCTED BY:

**E KHAMBAKO ATTORNEYS
C/O THOBELA SINDY ATTORNEYS
MBOMBELA**

FOR THE 2ND – 4TH

RESPONDENTS:

ADV. DJ SIBUYI

(TRUST ACCOUNT ADVOCATE)

MTHUNZI CHAMBERS &

ADV. B MDLULI

ADV. T MUAVHA

INSTRUCTED BY:

E KHAMBAKO ATTORNEYS

DATE HEARD:

07 NOVEMBER 2025

DATE OF JUDGMENT:

19 NOVEMBER 2025