

LL

Case No 114/1991

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE MINISTER OF EDUCATION

AND TRAINING

First Appellant

THE DIRECTOR-GENERAL, DEPARTMENT

OF EDUCATION AND TRAINING

Second Appellant

THE PRINCIPAL, DURBAN FINISHING

SCHOOL

Third Appellant

and

PINKY PRIMROSE NDLOVU

Respondent

CORAM:

BOTHA, KUMLEBEN, GOLDSTONE JJA,
NICHOLAS et HARMS AJJA

HEARD:

7 SEPTEMBER 1992

DELIVERED:

28 SEPTEMBER 1992

JUDGMENT

BOTHA JA:-

During 1989 the respondent attended the Durban Finishing School as a full-time student in standard 10. She studied six subjects, one of which was Biology (higher grade). In November 1989 she wrote the examinations in these subjects for the National Senior Certificate. The conduct of the examinations was under the control and administration of the Department of Education and Training, of which the first appellant is the Minister and the second appellant the Director-General.

In January 1990 the respondent was officially notified that she had passed all her subjects, with matriculation exemption. Her success meant that she had achieved her goal of qualifying for further studies in the nursing profession. Her joy was, however, short-lived. On 22 January 1990 the principal of the school (the third appellant) issued an "urgent notice" advising that "all present

Biology HG results (Nov 1989) are cancelled", and that candidates were required to rewrite the paper on 16 February 1992 "to be able to obtain Biology HG results". This message caused the respondent to consult an attorney, who then addressed a letter to the second appellant. The latter responded in a letter of 6 February 1990, in which the following was stated:

"On 18 November 1989, the day on which the examination in Biology HG was written, Mrs Kemp, the principal of the Durban Finishing School, reported that two candidates had been caught with worked out answers. The worked out answers in their possession were based on the examination question paper that was being written. Both candidates admitted orally before witnesses that they had obtained the Biology HG paper before the examination.

Seeing that the Biology HG paper had been available before the examination at the school in question, it has been decided in terms of stipulation (2) and (3) of regulation 17 that all the candidates of Durban Finishing School that took Biology would have to rewrite the examination in question.

You will appreciate that the Department has to protect the credibility and integrity of its examinations and certificates."

The "regulation 17" referred to is part of the regulations made by the first appellant in terms of section 44 of the Education and Training Act 90 of 1979 and published in Government Notice No R803 of 16 April 1981 ("the regulations"), to which further reference will be made presently.

The respondent thereupon brought an application on notice of motion in the Durban and Coast Local Division for inter alia an order setting aside the cancellation of the result she had obtained in the Biology examination. She cited the present appellants as respondents. They opposed the application. The matter came before THIRION J, who granted the order prayed for, with costs. Subsequently leave was granted to the appellants to appeal to this Court.

From the affidavits filed on behalf of the appellants the following facts appear. The respondent was one of 58 candidates at the school who sat for the Biology (higher grade) examination. Five class-rooms were used to accommodate these candidates. In each there was an invigilator who supervised the writing of the examination. The Biology paper received by each candidate contained a separate sheet of questions, the answers to which the candidate was required to enter on that question-paper. Shortly after the commencement of the examination the invigilator in one of the class-rooms found a candidate in possession of a question-paper on which the answers had already been written. A search of all the candidates resulted in another one of them, in a different class-room, also being found in possession of an already completed question-paper. These two candidates subsequently admitted that they

had obtained possession of the question-papers some time before the examination and that they had written down the answers on them before taking them into the examination room. After the examination a third candidate came forward and reported that she, too, had seen the question-paper before the examination, and that she had memorized the answers required, in order to be able to write them down in the examination room.

These facts were reported to the second appellant. They were the basis upon which he decided in January 1989 to refuse to recognise the results obtained by the candidates who wrote the Biology examination at the school and to require them to rewrite the examination, thus in effect cancelling the results of all of them.

The respondent stated in her founding affidavit that in the room in which she wrote the

examination, no candidate was found in possession of unauthorized material. She said further that she had not been a party to any irregularity or dishonesty before or during the examination. And one of the grounds relied upon for the relief sought by her, was that she had not been afforded any opportunity to be heard before the second appellant came to a decision prejudicially affecting her. These averments were not placed in issue by the appellants. It is accordingly common cause, and the matter was argued on this footing, that the respondent was innocent of any irregularity in connection with the examination and that she had not been given an opportunity to make representations protesting her innocence to the second appellant before he decided to cancel the result obtained by her.

The case for the appellants is that the respondent had no right to be heard and that the

second appellant was not obliged to consider her guilt or innocence before he took his decision (or thereafter). The rationale underlying the appellants' case appears from the affidavit of the second appellant, and it may be paraphrased as follows. The integrity of the examination system and of the certificates issued in terms of it is universally jealously guarded by the authorities in control of education, for reasons which are obvious. The maintenance of this integrity is of the utmost importance to the Department and its Director-General. When irregularities occur by which some candidates obtain an unfair advantage over others, it is frequently impossible to identify accurately the individuals who have been so advantaged and those who have not. The present case is an example of such a situation. There was clear proof that some candidates at the school had gained access to a part

of the Biology paper which had irregularly been made available prior to the examination, but it could not be established which of the 58 candidates had taken advantage of the irregularity. All the candidates had studied together in the same class and there is a reasonable possibility that more of them than the 3 mentioned earlier had taken part in the irregularity. The examination and its results have thus been rendered suspect in relation to all the candidates at the school. The only acceptable way of dealing with this situation, so it is said, is to treat all the candidates at the school as a group and to require the whole group to rewrite the examination. In this manner the integrity of the Department's examinations and certificates can be preserved whilst at the same time protecting the candidates who were innocent of any irregularity by according them the opportunity to rewrite the examination and thus to remove any

suspicion (and consequent depreciation in worth) that would otherwise have attached to the certificates they hoped to acquire.

The above reasoning (which, I think, has much to commend it) serves to explain why the appellants seek to defend the decision which deprived the respondent of her pass in Biology, even though she was not guilty of any irregularity and was denied an opportunity of protesting her innocence. But it does not yet address the question whether the second appellant was entitled to act as he did. As to that, the appellants contend that the second appellant was empowered to act as he did by the regulations. Whether or not that contention is well-founded is the vital issue in the appeal.

I turn, then, to the regulations. As a whole they cover a wide variety of topics related to different provisions of the Act under which they were

promulgated. One section is devoted to "CONDUCT OF EXAMINATIONS". The provisions calling for consideration appear in reg 17, which bears the sub-heading "Irregularities by candidates". Subregulations (1), (2) and (3) are relevant. They read as follows:

"17. (1) If any candidate -

(a) unless otherwise provided by an authorised person for an examination, takes into the examination room or has in his possession while he is in the room, any book, memorandum, notes, card or other document or paper other than such as may be supplied to him by the invigilator, his admission card and identification document; or

(b) in any irregular manner helps or attempts to help another candidate, obtains or attempts to obtain help or communicates or attempts to communicate with any person (except the invigilator); or

(c) disregards the examination rules or examination instructions referred to in regulation 14(1) [except those regarding a matter referred to in paragraphs (a) and (b)] and, after being warned by the invigilator, continues to disregard the rules and regulations referred to; or

(d) creates a disturbance in an examination room or behaves in an improper or unbecoming manner and refuses, after being

warned by the invigilator, to stop the causing of the disturbance or his improper or unbecoming behaviour; or

(e) disregards the arrangements of the invigilator and, after being warned by the invigilator, continues to disregard the arrangements referred to;

the invigilator shall immediately bring such irregularity to the notice of the chief invigilator and the chief invigilator may, after he has confronted the candidate concerned with the alleged irregularity and has afforded him the opportunity to present his side of the case in writing, or verbally, in the presence of an invigilator or other witness -

(i) expel the candidate from the examination room;

(ii) confiscate the candidate's script; or

(iii) permit the candidate to continue with the examination;

and the chief invigilator shall, immediately after the examination, submit a complete report, together with the candidate's written statement (or, in the case of a verbal statement, the chief invigilator's written version thereof) and any other evidence regarding the matter, to the Director-General.

(2) Should the Director-General be of the opinion that a candidate or group of candidates has obtained an unfair advantage because -

(a) the contents of a question paper for which a candidate or group of candidates has entered have become known to him or them prior to the date and time on which the examination is conducted; or

(b) any of the provisions of subregulation (1) has been contravened; or

(c) another person pretended to be the candidate concerned at the examination; or

(d) some irregularity or other has occurred in connection with the writing of such examination or the handling of a script after such examination has been conducted;

the Director-General may take one or more of the following steps:

(i) Prohibit the candidate or group of candidates from entering the examination room or from further writing the examination;

(ii) refuse to recognise the results obtained by the candidate or group of candidates in the examination;

(iii) refuse any person referred to admission to an examination for such period as the Director-General may determine;

(iv) instruct that any success in a subject or an examination as a whole with which such candidate has been credited be cancelled; or

(v) reject the examination script

in respect of the subject concerned.

(3) The Director-General may require a candidate or group of candidates referred to in subregulation (1) and (2) to rewrite the examination as a whole or in part on such date, time and place as he may determine."

It will be seen that there are four segments of these provisions which bear directly on the facts of this case: the opening words of subreg (2), para (a) of subreg (2), para (ii) of subreg (2), and subreg (3). In each of these is to be found the expression "group of candidates" (as also in para (i) of subreg (2)). This expression is foundational to the argument for the appellants, which may be stated as follows: by the use of the expression "group of candidates" in juxtaposition with "a candidate" or "the candidate", the Minister in issuing the regulations intended to authorize the Director-General to take the steps envisaged against a group

of candidates as an entity, (a) irrespective of whether or not all the individuals in the group have been guilty of an irregularity, and (b) without being obliged to afford a hearing to the individuals in the group. Propositions (a) and (b) are obviously closely interrelated. For convenience, I commence with a consideration of (b). At stake is the rule: audi alteram partem (to which I shall refer as "the audi principle").

Counsel for the appellants in argument conceded that the audi principle applied in cases where the Director-General contemplated taking steps against an individual candidate in terms of subregs (2)(a), (2)(ii) and (3). The concession was clearly correct. A candidate who obtains a pass in an examination acquires the right to recognition of his success, and the decision which the Director-General is empowered to take impinges on that right. Conse-

quently the candidate has a right to be heard, unless the regulations show, either expressly or by implication, a clear intention on the part of the Minister to exclude such a right (see e g Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 662G-I and South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 10G-I). In the case of an individual candidate, no indication of such an intention can be found in the regulations. The fact that an opportunity to be heard is expressly provided for in the particular circumstances dealt with in subreg (1) does not warrant an inference that it was intended to be excluded in the different circumstances dealt with in subregs (2)(a), (2)(ii) and (3) (cf Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A) at 37F-38D and South African Roads Board v Johannesburg City Council supra at 16E-17A). In a situation falling within the

ambit of subregs (2)(a), (2)(ii) and (3) proper effect can be given to the audi principle before the Director-General forms the opinion postulated in the opening words of subreg (2). Consequently that is the time when the opportunity to be heard must be accorded, even if in other circumstances (e g under subregs (2)(a) and (2)(i)) it may not be possible to apply the audi principle effectively or at all (see e g Blom's case supra at 665A-666B and 668C-E, and Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A) at 750C-F).

That being the position in regard to individual candidates, I turn to consider the notion of a "group of candidates". The starting-point of the argument for the appellants is that a group of candidates constitutes an entity apart from the individuals comprising it. In my view the argument falters at its inception, notionally and linguistically.

When the expression "group of candidates" first occurs, in the opening part of subreg (2), it is used in context with the obtaining of an unfair advantage. But one cannot think or speak of a group of candidates obtaining an unfair advantage without inevitably thinking or speaking of each of the candidates making up the group. Similarly, in the context of para (a) of subreg (2), it is impossible to conceive or talk of a group of candidates entering for an examination and having knowledge of the contents of the question-paper before the examination, without visualizing and involving every individual member of the group. Notionally, absence of knowledge on the part of a particular candidate must perforce exclude him from a group of candidates having knowledge. Linguistically, this is highlighted by the use in para (a) of the words: "have become known to him or them"; one cannot substitute "it" (denoting the

group) for "them" (the members of the group). And in para (i), to prohibit a group of candidates from entering the examination room must mean to prohibit the individual candidates comprising the group from entering; in para (ii), to refuse to recognise the results obtained by a group of candidates can mean nothing but to refuse to recognise the results of the individual candidates in a group; and in subreg (3) the concept of requiring a group of candidates to rewrite an examination can only be applied to the several members of the group individually.

The observations above point to the conclusion that the expression "group of candidates" was used in the regulations as a kind of shorthand expression to denote a number of individual candidates who together constitute a group by reason of having some attribute in common. In the opening words of subreg (2) the common attribute is the

obtaining of an unfair advantage; in para (a) it is the prior knowledge of the contents of a paper.

At this point the two propositions embraced in the argument for the appellants, earlier marked (a) and (b), converge. The connecting link is the idea, just mentioned, of an attribute common to the individual members of a group of candidates. Proposition (a) denies that such a common attribute is required to constitute a group of candidates. It postulates that action can be taken against individual candidates who are innocent of any irregularity on the ground that they belong to a group of which some members are proved to have been guilty of an irregularity. This involves much more than simply viewing a group of candidates as a notional entity; it assigns to the concept of an entity the consequence that what affects some members of it, affects all; the guilt of some taints the lot. But it is

argued that this is not the right way to look at the matter: the draftsman of the regulations was not concerned with guilt and punishment (at least not in the context of subregs (2)(a), (2)(ii) and (3); contrast subreg (2)(iii)); he was concerned with the preservation of the integrity of the examination system, in the manner explained earlier. It was urged that effect should be given to this object of the regulations by interpreting them accordingly, even if the language chosen to express this intention was less than perfect. The answer to this line of the argument is to be found by reverting to consider proposition (b) above, involving the audi principle. It rests on considerations of fundamental fairness and the requirements of natural justice. In this context it does not avail the appellants to say that the object of the Director-General's action is to preserve the integrity of the examination system and

not to punish an innocent candidate. The prejudicial effect of his action on the rights of an individual candidate is all that matters. It entails the right to be heard, which can be excluded only if the intention to do so is made manifest. The appellants attempt to find such an intention, in relation to individual members of a group, in the expression "group of candidates". The attempt must fail, for, in view of what has been said above, it is impossible to find in that expression an implication of a clear intention to exclude the right to be heard. Consequently proposition (b) must be rejected. The essence of a candidate's right to be heard is the opportunity to show that he is innocent of any irregularity. That being so, it must follow that there is no room for arguing that it is immaterial whether any individual member of a group of candidates is guilty or innocent of an irregularity.

Consequently proposition (a) must also be rejected.

Counsel for the appellants argued that, if the interpretation contended for were not accepted, the expression "group of candidates" in the regulations would be rendered superfluous and, indeed, senseless. I do not agree. It fulfills a useful function, as indicating the manner in which the Director-General is to exercise his powers in certain circumstances. If he receives information of an irregularity which may involve a number of candidates, he can examine the facts to see whether a prima facie inference is justified that a number of candidates have participated in the irregularity, thus sharing a common attribute and constituting a group of candidates. If he is satisfied on that score, he is then empowered, before he forms the opinion required by subreg (2), to call on the members of the group for an explanation. This he is

entitled to do, even though there is no evidence directly implicating each individual in the group. In this respect the position differs from the case where he is concerned with a particular candidate only; there he would be able to act only on evidence relating to misconduct of that individual. An example of a group situation is afforded by the facts of this case. Another would be where all the candidates in one class were to answer a particular question in exactly the same way. In calling on the members of the group to explain, the Director-General would obviously be in duty bound to convey to them the information on which he bases his inference of group complicity. Each individual will thus be afforded the opportunity of showing that he did not take part in the irregularity, that he did not in fact belong to the group, and so to make representations for excluding him from the group when the

requisite opinion is formed. On this basis the words "group of candidates" cannot properly be regarded as mere surplusage.

Finally, counsel for the appellants sought to rely on Pretoria City Council v Modimola 1966 (3) SA 250 (A) at 261E-262A and E Snell & Co (Transvaal) (Pty) Ltd v Minister of Agricultural Economics 1986 (3) SA 532 (D & C L D) at 536F-537E in support of an argument that the audi principle did not apply in this case, on the grounds that the decision which the regulations empowered the Director-General to take was not designed to deprive individuals of their rights, but to enforce a policy of general application, and that the Director-General was consequently to be guided solely by what was best for the community as a whole. The argument is not well-founded. Modimola's case supra was extensively discussed in a recent decision of this Court, to which, surpri-

singly, neither counsel referred us: South African Roads Board v Johannesburg City Council supra. I do not propose to analyse the judgment in the latter case (per MILNE JA) in any detail. It will suffice to quote two of the general conclusions stated in the judgment (at 12E-F and 13B-C):

"It seems to me rather that a distinction should be drawn between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals."

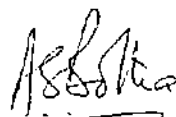
"For the audi principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."

Applying this approach to the facts of the present

case, it is not open to doubt, I consider, that the Director-General was obliged to give effect to the audi principle. It may be that in other circumstances so large a number of candidates can be involved (as in some examples given in argument, where the contents of a paper is disseminated on a wide scale) that the application of the audi principle must needs be attenuated, but it was rightly not suggested that such a situation arose in the present case.

The decision of the second appellant was invalid and the Court a quo was right in setting it aside.

The appeal is dismissed, with costs.



A S BOTHA JA

KUMLEBEN JA
GOLDSTONE JA
NICHOLAS AJA
HARMS AJA

CONCUR