



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 11 DECEMBER-2020

SIGNATURE

CASE NO: 64171/2020

In the matter between:

LIENKE SPIES

First Applicant

GERHARD BURGER

Second Applicant

IZAK JACOBUS ARNOLD

Third Applicant

CHRISTIAAN SWANEPOEL

Fourth Applicant

AFRIFORUM NPC

Fifth Applicant

and

THE MINISTER OF BASIC EDUCATION

First Respondent

THE NATIONAL EXAMINATIONS

IRREGULARITIES COMMITTEE (NEIC)

Second Respondent

UMALUSI COUNCIL FOR QUALITY

**ASSURANCE IN GENERAL AND FURTHER
EDUCATION AND TRAINING**

Third Respondent

CASE NO: 64222/2020

UNAMI PHIWOKUHLE BHEMBE

First Applicant

ITUMELENG SAMKELO NKAMBULE

Second Applicant

MARNÉ VAN DER MERWE

Third Applicant

and

MINISTER OF BASIC EDUCATION

First Respondent

**DIRECTOR GENERAL DEPARTMENT OF
EDUCATION**

Second Applicant

MEC FOR EDUCATION GAUTENG PROVINCE

Third Applicant

MEC FOR EDUCATION, NORTH WEST PROVINCE

Fourth Applicant

MEC FOR EDUCATION MPUMALANGA PROVINCE

Fifth Respondent

MEC FOR EDUCATION LIMPOPO PROVINCE

Sixth Respondent

**MEC FOR EDUCATION WESTERN CAPE
PROVINCE**

Seventh Respondent

**MEC FOR EDUCATION EASTERN CAPE
PROVINCE**

Eighth Respondent

**MEC FOR EDUCATION KWA-ZULU NATAL
PROVINCE**

Ninth Respondent

**MEC FOR EDUCATION NORTHERN CAPE
PROVINCE**

Tenth Respondent

**MEC FOR EDUCATION FREE STATE
PROVINCE**

Eleventh Respondent

MINISTER OF HEALTH

Twelfth Respondent

**THE MINISTER OF GOVERNANCE AND
TRADITIONAL AFFAIRS**

Thirteenth Respondent

UMALUSI

Fourteenth Respondent

CASE NO: 64373/2020

ITHA WESSELS

First Applicant

EESA OMAR

Second Applicant

PHEELO MOEKETSI

Third Applicant

ALANIS LISBEL MEDINA GOMES

Fourth Applicant

NOMONDE RADEBE

Fifth Applicant

and

THE MINISTER OF BASIC EDUCATION

First Respondent

**UMALUSI COUNSEL FOR QUALITY
ASSURANCE IN GENERAL AND FURTHER
EDUCATION AND TRAINING**

Second Respondent

**THE MEMBER OF EDUCATION OF THE
EXECUTIVE COUNCIL OF THE
PROVINCE OF GAUTENG**

Third Respondent

CASE NO: 58905/2020

SOUTH AFRICAN DEMOCRATIC TEACHERS UNION

Applicant

and

MINISTER OF BASIC EDUCATION

First Respondent

DIRECTOR GENERAL:

DEPARTMENT OF EDUCATION	Second Respondent
MEC FOR EDUCATION: GAUTENG PROVINCE	Third Respondent
MEC FOR EDUCATION: NORTH WEST PROVINCE	Fourth Respondent
MEC FOR EDUCATION: MPUMALANGA PROVINCE	Fifth Respondent
MEC FOR EDUCATION: LIMPOPO PROVINCE	Sixth Respondent
MEC FOR EDUCATION: WESTERN CAPE PROVINCE	Seventh Respondent
MEC FOR EDUCATION: EASTERN CAPE PROVINCE	Eighth Respondent
MEC FOR EDUCATION: KWA-ZULU NATAL PROVINCE	Ninth Respondent
MEC FOR EDUCATION: NORTHERN CAPE PROVINCE	Tenth Respondent
MEC FOR EDUCATION: FREE STATE PROVINCE	Eleventh Respondent
THE CHIEF EXECUTIVE OFFICER: UMALUSI	Twelfth Respondent
THE NATIONAL EXAMINATIONS IRREGULARITIES COMMITTEE (NEIC)	Thirteenth Respondent
and SUID AFRIKAANSE ONDERWYS UNIE (SAOU)	Amicus Curiae

JUDGMENT

These urgent applications, although heard in open court, have still been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and orders are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

Our children are our future and their education should be the door to that future. The sins of dishonesty and greed have inserted themselves into the hinges of that door. These sins, helped along by desperation to succeed, manifested themselves by the “leaking” of two exam papers prior to the writing of two subjects in the 2020 National Senior Certificate (“matric”) exams, being for many of our youth, the culmination of their school careers. This is the judgment in four urgent applications launched earlier this week and heard jointly and simultaneously yesterday. These applications were four of the sixty six urgent applications dealt by myself and my colleague Makhoba J during the course of the week, not counting in camera applications and the issuing of search and seizure warrants. The four applications are all about whether a decision imposing a nationwide rewriting of the two papers passes legal scrutiny.

[2] The parties

2.1 Some 339 000 learners sat for the Maths II paper in question and some 282 000 learners sat for the Physical Science II paper. The individual applicants in the urgent applications are learners who had not received access to those papers before writing the exam. These individual applicants are supported by a civil rights initiative and non-profit company, Afriforum who claim to act in a representative capacity of those children of its 260 000 members who are matric learners. An educators union, SADTU is, in its own right, an applicant in the last of the four urgent applications. The

amicus curiae, SAOU, is another educators union and, although acting as an amicus, made common cause with and supported the cases of the applicants.

- 2.2 The respondents in the various applications are the Minister of the Department of Basic Education (“the Minister”), the MEC’s for Education for all the provinces, the Minister of Health, the Minister of Cooperative Governance and Traditional Affairs, the National Examinations Irregularities Committee (NEIC) of the Department of Basic Education (the DBE) and the Umalusi Council for Quality Assurance in General and Further Education and Training (“Umalusi”).

[3] Relief claimed

The relief claimed by the various individual and organized applicants respectively vary in their specifics but not in their material content. They all deal with the decision of the Minister taken on 3 or 4 December 2020 that the Maths II and Physical Science II papers have to be re-written by all matric pupils enrolled for those two subjects, on 15 and 17 December 2020 respectively. As the parties were in agreement that all four applications should be dealt with jointly and simultaneously and, due to time restrictions imposed by the urgent nature of the applications, it is neither necessary nor apposite to individualise the relief. Cumulatively, the following are claimed:

- 3.1 That the decision by the Minister referred to above, be reviewed and set aside and that the DBE be interdicted from requiring a rewrite of the two papers in question;
- 3.2 That the learners’ papers in respect of the two subjects be marked and that the marks be allocated and published;

3.3 That the marked papers be kept in safe custody pending any possible later review, disciplinary, criminal or other proceedings.

[4] The applicants' case/s

4.1 All the applicants aver that 2020 has been a particularly difficult year for all learners in the country. The impact of the COVID 19 restrictions and the measures imposed in terms of the Disaster Management Act 57 of 2002 had a more deleterious effect on those learners for which 2020 was not just another school year, but one which has a huge impact on their post matric futures. The respondents do not deny these averments.

4.2 It is further common cause that the examination roster was the culmination of a substantial amount of planning and involved a structured spread of exam papers accommodating all the various subjects. It had to cater for the orderly running of the matric exams for the largest number of learners ever, being in excess of 1 million. The last day of the exams was scheduled to be 15 December 2020. All the individual applicants state that their study rosters, exam preparation, mental preparedness and time allocation were done according to this roster. Many of the learners (and their families) had made substantial plans for when they each wrote their last subject. Many learners returned to their homes or home provinces, many of which were not at their centre of learning. This was particularly applicable to hostel dwellers. A further common occurrence was that upon completion of the last paper in a subject, the learners returned their textbooks to their schools. In many schools the return of books were also prescribed by standing regulations. Many of the learners also had the practice of, almost in celebratory fashion, destroying their notes made in preparation of a particular exam paper upon completion thereof.

- 4.3 All the individual applicants in the four applications were, until the Minister's announcements and subsequent media reports, totally unaware of the leakage of the two papers in question. Many of the learners who would be required to rewrite the maths II paper on 15 December also write other papers on the morning of that day (such as visual arts) and on the preceding day (such as information technology). The time period they had to prepare for the initial maths II paper was, in most instances, longer than the time period now afforded by the Minister's announcement of the rewrite made on 4 December 2020. The scheduling of studies and preparation for the exams are one of the beneficial consequences of the predetermined and pre-published exam roster. Apart from the fact that it is therefore a good practice, it is also prescribed in the Regulations Pertaining to the Conduct, Administration and Management of the National Senior certificate examination initially published in government regulation notice R 872 in Government Regulation Gazette number 31339 of 29 August 2008 and amended from time to time ('the Regulations').
- 4.4 All the applicants also state that upon having written the two papers in question, they legitimately expected that their papers would be marked and assessed and that the marks allocated would subsequently be released. They further claim that they have a clear right to such marking in terms of the Regulations (with which I shall deal with more fully hereinlater).
- 4.5 Many applicants also have personal circumstances which would give rise to either prejudice or even hardship where they now required to return, either from holidays which have already commenced, ancestral of family homes or elsewhere. The one set of applicants made the point that such travel would increase the Covid 19 exposure which would be exacerbated should they now be required to attend to examination halls. These latter

contentions have not been addressed nor controverted by any of the respondents.

- 4.6 Apart from the general and widespread prejudice which the applicants' claim that they and all other innocent learners will suffer, it must immediately be apparent that there will be innumerable permutations of these personal circumstances amongst the 339,000 learners required to rewrite the maths II paper and the 282,000 learners required to rewrite the physical science II paper. One of the many examples of such personal circumstances is that of the second applicant in case number 64373/2020 who is getting married tomorrow, Saturday, 12 December 2020. The wedding, as a result of the Covid 19 restrictions, involved far more travel, venue and accommodation logistics than would have customarily been the case. She had finished her exams and clearly her post-wedding plans did not include rewriting papers on 15 and 17 December 2020.
- 4.7 Apart from the individual circumstances and logistical difficulties which many learners will face regarding the proposed rewrites, all of the individual applicants complain about the psychological impact of the proposed rewrites. They claim to have, in their minds, already divested themselves from the two papers in respect of which they had already ran their academic races. They fear that they will not fare as good as before when being forced to do another academic lap at short notice, without textbooks, sufficient preparation and notes.
- 4.8 The General Secretary of the South African Democratic Teachers Union) SADTU) submit in the founding affidavit of the Union's application that the only reason why the Minister took the decision that the papers had to be written and rewritten, was because she was held to ransom by Umalusi.

The minister was labelled “panic stricken, and extremely fearful” of, Umalusi who had already predetermined that it would not certify the examinations as compliant and that it demanded that the papers be rewritten. SADTU claims that the re-writing requirement “*imposes an unjust and psychological punishment to the entire matric learners who wrote the two subjects simply because ... Umalusi had determined that a limited number of learners had access to the leaked papers destroyed the credibility of the results*”.

- 4.9 So far the views and general approaches of the applicants. I shall deal with the legality and rationality attacks on the decision hereunder.
- 4.10 The amicus curiae represents more than 37,000 educators employed at more than 4400 schools nationwide. In addition to supporting the allegations regarding individual inconvenience, prejudice and hardship of the innocent learners required to rewrite the papers, such as the individual applicants, it makes the point that, after having completed the maths II paper on 16 November 2020, the learners have not “touched” mathematics and physical science for approximately a month their attention and efforts having been taken up by other subjects. The maths and physical science subjects require practice to keep mentally and academically “fit in them”. The comparison is made with a professional athlete who stopped practising after completing an Olympic event and who is then, without access to his training material, required to redo the event. The amicus makes the submission that as a result all the learners will in all probability underperform substantially which underperformance will reflect negatively, not only on them as individuals, but also on the quality of education, educators and schools. The point is made that educators and schools are assessed on the performance of the learners and resources are

also accordingly allocated. The prejudice suffered by learners will therefore extend also to their educators and schools.

[5] Views of the other “stakeholders”

- 5.1 The DBE internal moderators for mathematics expressed their views on the prejudice of learners as follows: *“it is the opinion of the moderators that a very small percentage of the candidates may have had access to the paper prior to it being written and that the vast majority of the candidates were affected by the breach in security. Given that the year had already presented challenges to this cohort of candidates a rewrite of the mathematics paper II by all candidates will just add to the burden that the majority of candidates had carried during the course of this year. The psychological impact that a rewrite will have on the vast majority of the candidates cannot be overlooked. The possibility that a candidate may take his or her life increases under the circumstances. For many of these candidates, writing the mathematics paper to on 16 November brought their engagement with mathematics to an end. It is going to take tremendous effort for these candidates to get into the correct mindset to prepare to rewrite this paper we believe that a number of the candidates not involved with the breach in security may not present themselves for the rewrite of this paper”*. The internal moderators for the physical sciences paper echoed similar sentiments: *“most learners were not exposed to the paper prior to the examination and should receive the benefit of not being involved in the leaking of papers. Grade 12 learners had a difficult year and worked hard for this examination. They are anxious to receive the results and enroll at higher education institutions. A rewrite will delay this process for innocent learners who are the majority”*.

5.2 The Minister claims that the school governing bodies (SGBs) were also consulted in the decision. They were however not involved in the final decision making progress and merely “briefed” at the meetings of 21 and 28 November 2020. These were weekly meetings held with them by the Director-General (the “DG”) of DBE during the course of the exams. Particularly notable is the meeting of 21 November 2020. The minutes of the meeting indicate that the DG informed the SGB’s of the leak of the mathematics II paper. He further advised that an investigation team had been put together and that the services of the Directorate of Priority Crime Investigations (‘the Hawks’) had been engaged to assist with the identification of the source of the leakage. At the meeting of 28 November 2020 the DG again referred to the leakage of examination papers which by this time included that of physical science II. He reported that the first suspect related to the leaked papers had appeared in court and would again appear the following week. Dr Paliiah of the DBE also briefed the meeting and reported on progress to date with reference to ‘normal irregularities’ amongst others “*crib notes, cell phone and imposter*”. He reported on the number of learners who had access to the mathematics II paper per province and the number of learners who had access to the physical science II paper per province. The minute of the meeting also referred to 53 learners who had been referred to the Hawks, 11 retrieved cell phones and cell phone records “undergoing analysis” and further audits of the distribution chain and telephonic interviews with those learners who had received leaked papers by WhatsApp. The educator unions who were also represented at these meetings and they indicated that it would be difficult to take a position at that time and that they would await the report from the National Examination Irregularities Committee (EIC).

[6] Particulars of the “leaks”

- 6.1 The DG of the DBE explained in the principal answering affidavit to the urgent applications that the DBE spokesperson became aware on the morning of 16 November 2020 of an email indicating that the mathematics II paper may be compromised. He alerted the Chief Director National Assessment of Public Examinations, Dr Paliah who later verified that the email confirmed a true copy of the mathematics II paper scheduled to be written later that morning. The DG states that by that time it *“was unfortunately so close to the time that the learners had to sit for the paper, that the DBE could not do anything to ameliorate the situation”*. A similar occurrence took place on the morning of 23 November 2020 when the DBE was “made aware” that the physical science paper II which was supposed to be written on that day had also been leaked.
- 6.2 The DG then established a National Investigating Task Team (“NITT”) to investigate the leakage of the papers. The NITT operated under the auspices of the NEIC. The only report available from the in NITT is one dated 30 November 2020.
- 6.3 As the above-mentioned report and the contents there of featured largely in these applications and in the impugned decision it is apposite to refer to the following relevant extracts therefrom. After referring to the reporting of the leakages of the papers and the NITT’s terms of reference and methodology, the report continued as follows: *“the in NITT has a four-fold mandate which will conclude at the end of February 2021 with the release of the results and the final report will address issues relating to the extent of the leakage, the source of the leakage, the current compromise of the examinations and how these can be mitigated and the future improvements to the National examination system to avoid these leakages. However, for the immediate the in NITT has been focusing on the extent of the*

compromise of the mathematics and physical science papers. This was necessary to determine whether the compromise of these two papers is localised to specific provinces or spread across all nine provincial education departments and across all districts and schools. Hence this interim report will focus on the first object mentioned in the terms of reference which will be to the extent of the spread of the compromise of both the mathematics II and physical science II papers. The main purpose of this interim report is to establish whether the extent of the leakage warrants a rewrite of examination in these two papers and if there is a rewrite, should it be a national rewrite or a selected rewrite applicable only to candidates that have had access to these two papers. This report is extremely important given that the decision that will be taken based on this report will impact on all learners taking these two subjects in the country”.

- 6.4 After having dealt with limitations of the interim report, the NITT dealt with the issue of WhatsApp groups as follows: *“one of the groups that was established across all nine provincial education departments is the Top Achievers Group that was coordinated by the University of Stellenbosch and unfortunately, it would appear that this group had fallen prey to such activity which has cast a shadow over the entire group [A table was then produced, indicating a spread over the provinces of 134 learners in the Top Achievers Group and 61 other learners in other groups] As at 29 November 2020, 195 learners are reported to have had access to the mathematics paper II based on the information received by the DBE and the PEDs. This number may appear to be small compared to the 339,000 learners that wrote the mathematics examination. However given the viral spread of information on social media platforms, this number can be estimated to be far greater than the number listed. It is also difficult to accurately identify the number of learners that had access to the question*

paper in the absence of the analysed cell phone records. It is not possible to have the cell phone of every learner analysed but the cellphones of all learners that are suspected of having had access will be retrieved and analysed. It is ought also interesting that the majority of learners that had access to the mathematics paper were from the Top Achievers Group. It is reported that the learner who posted these two questions on the Top Achievers Group was severely reprimanded by group mates and he has since exited the group [A second table was produced indicating 60 learners who had prior access to the physical science II paper of which one was a whistleblower]. The number of learners that had access to the physical science II question paper is significantly reduced given that learner activity and the support groups was significantly reduced after the repercussions for having access to the mathematics paper was made public. In the case of the Top Achievers Group, all activity has been summarily suspended. The DBE continues to follow up on all leads that are received and will update these tables accordingly”

- 6.5 The report also noted that 71 of the 195 candidates implicated in respect of the maths to paper were interviewed, the majority of which indicated that they received the messages but that all of them only open the WhatsApp messages after the writing of the examination’ save for three learners. The majority of learners interviewed also stated that only two sub-questions were posted. All 71 learners interviewed responded that they had not shared the message with any other person outside the group. The report also refer to the fact that the Hawks had interviewed 11 learners and retrieved the cell phones of 10 candidates. The report also, on the issue of consultation with key stakeholders, reported that the teacher unions were of the view that the decision regarding a rewrite of the papers could only be made after all the information was made available and properly

analysed. Half of the school governing bodies thought that rewrites might be in the interest of examination credibility and, the need to limit negative criticism from the South African media. The other school of thought was that the DBE should not increase the anxiety and trauma to learners that already have had a tough year by requesting them to rewrite the examination. The unanimous opposition to rewriting the papers by the examination panels for mathematics and physical science was also noted.

- 6.6 On the issue of what circumstances would justify a decision to have a national rewrite the NITT concluded as follows *“first a decision to do so would be needed the public response to the leaks were such that the results would not generally be accepted, secondly would be justified if there was evidence of widespread leaks. We know that these two papers have been compromised. We do not and may never know the extent to which these leaked. We have evidence the leaks spread digitally to small groups. Thus far we have evidence that up to 200 learners did or could have accessed two questions from maths II out of a total of 391 339 learners enrolled for the subject and at the leak to the WhatsApp group was limited to these two questions and came late, that up to 61 learners did or could have accessed parts of the physical science of the 283 327 learners enrolled for the subject. Thirdly it would be necessary if Umalusi made it a condition for accepting the results for the 2020 in NSC”*.
- 6.7 It appears that the NITT report made its way to the NEIC and from there to the committee of Heads of Education Departments (HEDCOM).
- 6.8 The copy of the NITT report produced by the respondents, appears to include somewhat of a minute of subsequent events. It therefore included a recommendation by the HEDCOM to the Council of Education Ministers

(CEM). This led to the following *“the CEM debated the recommendation from HEDCOM extensively and finally it was decided that the evidence emanating from the investigation is not conclusive enough to justify a national rewrite of the physical science and mathematics questions papers. From the evidence presented it would appear that the extent of the leakage was confined to the candidates that received the question paper on what’s app and therefore this does not justify a national rewrite. The DBE and PEDs must manage this through its normal protocols relating to the management of examination irregularities. Investigative marking and other statistical analysis must be employed in identifying the learners that may have had access to the question paper and did not reveal this information to the investigation team. This will ensure that the large number of candidates did not have access to the question paper will not be disadvantaged and it will also reduce the likelihood of litigation against the DBE”*.

- 6.9 The above-mentioned decision of the Council of Ministers, as reflected in the minuted portion of the in ITT report, however contains the following proviso: *“However, if the Quality Assurance Council [Umalusi] decides, based on its mandate with regard to maintaining the integrity and credibility of NSC examinations, that there should be a national rewrite, the DBE will comply”*.

[7] Umalusi’s view

Umalusi’s view, confirmed in its answering affidavit delivered in the first of the four urgent applications, was formulated at a meeting of its Executive Council (EXCO) and contained in a letter dated 2 December 2020 to the DG of DBE as follows: *“1) the investigation into the leak of mathematics paper II and physical sciences paper II has not been completed and might not be completed in the near*

future; 2) the full extent of the spread of the two leaked papers has not been determined; 3) the different stakeholders and structures within the Ministry of education have proposed diverging remedies; 4) for the integrity and credibility of the two papers have been irrevocably compromised... . Given Umalusi's legislative mandate to ensure the integrity, credibility and validity of the in NSC examinations in accordance with the General and Further Education and Training Quality Assurance Act 2001 (Act number 58 of 2001) as amended in 2008 and the National Qualifications Framework Act 2008 (Act number 67 of 2008) as amended, EXCO has resolved that the DBE must have the two papers (mathematics paper II and physical science paper II rewritten”.

[8] The record of the decision to rewrite:

The Minister was requested by the applicants to deliver the record of the decision. In fact, one of the urgent applications was formally launched as a review application, which required the Minister to deliver the record of the actual decision whereby it was decided that the two papers in question had to be rewritten. After some delay and only upon a direction of the court, the “record of decision” documents were produced. From this it appears that the decision was taken at a special meeting of the Council of Education Ministers (CEM) special meeting on 3 December 2020. It was not a long meeting, lasting from 07h00 to 0733. It was chaired by the Minister who introduced the meeting, informed the participants that the DG had briefed her regarding a meeting that was held with a Umalusi on Monday, 1 December 2020 and subsequent meetings of the CEM. Hereafter Dr Paliah briefed the meeting and dealt with the recommendations made to Umalusi by the CEM and Umalusi's views contained in their above quoted letter of 2 December 2020. Although Dr Paliah stated that, Umalusi could not make the actual decision that the two subjects be rewritten, he told the meeting that Umalusi, would exercise their mandate at the end of the process not to approve the NSC results on the basis that the examination was not conducted

“free from any irregularity. The minutes then record as follows the Council resolved that mathematics paper II and physical science paper II examinations would be rewritten” and noted the following somewhat secretive direction during their discussion. “In order to contain the leak of the decision taken by CEM for the rewrite of the mathematics paper II and physical science paper II examinations, a meeting with the teacher unions and school governing bodies and professional bodies would be convened on Friday, 4 December 2020 15 minutes before the press briefing by the Minister of Basic Education and during which time, the learners would be writing another examination paper”. The Minister duly held the proposed meeting and press conference on 4 December 2020 at which she announced the national rewrite of the two papers.

[9] The attacks on the rewrite decision

- 9.1 The parties were all ad idem that the decision to rewrite constituted an administrative action and was therefore subject to the provisions of the Promotion of Administrative Justice Act, No 3 of 2000 (“PAJA”).
- 9.2 The parties were all also ad idem that the decision was an extra-ordinary one as never before had a decision been taken for a national rewrite of any subject for the NSC examinations. There can therefore be no doubt that such a decision should stringently comply with all the requirements for a valid administrative act.
- 9.3 The applicants argue that the decision was both procedurally and substantively irregular and should therefore be set aside.
- 9.4 The relevant portions of section 6(2) of PAJA provides as follows: “a court has the power to judicially review an administrative action if (a) the administrator who took it ... was not authorised to do so by the empowering

provision ... or ... (e) the action was taken ... because of the unauthorised or unwarranted dictates of another person or body ... or ... (h) the exercise of the power or the performance of the function authorised by the empowering provision in pursuance of which the administrative of action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function... ”.

[10] Procedural irregularity/ lack of “process rationality”:

10.1 In order to determine whether the decision was authorised by the empowering provisions, it must first be determined who took the impugned decision as this important aspect is not clear from the respondents’ papers.

10.2 Counsel for the Minister argued, orally and in short heads submitted to the court, that the DG took the decision. This argument was based on statements to this effect made by the DG in the brief opposing affidavits delivered in response to the applications in case numbers 64222/20 and 64373/20. The source for the authority to take those decisions was argued to derive from paragraph 5 (10) (p) of Annexure M to the regulations. This subparagraph, dealing with the sanctions to follow upon discovery of irregularities read as follows:” *a leaked examination question paper is a paper to which a learner had access e.g. a copy of the examination question paper, a part of it or a transcript which resembles the examination question paper. This must be regarded as a criminal case and be referred to the is SAPS. In the event where it can be proven that specific candidates have stolen an examination question paper prior to it being written, the guilty candidates must be barred from writing the examination for a period of 3 to 5 years, from the date of the offence. The results obtained for the subject should be declared null and void. In the*

case of a leaked examination question paper, the Director-General: Basic Education must, in conjunction with, Umalusi and the relevant head of the assessment body decide what action should be taken to ensure the credibility of the examination’.

10.3 It is clear that the empowering provision, although it appears to deal with sanctions regarding individual learners, and in so far as it deals with the issue of credibility of the examination, requires the DG to act “in conjunction” with two other decision-makers, namely, Umalusi and the relevant head of the assessment body. There is no evidence in the DG’s affidavits, “the head of the assessment body”, either took any decision or acted in conjunction with him. Insofar as the respondents therefore seek to rely on any decision taken by the DG, it appears that such a decision was not in compliance with the empowering provision.

10.4 There is however, a further factual difficulty attached to the submission that the DG took the decision. In an attempt to bolster the allegations made by him in the aforementioned two affidavits, counsel for the Minister referred to an annexure to the founding affidavit of SADTU in its application. This annexure is a circular issued by the DG on 7 December 2020. It deals with the rewrite of the two papers. The first two paragraphs of the letter read as follows: “*The Minister of Basic Education, Ms Angie Motshekga has announced on Friday, 4 December 2020 the rewrite of mathematics paper II and physical science paper II which were previously written as part of the 2020 National Senior Certificate examination. This decision was taken following an investigation by the Department of Basic Education that confirmed that both these papers were accessed by a number of learners prior to the writing of the examination...*”. This letter however, does not support counsel’s

contention. On the contrary, a reading thereof suggests that the Minister took the decision. There is no reference in the letter to the decision having been taken by the DG. His sole participation in the process appears to be the issuing of the circular wherein parties are informed of the decision of the Minister, and not the DG.

- 10.5 Apart from the aforementioned letter, there is a more fundamental hurdle in the path of this submission and that is the contents of the minute of the meeting of the Council of Education Ministers (CEM) furnished by the Minister as part of the ‘records of the decision’. Therein the DG does not feature as a decision-maker but the CEM does. The CEM is however not a formal body nor an administrator which features in the regulations nor and neither is it empowered thereby to take the impugned decision.
- 10.6 The principal answering affidavit delivered on behalf of the Minister by the DG in the primary application in case number 64171/2020, dealing with the consultative process and in response to the allegation that learners, having representation on school governing bodies, were not consulted, contains the following statement: “*the school governing bodies were thoroughly consulted prior to the Minister taking the decision to direct that the leaked papers should be rewritten*” (my underlining).
- 10.7 As already set out above, the Minister was the administrator who briefed the school governing bodies 15 minutes prior to the press conference at which she announced the rewrite of the papers.
- 10.8 In numerous other instances, the DG in his affidavit referred to the decision having been taken by the Minister. Examples are: “*The applicant knew or should have known that if the investigation reveals that there was a widespread access to the leaked question papers prior to the papers*

being written, the Minister, in exercise of the wide discretionary powers she has, may decide among others, that the paper be rewritten” (par 67.3) and “It is denied that here was no transparency with regard to the facts considered by the Minister in deciding to order the rewrite of the leaked papers” (par 69.1) and “It is denied that the approach followed by the Minister is a broad-brush approach and that it is unwarranted” (Par 82) and “should this court decline to grant the relief sought in the applicant’s notice of motion, the learners will have to rewrite the examination as is directed by the Minister ...” (par 84.3) and “I deny that the decision of the Minister is reviewable on any of the grounds ...” (par 86.1).

10.9 Strangely enough, and contrary to the quotations contained in paragraphs 10.6 and 10.8 above, the Minister in a confirmatory affidavit wished to clear up a ‘misconception’. Therein she stated that she was not competent to have made any decision regarding the rewrite of examination papers. She again referred to the provisions of paragraph 5 (10) (b) of annexure M of the regulations. She confirms that that subsection provides that the DG in conjunction with Umalusi and the head of the assessment body should decide what steps to be taken to ensure the credibility of the examination. She then goes on to explain that the “head of the assessment body” is the same person as the DG. This explanation is not only nonsensical but clearly not that contemplated in the subsection.

10.10 An alternative possibility was referred to namely that paragraph 5 (3) (b) of Annexure M of the regulations provide that “*examination irregularities, identified as having occurred prior to the examination question paper being written, may include the leakage of the examination question papers. In the event of the leakage of a national examination question paper, the Director-General of the Department of Education and*

the Minister of Education should decide on the most appropriate course of action” (my emphasis). There was however no allegation or evidence that such a joint decision had been taken and neither the DG nor the Minister relies on such a joint decision.

- 10.11 Having regard to the documents discovered by the Minister as the records of decision and the chronology of the meetings of 1 December 2020, 3 December 2020 and the announcement on 4 December 2020, the Minister was the one who took the decision pursuant to the decision of the CEM. The director-general never featured in these documents or sequence of events as the decision-maker. Any contention by the Minister to the opposite is clearly an afterthought, devoid of a factual basis, and is rejected.
- 10.12 Even if I may be wrong in the determination of who actually took the decision, the consequence of the above shambles is that irrespective whether the Minister or the DG had taken the decision, it was, in the fashion in which it had been taken, ultra vires any of the two possible applicable empowering provisions.
- 10.13 On the issue of process rationality, it is one thing if, Umalusi had, during the decision-making process informed the Minister that there might be a risk that it might, come February 2021 decline to certify the examination as being compliant. This would however, only take place after the papers had been marked and the statistical moderation had been done and upon presentation of a full report regarding the actual extent of the leakage of the papers and the benefits of identified learners may have gained therefrom. Such a view expressed by Umalusi would certainly be an important consideration that the Minister should take into account as a

factor. It is quite another thing for Umalusi to dictate, at this early and, so the applicants argue, premature stage of the preliminary investigations, that it would as a fact not certify the examinations and that therefore the Minister must declare a rewrite. This is the wording used by Umalusi's EXCO in its letter of 2 December 2020 and is what had happened if one has regard to the contents of the documents referred to in the "record of the decision". Umalusi has no authority to prescribe or to make prescriptions regarding the rewrite of any papers and therefore any abdication of decision-making process to Umalusi or submission to Umalusi's premature views as determinative of a decision, results in that decision falling foul of section 6(2)(e) of PAJA. It is clear that all stakeholders being directly involved with the learners, being the educators and moderators, the SGB's and the CEM were of the view that it was premature, at this stage unwarranted and prejudicial to order a rewrite before the actual extent of the leaks had been established. Yet, at the instance of the "unwarranted dictates" of Umalusi, the Minister and the DBE succumbed to its determinations.

10.14 For the above reasons the decision to have the maths II paper and physical science II paper rewritten, is procedurally irregular and should be reviewed and set aside on this ground alone.

[11] Substantive irregularity

11.1 This court is acutely aware of the principles regarding the separation of powers as set out in various decisions of our courts and as determined by the Constitution and the Constitutional Court. I have been referred to, *inter alia* Electronic Media Network Ltd & Others v e.tv (Pty) Ltd & Others 2017 (a) BCLR 1108 (CC).

- 11.2 Emphasis was also placed on behalf of the Minister that, in considering the rationality of her decision, due regard should be had to the discretion afforded to her as decision-maker and the general objectives of the empowering provisions. See: Trinity Broadcasting, Ciskei v Independent Communications Authority of South Africa [2003] 4 All SA 589 (SCA) and Roman v Williams NO [1997] 4 All SA 210 (C).
- 11.3 The DG has, however, in his main answering affidavit, conceded, that in this case, “... *the Minister needs to consider less onerous measures when deciding on the appropriate action to be taken following the leaking of the exam papers*” (par 87.1). The Minister has, by her confirmatory affidavit, agreed to this obligation.
- 11.4 This court has in Black Eagle Projects Roodekrants v MEC: Department of Agriculture, Conservation and Environment, Gauteng Province [2019] 2 All SA 332 (GJ) laid down that in rationality review based on PAJA, two questions will normally be asked: 1) Is the action rationally related to the purpose for which the power was given and 2) is the decision, viewed objectively rational? While the answer to the first question favours the Minister, the answer to the second question is where the difficulty lies. One of the issues to be determined in answer to the second question is whether her decision was so unreasonable in the circumstances that no reasonable decision-maker would have resorted to it. See Trinity Broadcasting (Supra) at para 20.
- 11.5 The complaints of injustice resulting from subjecting literally hundreds of thousands of innocent learners to a rewriting process are, to my mind, justified by the current negligible known extent of the number of learners who may have benefited from the leaked papers. 195 learners out of

339,000 learners who wrote the maths II paper translate to less than 0,06%. The percentage is even lower in respect of the physical science II paper. The conclusion by Umalusi that such a negligible percentage has so irrevocably damaged the integrity of these two papers that it cannot be certified cannot be sustained.

- 11.6 Umalusi sought to bolster its stance by the repetitive allegations that the extent or actual extent of dissemination of the leaked papers is unknown and, so it suggested, might have been “viral”. This fear is more apparent than real. In the first week or 10 days since the discovery of the initial leak only 195 learners could be identified. Even if subsequent events to the decision are taken into account, as the Minister argues it should, separate investigations and interviews of further learners conducted by an employee of the DBE at a school, revealed a maximum of four learners who may have had access to the papers, all of which, save one, indicated that they had received the messages after they had written the exams. One would have expected, in an instance of this magnitude or extraordinary nature that no stone would have been left unturned to further determine the extent of the leakage. The absence, in a similar time period as that which had elapsed prior to the NITT’s interim report, of any further leakage or identified learners, supports the inference that there are none or, at best, very few. There is a complete absence of the alleged “viral” spread.
- 11.7 There is no rational basis why the proposals by all the stakeholders that a final decision should only be taken once the further investigations have been concluded, should not be the way to go.
- 11.8 Even if the extent of the leakage is hundredfold of that already identified, the question is still whether a 6% compromise would result in a non-

certification. Umalusi has not even considered this or at least not done so on the papers.

11.9 In terms of section 21 of the General and Further Education and Training Quality Assurance Act, No 58 of 2001, in terms of which Umalusi must “assure” the quality of the assessments for the NSC, it may refuse to issue a certificate of such assurance if a “substantial” irregularity has occurred. On the only available evidence to date, it can hardly be found that the percentages referred to above, amounts to being “substantial”.

11.10 Once it is found that Umalusi’s stance is so irrational as to be without foundation, then any reliance on its prescriptions or dictates would equally be irrational, at least to the extent that no reasonable person would rely thereon.

11.11 There is yet another aspect which is of importance: even if one were to determine that the decision to order a rewrite is rational or reasonable, there is no reason to justify the writing of the papers on 15 and 17 December 2020, rather than in the first week of January. Counsel for the Minister has confirmed that nothing is going to happen regarding the examinations between 15 December 2020 and 3 January 2021. The return of text books to the learners, the added time period of preparation, the return after the holidays, the amelioration of any logistical difficulties for learners to return to the exam locations would all have been avoided, had a decision been taken to allocate later dates. Counsel for the Minister could offer no explanation why this had not been considered and it was unfair of to expect an explanation from counsel, where there is none on the papers.

11.12 The decision, as it stands, for the dates of 15 and 17 December 2020 is therefore on this basis also one which no reasonable person would have

taken, when all the facts are considered. The attempted justification of these dates furnished by the DG, in answer to all the prejudices raised by the applicants as a referred to earlier in this judgement, namely that these prejudices to be suffered amount to a mere “inconvenience” or “smokescreen”, smacks of callousness.

11.13 The decision therefore falls foul of section 6(2)(h) of the PAJA as quoted earlier.

[12] Conclusion


I therefore conclude that the decision to have the maths II and physical science II papers of the National Senior Certificate examination of 2020 rewritten was irregular and unlawful and should be reviewed and set aside. I further conclude that, the learners have a right to have their exam papers marked in terms of regulation 45, which provide for such right, irrespective of whatever proposal or certifications may be made by Umalusi, now or in the future. In the exercise of my discretion, I find no cogent reason to depart from the general principle that costs should follow the event. This should include the costs of the amicus curiae who made useful contribution to the debate of the matters.

[13] Order:

1. The decision announced by the Minister of Basic Education on 4 December 2020 that the Mathematics Paper II and Physical Science Paper II of the National Senior Certificate examinations of 2020 should be rewritten on 15 and 17 December 2020 is hereby review and set aside.
2. The first and second respondents are ordered to take all necessary steps to ensure that the examination answer scripts of those learners

who have not been found to have been involved in irregularities pertaining to the examination of the abovementioned papers, including the individual applicants in these urgent applications, be marked in accordance with the management plan for the said examinations annexed as annexure HMM1 to the answering affidavit of the Director-General of the Department of Basic Education delivered in case no 64171/2020.

3. The first and second respondents are jointly and severally ordered to pay the costs of the applicants in all four urgent applications, including the cost of senior and junior counsel, where so employed, including the costs of the amicus curiae.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 10 December 2020

Judgment delivered: 11 December 2020

APPEARANCES:

CASE NO: 64171/2020

For the Applicants:	Adv Q Pelsers SC
Attorney for Applicants:	Hurter Spies Inc., Pretoria
For the First Respondent:	Adv C Erasmus SC together with Adv E Baloyi-Mere and Adv H Mpshe
Attorney for First Respondent:	The State Attorneys, Pretoria
For the Second Respondent:	Adv D Fine SC together with Adv A Milovanovic
Attorney for Second Respondent:	The State Attorneys, Pretoria

CASE NO: 64373/2020

For the Applicants:	Adv T Strydom SC together with Adv JJ Botha
Attorney for Applicants:	Rianie Strijdom Attorney, Pretoria
For the First Respondent:	Adv C Erasmus SC together with Adv E Baloyi-Mere and Adv H Mpshe
Attorney for First Respondent:	The State Attorneys, Pretoria
For the Second Respondent:	Adv D Fine SC together with Adv A Milovanovic
Attorney for Second Respondent:	The State Attorneys, Pretoria

CASE NO: 64222/2020

For the Applicants: Adv E Ferreira together with
Adv J De Beer

Attorney for Applicants: Prinsloo Wolmarans Greyling Attorneys
c/c Malan & Nortjé Attorneys

For the First Respondent: Adv C Erasmus SC together with
Adv E Baloyi-Mere and Adv H Mpshe

Attorney for First Respondent: The state Attorneys, Pretoria

For the Fourteenth Respondent: Adv D Fine SC together with
Adv A Milovanovic

Attorney for fourteenth Respondent: The State Attorneys, Pretoria

CASE NO: 58905/2020

For the Applicants: Adv H W Sibuyi SC together with
Adv M I Motimele

Attorney for Applicants: Mphahlele MS Attorneys, Johannesburg

For the First Respondent: Adv C Erasmus SC together with
Adv E Baloyi-Mere and Adv H Mpshe

Attorney for First Respondent: The state Attorneys, Pretoria

For the Thirteenth Respondent: Adv D Fine SC together with
Adv A Milovanovic

Attorney for Thirteenth Respondent: The State Attorneys, Pretoria