IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 13018/08

In the matter between:

NOMGQIBELO CYNTHIA MOSE Applicant

(as the legal guardian of LUZUKO MOSE)

And

MINISTER OF EDUCATION IN THE PROVINCIAL

GOVERNMENT OF THE WESTERN CAPE:

MR YOUSUF GABRU First Respondent

HEAD OF THE WESTERN CAPE EDUCATION

DEPARTMENT: MR R.B. SWARTZ Second Respondent

FAIRBAIRN COLLEGE SCHOOL GOVERNING BODY Third Respondent

JUDGMENT: 13 OCTOBER 2008

Le Grange J:

[1] This is an extended return date of a rule *nisi*, issued by Allie J in August 2008. In this matter the Applicant, on an urgent basis, sought certain relief *inter alia,* reviewing and setting aside the decisions of the Three Respondents relating to her minor son Luzuko Mose ("LM"), a pupil at Fairbairn College, Goodwood.

[2] The relief sought by the Applicant was framed as follows:

> "*2. That a rule nisi be issued calling upon Respondents and all interested parties to appear and show cause on a date to be determined why an Order should not be granted in the following terms:*
>
> *2.1 Reviewing and setting aside Third Respondent's finding that Luzuko Mose had sold dagga and its recommendation to expel Luzuko Mose from Fairbairn College.*
>
> *2.2 Reviewing and setting aside Second Respondent's decision to expel Luzuko Mose from Fairbairn College.*
>
> *2.3 Reviewing and setting aside First Respondent's decision to uphold Second Respondent's decision to expel Luzuko Mose from Fairbairn College.*
>
> *2.4 That any party opposing this application pay the costs thereof.*
>
> *2.5 Further and or alternative relief.*

3. That pending the determination of this application it be ordered and directed that Luzuko Mose attend school at Fairbairn College."

[3] By agreement between the parties it was ordered that (LM) continue attending the Fairbairn College ("the School") pending the determination of the main application.

[4] The relief essentially sought by Applicant is aimed at preventing the expulsion of her son, LM, from the School. The School Governing Body (SGB) preferred certain charges against LM. The charges relate to the allegations that LM sold dagga to fellow learners at the School. He also allegedly smoked and provided dagga to learners whilst in the School's uniform, at a nearby public park in Goodwood.

[5] It is not in dispute that Third Respondent, as a precautionary measure suspended LM on 22 May 2008 and that the suspension was operative until 30 May 2008. The Third Respondent, after a fact finding hearing, then made a recommendation on 7 June 2008 to Second Respondent to expel LM. The Second Respondent after considering the recommendation of First Respondent expelled LM. An appeal was then lodged against the decision of Second Respondent. The appeal was however dismissed by the First Respondent.

[6] The Applicant in her founding affidavit concentrated heavily on the SGB's meeting of 22 May 2008. She contended that the meeting was not properly convened or constituted and that the decisions taken and processes embarked upon pursuant thereto

are invalid. It is not in issue that LM was suspended as a cautionary measure and that the suspension was only operative until 30 May 2008. Mr. A Kantor, who appeared on behalf of the Applicant, conceded that the suspension has run its course and that no relief is sought relating to the suspension of LM in the present application.

[7] In *casu*, the relief Applicant seeks is an order reviewing and setting aside the decisions of the three Respondents relating to the expulsion and subsequent appeal of her son. The substratum of the Applicant's complaint is firstly, the expulsion of LM was procedurally unfair. Secondly, the Respondents did not properly apply their minds to the matter and their decisions were grossly unreasonable. Thirdly, the rules of natural justice were not complied with. Fourthly, Third Respondent was not quorate and acted in bad faith and lastly First Respondent made a decision to uphold the appeal and was *functus officio* when he thereafter decided to dismiss the appeal.

[8] Mr. Kantor's principal contentions were that the expulsion of a learner must be a measure of last resort but in the instant matter it was a measure of first choice and pre-judged. Furthermore the procedures adopted by the SGB at the hearing to consider the evidence against Applicant's son were inherently flawed as, *inter alia*, the witnesses were not sworn in, a parent was allowed to answer on behalf of his daughter whose testimony was used against LM, the Applicant and their attorney were waiting outside of the room where the hearing took place and the prosecutor, Mr. Koffeman, and his main

witness Mr. Marchand were present when deliberations as to guilt of LM allegedly took place. Moreover, there was perceived bias on the part of Third Respondent's members and they did not apply their minds to the facts of this matter. It was also contended that the Third Respondent was not properly constituted as two members, who are pupils at the School, were not present at the SGB hearing. With regard to the issue whether First Respondent was *functus officio*, Mr. Kantor conceded on the papers filed this attack seems questionable.

[9] Mr. D Jacobs, the Respondents' Counsel, main submissions were that on a proper perusal of the proceedings conducted by Third Respondent on 7 June 2008, the attack by the Applicant that the proceedings are procedurally fatally flawed and biased, is untenable and misconceived. He also argued that the hearing of Third Respondent was properly constituted and the record of proceedings reflects that the prosecutor, Mr. Koffeman and the witness M, was excused from the deliberations of the SGB. It was also contended that the Applicant's reliance on the suspension of LM on 22 May 2008 by Third Respondent as the foundation for her review is misplaced and that First Respondent was not *funtus officio* when he decided to dismiss the appeal.

[10] At the hearing of the SGB of 7 June 2008 the Applicant and LM was assisted by an attorney. It is not in dispute that LM at this hearing pleaded guilty to smoking dagga whilst in the School's uniform at a nearby public park in Goodwood. In issue was the

selling and provision of dagga to fellow learners of the School. It needs to be mentioned that six other learners faced similar charges at the same hearing. Some of these learners, besides their parents being present, also had legal representation at the hearing.

[11] Mr. Koffeman, a member of the SGB who acted as the prosecutor, firstly called Mr. Marchand, the Headmaster of the School who gave a report on the order of events since the School became aware that certain of its learners were involved in smoking and selling dagga. He also stated that the learners who were implicated during the preliminary interviews were sent for tests of illegal substances.

[12] It appears not in issue that the urine test of LM showed high levels of the drug cannabis (dagga). On a proper perusal of the record, Mr. Marchand was extensively cross-examined by the Applicant's attorney with regard to the procedure that was adopted during the initial interview process that led to the suspension of LM on 22 May 2008. Mr. Koffeman thereafter called three fellow learners, whose parents were also present, to give evidence against LM. All three gave unsworn testimonies, individually, implicating LM of selling dagga at School. Their testimony in summary is that everyone at School knows LM sells dagga cigarettes. In one instance during a Mathematics Literacy class, two dagga cigarettes were sold by LM for R10 to a classmate and it was noticed that he had a bank bag which contained approximately 20 dagga cigarettes on

his person. All three learners, one whom have been friends with LM for approximately six to seven years, were also cross-examined by the attorney. During the cross-examination of one of the learner's, the parent asked if he can reply on behalf of his visibly distraught daughter. The parent then continued to state what his daughter's testimony in chief was. Applicant's attorney objected to the parent's reply and the chairperson intervened, stating that the parent of the learner will not allow his daughter to be intimidated by the questions posed by the attorney. The attorney decided to summarily stop his cross-examination in protest and attacked the fair process of the hearing.

[13] The grounds the Applicant are relying on to review and set aside the decisions of the Respondents is in my view misconceived and do not support the conclusion that the Respondents in exercising their discretion acted in an arbitrarily, capricious or irrational manner. The contention that First Respondent was *functus officio* when he dismissed the appeal of LM is also without merit.

[14] The proceedings conducted by Third Respondent can hardly be described as procedurally unfair. The argument advanced by the Applicant that the disciplinary hearing should have been conducted as if it was a Court of Law does not accord with the generally accepted approach to administrative tribunals. What is required is that the administrative tribunal should act fairly in affording the affected individual the

opportunity of a fair hearing. The concept "Fairness" may be a highly contested concept and not easy to ascertain nor may it be easy to find agreement upon what it means in any specific situation. The correct approach is that *"fairness"* must be deduced from the circumstances of each case having regard to the factors, namely the nature of the inquiry, the rules governing the tribunal and the subject-matter. The classic statement, which has been adopted and accepted by courts in South Africa, is that made by Lord Loreburn LC in the English case of Board of Education v Rice, 1911 AC 179,182.

> "*In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind … In such cases the Board …. will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view*". See further: **Baxter: Administrative Law** at pp. 542-3 and the authorities referred to therein.

[15] It follows that the evidence of the witnesses, who gave oral evidence at the hearing, cannot in my view be regarded as an *irregularity* or *illegality* merely because it was not under oath. The Applicant's attorney had, in my view, a fair and reasonable opportunity to cross-examine the witnesses who testified against the Applicant's son.

Mr. Marchand was extensively cross-examined as to the preliminary interview of the various learners and Applicant's son. Questions were also asked about the procedure of the urine tests that the learners in particular LM, was subjected to. The three learners, who implicated the Applicant's son in the selling of dagga cigarettes, were also cross-examined. It was only when one of the parents wanted to reply on behalf of his distraught daughter that an objection was raised by the attorney and thereafter he stopped his cross-examination. Despite this incident, the rest of the proceedings can hardly be described as procedurally unfair. In fact, the record of the proceedings reflects that the attorney apologized to the SGB for the offensive manner in which he addressed the committee. Even if the evidence of the father who replied on behalf of his daughter is ignored, the bulk of the evidence overwhelmingly supports the conclusion that LM was selling dagga cigarettes to his fellow learners at the School. The SGB's finding in this regard was therefore correct. Moreover, according to the evidence of Mr Marchand, the Applicant's son, out of his own volition admitted during the preliminary interviews the allegations against him. The evidence tendered by certain learners against the Applicant's son whilst they were waiting outside mainly referred to usage of dagga, where LM was also present. This evidence can hardly be regarded as prejudicial to LM as he admitted and pleaded guilty to the charge of smoking dagga.

[16] The further objection by Applicant that the Third Respondent was not quorate is ill founded. In terms of the provisions of the Province of Western Cape: Provincial Gazette Extraordinary 6519 dated 20 May 2008, Regulation 21 (4) provides as follows:-

> "*The majority of the enfranchised members of a governing body shall constitute a quorum for any meeting of the governing body.*"

[17] In this instance, the absence of the two school learners at the SGB did not affect its quorum. The majority of the SGB members were present and the board was quorate. On the papers filed the Applicant's son had previously, in March 2007, admitted to smoking dagga during the School's annual Big Walk and was given counseling and taken for drug tests. Two drug tests taken in 2007 also show the Applicant's son had high levels of cannabis in his urine samples. The Applicant's suggestion that the recommendation to expel LM amounts to discrimination was pre-judged and should be set aside in accordance with section 6(2)(a)(iii) of the Promotion of Administrative Justice Act 3 of 2000 is therefore without substance.

[18] The Applicant also suggested that deliberations of Third Respondent were tainted because the prosecutor, Messrs Koffeman and Marchand took part in the deliberations of the SGB. The record of proceedings does however not support this suggestion. The record at page 135 reflects that Koffeman and Marchand, including the Applicant, her

son and their Attorney, were excused where after the SGB deliberated the evidence and concluded that LM was guilty of the offences preferred against him. The matter was then postponed to consider a suitable punishment.

[19] The contention that First and Second Respondent did not go further than to implement the recommendation of Third Respondent is without merit. Second Respondent at pages 291 and 292 of the record clearly states that after careful consideration of the relevant information he decided to expel LM. Moreover, it was also suggested that should placement assistance be requested the Circuit Manager of Second Respondent could arrange alternative placement or provide LM with advice on further educational options and assist with referral to therapeutic support including drug counseling.

[20] The First Respondent filed an affidavit with regard to the averment that he was *functus officio* when deciding to dismiss the appeal of LM. He denies that he was *functus officio* and set out what steps he has taken to come to an appropriate decision. On the papers filed I am satisfied that First Respondent considered all the relevant fact and could not have been *functus officio* when he made his decision to dismiss the appeal of Applicant's son.

[21] Mr. Kantor correctly conceded that the Applicant's son has been found guilty of a serious misconduct. It appears from the facts of this matter the ills of our society have spilled over onto the grounds of our schools, which ordinarily should be safe havens for education and training. The Applicant's son like any other learner has undoubtedly a constitutional right to proper basic education. In my view, a learner and in particular learners at high school institutions cannot place in jeopardy his or her fellow learner's equally important right to proper basic education in a safe environment by indulging in serious misconduct, like selling and abusing illegal drugs at school premises. With rights come responsibilities. Our learners and more importantly, at high school institutions, must appreciate and understand that misconduct, like in open society, attracts sanctions and in appropriate circumstances, may include expulsion. The overwhelming majority of parents in South Africa at great cost and personal sacrifice only want the best education for their children. The Applicant in this instance is no different. The offences Applicant's son have been found guilty of is very serious. His further presence at the school does compromise the safe environment for his fellow learners, and the sanction of expulsion is not disturbingly inappropriate in the circumstances of this case.

[22] For the reasons stated herein the Rule *nisi* cannot be confirmed and it follows that the application cannot succeed.

[23] In the result the following order is made.

"The Rule *nisi* is discharged. The application is dismissed with costs."

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LE GRANGE, J