REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:	Case No: 1940/2013
OLUWATOBI DAVID OLOWOOKORUN	Applicant
And	
THE UNITED HEBREW INSTITUTIONS OF	
PORT ELIZABETH	First Respondent
THE THEODORE HERZL SCHOOL BOARD	Second Respondent
STEPHEN HAROLD FAY	Third Respondent
STEPHEN ARNOLD PETER	Fourth Respondent

Coram: **Chetty J**

Heard: **6 March 2014**

Delivered: **13 March 2014**

Summary: ***Review*** **–** *Applicant seeking review of decisions to revoke his prefecture – Applicant no longer at school but at University – Matter of academic interest – Mootness principle – American jurisprudence – Decision in any event not unreasonable – Application dismissed*

JUDGMENT

Chetty, J

[1] The applicant is at present a first year medical student at the University of the Witwatersrand. He matriculated in 2013 at Theodore Herzl, a private school (the school) administered by the first respondent, having spent his entire scholastic years initially at its primary component, and thence, the High school. During July 2012, and whilst a Grade xi learner, he was appointed as a prefect for a fixed period of one year, terminating July 2013.

[2] It is not in issue that the relationship between the applicant and the school was a contractual one. The High school's policy vis-à-vis a learner's general behaviour, incorporated in a document under the rubric, ***General Discipline, Code of Conduct and Grievance Procedure for Learners: 2011***, enumerated a plethora of inappropriate behaviour and correspondent corrective action for transgressions both on, and off campus. The malapropos behaviour relative to the latter scenario was defined as ***"any action that is deemed to harm the school's reputation"*** and listed the corrective action as, ***"HOD intervention. Use discretion to determine appropriate sanction. Full report on pupil's file. Parent involvement."***

[3] The school also had a separate policy on substance abuse which not only emphasized the dangers attendant upon alcohol consumption but the consequences which would befall an offending learner, irrespective of whether its imbibement occurred on or off campus. The rationale underlying the school's adoption of the policy was explained by the third respondent, in response to the applicant's contention that the school in fact countenanced alcohol consumption by learners, as follows: -

> "27. **AD PARAGRAPH 26:**
>
> I refer to the affidavit of STEPHEN ARNOLD PETER enclosed herewith which deals with this allegation. From my personal knowledge and observation I can confirm that the blanket permission for alcohol use which the Applicant seems to want to establish was simply never given. We understand, from personal experience, that it is difficult if not impossible to absolutely monitor nightclub attendance and alcohol use, and it was because of that understanding that the message given by MR. PETER, and several other teachers before and after that event, made it clear how dangerous alcohol use and abuse can be, and how prefects are held to a very much higher standard in this regard by the school. Children under the age of 18 in any event are not by law allowed to attend establishments which sell alcohol, nor may they imbibe alcohol. This is again an instance where a legalistic approach is

> not regarded as practical, enforceable or necessary. The rule was simply that a prefect, even more than a general learner, must not act improperly in public, and that alcohol use (not even necessarily abuse) may have an adverse effect on one's conduct and is disapproved of. It was also a clear and unambiguous message that alcohol abuse and / or inappropriate behaviour by a prefect in public would lead to a harsh sanction, including the loss of one's prefect privileges, or even expulsion from the school."

[4] Although the applicant in his replying affidavit denied all knowledge of the policy and the aforementioned admonishment by the educators, it is evident from the evidence of the third respondent that this in fact occurred. On application of the rule enunciated in ***Plascon Evans Plaints Ltd v Van Riebeeck Paints (Pty) Ltd***[1], I accept that the applicant was fully appraised of the policy, and understood both it and its ramifications.

[5] By his own admission, the applicant consumed alcohol at the home of a fellow learner on 10 April 2013 prior to attending a party at the home of another learner situate close by. Although the content of the numerous affidavits deposed to by the various deponents thereto concerning the events which then unfolded, with particular reference to the applicant's state of sobriety and the interpretation of the posts made by the applicant on the twitter online message service, are at

[1] 2001 (1) SACR 469 (SCA) A

variance, the need to resolve the conflict is unnecessary by virtue of the applicant's express acknowledgment that he misbehaved. Such behaviour, it is common cause, precipitated his and a fellow learner's, one *Zeelie's*, appearance before the third respondent on the Monday morning.

[6] Although there are conflicting accounts of what transpired at this meeting, I accept that, in addition to the alcohol consumption transgression put to the applicant, a further discussion concerning the tweets posted by the applicant in fact occurred. It is common cause that the applicant and *Zeelie* were then notified that their prefecture was suspended pending further investigation and, during the early afternoon, summoned to the third respondent's office where they were informed that a final decision had been made to revoke their prefecture.

[7] The sanction unleashed an avalanche of missives relating to the internal appeal but to no avail. No consensus vis-a-vis the appeal could be reached over the following months and eventually, almost a year later, during July 2013, virtually on termination of the applicant's tenure as a prefect, the applicant launched these proceedings in which he sought the following relief, of relevance, viz.: -

> **"1. That the decision of the Third Respondent, alternatively the Fourth Respondent, alternatively the Third and Fourth Respondents, alternatively the Second, Third**

and Fourth Respondents to revoke the Applicant's appointment as a prefect at the Theodore Herzl School on or about the 13th of August 2012 be reviewed and set aside, alternatively be declared unlawful.

2. That the Respondents expunge this matter from the records of Theodore Herzl School."

[8] After the filing of further affidavits, notices etcetera, the matter was enrolled for hearing on 6 March 2014. By then almost twenty months had elapsed, the applicant had matriculated and enrolled, as adumbrated hereinbefore, as a medical student at the University of the Witwatersrand. It is not in the least surprising therefore that the first salvo directed at the application was the mootness of the relief sought. In argument before me, counsel for the respondents, Mr. *Beyleveld*, submitted that the matter was of academic interest only and that the applicant should, on that ground alone, be non-suited.

[9] The submission finds resonance in the judgment of van der Byl, A.J., in ***Francois Xander van Biljon v Neil R Crawford and Others***[2] where the learned judge, said the following: -

[2] Unreported Judgment, 475/2007 (S.E.C.L.D)

"[14] If regard is had to the facts stated above, I must say that I for at least two reasons fail to understand the ratio for the order claimed that the Applicant be reinstated as prefect and that his badge and tie be returned to him, being an order which the Applicant, as indicated by Mr. Malan who appeared on behalf of the Applicant on a question posed by me, persisted with.

The first reason why I find it difficult to understand the Applicant's persistence, is the fact that the school year in respect of which the Applicant has been appointed as prefect has expired at the time of the hearing of this application so that, as I see it, his reinstatement (and even the return of his badge and tie) will be an exercise in futility.

The second reason why I find it so difficult, is the fact that the Applicant could not have taken up his prefectship since his prefectship has in effect been withdrawn before the commencement of the school year in respect of which he has been appointed as prefect.

The evidence also does not, at lease explicitly, show whether he had already been handed a prefect's badge and tie."

[10] Mr. *Dyke's* riposte to the mootness argument is in fact sourced from the judgment of Van Zyl, J., in ***Antonie v Governing Body, Settlers High School and Others***[3], where the learned judge said: -

> "The matter cannot, however, be regarded as moot in that the first respondent's decision and sanction are permanently recorded on the applicant's school disciplinary record. It hence remains a blot on her school career and may impact negatively on her personality, dignity and self-esteem. It may, indeed, affect her normal development into full maturity and even have a seriously prejudicial affect on her future career"

[11] Reliance on ***Antonie*** is entirely misplaced. As I pointed out to Mr. *Dyke*, the third respondent's uncontroverted evidence was that the revocation of the applicant's prefecture was never formally recorded. Simply put, there is no disciplinary record, *caedit quaestio.* Thus constrained to accept the factual position and, a fortiori, abandoning the relief foreshadowed in paragraph 2 of the notice of motion, Mr. *Dyke* nonetheless submitted that there was a very real possibility that the applicant could, at the completion of his tertiary education and,

[3] 2002 (4) SA 738 (C)

during a job interview, be asked whether he held any leadership positions in school. The argument is spurious. The possibility is so remote that it can be discounted. As the third respondent correctly points out:–

> "83.11 Besides the correspondence which is annexed to the papers there is no formal recordal and storage of a "disciplinary record". I venture to suggest that whenever the Applicant in future would seek employment or registration to any tertiary education, the fact that he was a prefect or not would be irrelevant."

[12] The doctrine of mootness is recognized in most jurisdictions. In a scholarly article, chronicling its development in American jurisprudence, titled, ***Mootness in Judicial Proceedings: Toward a Coherent Theory***, the authors[4], state the following: -

> "The recent decision of the United States Supreme Court in DeFunis v. Odegaard' has drawn unusual attention to the legal doctrine of mootness. In the past there has been little judicial

[4] Don B. Kates Jr. and William T. Barker, California Law Review, Volume 62, Issue 5, December 1974

or scholarly writing on the subject, but this neglect is not because the mootness doctrine lacks importance or significant problems. The rule that a court will not decide a "moot" case is recognized in virtually every American jurisdiction. It is particularly important in the federal courts, because deciding a moot case has been held to be beyond the judicial power of the United States. Despite wide recognition

of the doctrine, however, there is a dearth of discussion as to what renders a controversy moot. Mootness questions can appear in any case at any stage; they can arise in almost any factual situation and they assume varied guises. Mootness questions are often summarily disposed of, and almost none of the literally thousands of mootness opinions has attempted a comprehensive analysis of the area."' As a result the law is a morass of inconsistent or unrelated theories, and

cogent judicial generalization is sorely needed. This Article will attempt to provide a long overdue analysis of this complex doctrine. At the outset, a few words about terminology are in order. The word moot is frequently used as a synonym for abstract or hypothetical and applied to any case not suitable for judicial determination. This usage confuses mootness with

such cognate doctrines as ripeness, justiciability, abstract or hypothetical questions, collusive litigation, and requests for advisory opinions. Unquestionably many of the concepts are related to each other and to mootness, although a cynic might suggest that their chief relationship is functional rather than doctrinal, for each allows a judge to eschew decision making. We shall, however, restrict the term to its narrow technical meaning and will describe as moot only those cases in which a justiciable controversy once existing between the parties is no longer at issue due to some change in circumstance after the case arose. Taken at face value the mootness doctrine is but a logical corollary to the courts' refusal to entertain suits for advisory or speculative opinions. If a person cannot bring a case about a non-existent or already resolved controversy, it would seem that he should not be able to continue a case when the controversy is resolved during its pendency.

Moreover, a case should not be heard when the parties' interests are not sufficiently adverse to ensure proper and effective presentation of the arguments for each side. But there are additional values served by the mootness doctrine.

When the matter is resolved before judgment, judicial economy dictates that the court abjure decision. This is particularly true today, when trial and appellate calendars are commonly backlogged from two to five years. Furthermore, neither the judicial system nor adverse parties should be subjected to the burden of litigation continued purely for spite or for personal vindication. Nevertheless, since a determination of mootness results in the drastic action of dismissal, the doctrine should be applied with caution.

In many cases the inherent brevity of the particular dispute creates an obstacle to any adjudication. In other cases, the defendant may seek to "moot out" a case against him by temporarily discontinuing the practice alleged 'to be illegal.'" In a variation on this technique, the defendant will cease the challenged practice as to the individual plaintiffs in a class action in order to obtain a dismissal and preserve the freedom to continue the practice as to all others.

The analysis that we advocate was developed primarily in the context of federal judicial power, but it also should be broadly applicable to state judiciaries, since it is our view that the only constitutional constraint on the mootness doctrine involves the

> maintenance of adversity between the parties, an element essential to any court's functional competence to make law. If the adversity of the parties has been so compromised that their advocacy will not meet the minimal constitutional requirement of a case or controversy, the functional competence of the court is endangered, and it should not decide even though it may have the power to do so. Conversely, if there exists adequate functional competence to decide, the factors to be considered in administering mootness as a doctrine of judicial economy should not change when the court is bound by a case or controversy restriction."

[13] In my view, the mootness doctrine, as it has been developed and applied in our own jurisprudence, demands that where the relief sought is of academic interest only, judicial economy dictates that the courts abjure decision. The application falls to be dismissed on that ground alone.

[14] In any event, notwithstanding the fact that the proceedings before the third respondent may be said to have been procedurally deficient, the decision to revoke the applicant's prefecture was clearly not unreasonable. As Swain, J.,

remarked in ***Khan v Ansur N.O and Others***[5], with reference to the following dictum by Wessels, J., in ***P v Board of Governors of St Michaels Diocesan College, Balgowan***[6], to wit, ***"However that might be, it seems to me that it is not sufficient for the applicant to satisfy the Court that circumstances exist which show that the rector acted unreasonably. This Court is, in my opinion, not entitled to substitute its discretion for the discretion which the rector was entitled to and did exercise in terms of the contract between the parties. In my opinion, the element of unreasonableness only becomes of importance where it is so gross that one is driven to the conclusion that bad faith existed or that the person on whom the discretion was conferred did not give due and proper consideration to the matter." -***

said the following:-

> "[35] I am not entitled to substitute my discretion for that discretion exercised by the school. I may only do so where I am satisfied that the decision is so unreasonable that I am driven to conclude that the school was motivated by bad faith, or failed to give due and proper consideration to the matter.
>
> [36] . . .

[5] 2009 (3) SA 267 (D) at para [35]
[6] 1961 (4) SA 440 (N) at 449H-450A

> [37] As regards the first ground, in my view, the cause of complaint is misconceived. The enquiry is whether the decision itself is so unreasonable that it displays bad faith, due regard being had to the evidence upon which it is based. Conduct on the part of the decision-maker, which has no bearing upon the reasonableness of the decision taken, cannot be used to impute mala fides to the decision-maker. In any event, having carefully considered the conduct of the school in this regard, I am satisfied that it does not show mala fides on its part."

[15] In my judgment there can be no question that the decision to revoke the applicant's prefecture was actuated by bad faith. It was an eminently reasonable one. In the result the following order will issue: -

The application is dismissed with costs.

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D. CHETTY
JUDGE OF THE HIGH COURT

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