***FORM A***
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

ECJ no : 39

PARTIES: YOLANDA TSHONA APPLICANT

AND

THE PRINCIPAL, VICTORIA GIRLS HIGH SCHOOL AND 3 OTHERS RESPONDENTS

- Registrar: Case no. 2764/2006
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE HEARD: 13 October 2006

DATE DELIVERED: 17 October 2006

JUDGE(S): PICKERING J:

LEGAL REPRESENTATIVES -
*Appearances:*
- for the State/Applicant(s)/Appellant(s): ): Mr. Kunju
- for the accused/respondent(s) Adv. Paterson:

*Instructing attorneys:*
- Applicant(s)/Appellant(s): Marongo, XM Petse Inc
- Respondent(s): Whitesides (Mr. Nunn

CASE INFORMATION -
- *Nature of proceedings* : REASONS FOR JUDGMENT

**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION)**

**CASE NO2764/2006**

In the matter between

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| **YOLANDA TSHONA** | **Applicant** |
| **VS** | |
| **THE PRINCIPAL, VICTORIA GIRLS HIGH SCHOOL** | **1st Respondent** |
| **THE CHAIRPERSON OF THE SCHOOL GOVERNING BODY, VICTORIA GIRLS HIGH SCHOOL** | **2nd Respondent** |
| **MEC FOR THE DEPARTMENT OF EDUCATION** | **3rd Respondent** |
| **SUPERINTENDENT GENERAL OF THE DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE** | **4th Respondent** |

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**JUDGMENT**

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**PICKERING J**:

This is an urgent application for the setting aside of the expulsion of applicant from a school hostel. Applicant is a 16 year old female learner in grade 9 at Victoria Girls High School,

Grahamstown. On 6 October 2006 she, assisted by her parents, launched the present application as a matter of urgency against the four respondents, namely, the Principal of Victoria Girls High School (first respondent); the Chairperson of the School Governing Body (second respondent); the Member of the Executive Council for the Department of Education, Eastern Cape (third respondent) and the "Superintendent General" of the Department of Education (fourth respondent).

In the application applicant seeks the following relief:

"*2.1 That the respondents be and are hereby compelled to comply with paragraph 2 of the Court order dated 26th April 2006 forthwith.*

*2.2 That the decision taken by the members of both first respondent and second respondent on the 4th September 2006 be and is hereby declared a nullity and is set aside.*

*2.3 That any decision taken by the first respondent and second respondent in pursuit of a recommendation of the 4th September 2006 by the first respondent's disciplinary committee be and is hereby set aside.*

*2.4 That the second respondent be and is hereby interdicted from entertaining the recommendations made by the disciplinary committee on the 4th of September 2006.*"

Applicant also seeks an order directing first and second respondents to pay the costs of the application on the scale as between attorney and client.

At the hearing of the application applicant's attorney, Mr. Kunju, who also appeared for applicants and Mr. Paterson, who appeared for first and second respondents, there being no

appearance for third and fourth respondents, were agreed that although the relief sought was framed in the form of a rule nisi the matter should be dealt with as an application for final relief.

According to applicant her mother had in the past had an altercation with first respondent concerning applicant's hairstyle. This resulted, according to applicant, in first respondent "becoming involved in a vendetta" towards her which culminated in charges of misconduct being laid against applicant. A disciplinary hearing was held on 14 March 2006 at which applicant was charged with offences relating to her possession of a cell phone, her possession of medication and the commission by her of multiple so-called mark order offences. The following appears from the minutes of this hearing:

"*The Chair asked Ms. Tshona whether or not she*

*1. Lied about her cell phone and sim Card*

*2. Was in possession of medication, and*

*3. Committed multiple mark order offences,*

*as testified by the witnesses. Ms. Tshona responded in the affirmative.*"

Thereafter applicant was found guilty of serious misconduct as charged. With regard to the sanction to be imposed upon her the minute reads as follows:

"*The Committee considered Ms. Tshona's lack of remorse, no response to disciplinary measures instituted by Hostel staff and prefects, and limited plea in mitigation of sentence. The Committee unanimously AGREED on the following sentence:*
*Ms. Tshona be expelled from the School Hostel, suspended for the remainder of the 2006 School academic year on condition that Ms. Tshona*

*1. Attends weekly counselling sessions with the School Counsellor or any registered counsellor, approved by the School and paid for by Ms. Tshona's parents, starting in*

*the week of 18 April 2006. Reports by the registered counsellor must be submitted to the School on a regular basis, and*

*2. Ms. Tshona is not found guilty of serious misconduct in the hostel, inclusive of an accumulation of order marks*."

Thereafter, during the last week of March, applicant was accused of further disciplinary infractions. It is not necessary to detail these. Suffice to say that on 30 March 2006 applicant was called to a meeting in the office of first respondent and was confronted with her alleged misbehaviour. According to the minute of such meeting, (Annexure MS7) applicant admitted her guilt whereupon she was informed that, because of her breach of the conditions upon which her expulsion from the hostel had been suspended, the sentence imposed on 14 March 2006 came into effect. In the result applicant was expelled from the hostel. On the same day first respondent addressed a letter (Annexure MS8) to applicant's parents advising them of the events and stating, *inter alia*, as follows:

"*Yolanda furthermore admitted that she had breached the conditions of her suspended expulsion. Therefore the expulsion from hostel has therefore come into force*."

Applicant's parents thereafter consulted with a firm of attorneys, Messrs. Nolte and Smit who, on 11 April 2006, addressed a letter (Annexure E) to first respondent stating, *inter alia*, as follows:

"*We act on the instructions of Mr. and Mrs. Tshona of Mthatha. Our instructions are to note an appeal against the sanction imposed by the School Governing Body of VHGS on the 30 March 2006 on a charge of contravening the conditions of her suspended expulsion*."

Certain grounds of appeal were thereafter set out, to which grounds I shall return hereunder.

Messrs. Whitesides, a firm of attorneys acting for the respondents, then became involved in negotiations with applicant's attorneys, including Messrs. X.M. Petse Inc. of Mthatha, in an

effort to reach an amicable settlement of the matter. On 20 April 2006 Mr. Nunn of Whitesides wrote a letter (Annexure I) to Nolte and Smit proposing that applicant's expulsion from the hostel be withdrawn and that she face a fresh disciplinary hearing concerning the charges against her. Whilst these negotiations were ongoing, however, applicant launched an application on 21 April 2006 in this Court under case no 1428/2006 against the same four respondents as in the present matter claiming, *inter alia*, the following relief in prayers 2.1 and 2.2 thereof:

"*2.1 That the respondents be and are hereby compelled to accommodate the applicant to her previous hostel room and or dormitory in Victoria Girls High School forthwith pending the finalisation of this application, alternatively.*

*2.2 That the decision taken by the First respondent to refuse and expel the applicant accommodation in the 1st respondent's hostel be and is hereby declared unlawful, unconstitutional and set aside."*

An order for costs on the attorney and client scale was also applied for.

The entire application under case no 1428/2006 is annexed to applicant's present application as Annexure A.

Thereafter a telephone conversation between the respective attorneys was held in which, according to Mr. Nunn, applicant's attorney Mr. Kunju, of X.M. Petse Inc., raised the issue of the setting aside of the suspended sentence imposed on 14 March 2006. First and second respondents were, however, not amenable to this suggestion. Further correspondence then followed between the respective attorneys. On 25 April Mr. Nunn wrote a letter (Annexure MS1) to applicant's attorney, Mr. Kunju, stating, *inter alia*, as follows:

"*Our clients believe that it is not in the interests of anyone, more particularly the minor child, to become embroiled in protracted High Court litigation and have decided to withdraw the*

*decision taken on 30 March 2006 to expel Yolanda from the School hostel. The result is that Yolanda is at liberty to return to the hostel with immediate effect*."

With regard to the decision of 14 March 2006 Mr. Nunn stated pertinently as follows:

"*The decision of the 14 March 2006 was not taken on appeal. Annexure E clearly refers to the sanction imposed on 30 March 2006*."

Mr. Nunn further took issue with the claim for costs on the scale as between attorney and client.

Mr. Kunju addressed a letter (Annexure MS2) to Mr. Nunn stating, *inter alia*, that he was writing to confirm:

"*That we consulted with our client regarding your instructions to settle the matter on the basis that you are:*

*(a) not to oppose the application*

*(b) tender the costs of the application on party and party scale.*

*We therefore advise that our client is inclined to accede to your instructions if you would further agree that the hearing in which the child was convicted and sentenced be declared null and void and of no force and effect*."

Mr. Nunn responded (Annexure MS3) as follows:

"*Our client is not prepared to declare the hearing held on 14 March 2006 at which a suspended sentence of expulsion from the hostel was imposed on Yolanda as null and void and of no force and effect. Should your client not be prepared to accept our client's tender to pay party and party costs, we suggest that a final order in terms of prayers 2.1 and 2.2 be obtained by agreement at the hearing on Wednesday…*"

Apparently as a result of this letter negotiations broke down and on 26 April 2006 the matter proceeded to Court. On that day, according to the affidavit of Mr. Nunn, he and Mr. Kunju appeared in chambers before Van der Byl AJ. Mr. Nunn indicated that he had no objection to a final order being granted in terms of prayers 2.1 and 2.2 of applicant's notice of motion but was opposing the order for costs on the attorney/client scale. Some discussion followed whrereafter an order incorporating the terms of prayers 2.1 and 2.2 of the notice of motion was by agreement made by Van der Byl AJ. The order (Annexure B) reads as follows:

"*1. That the first and second respondents be and are hereby compelled to accommodate the applicant in her previous hostel room and or dormitory in Victoria Girls High School forthwith.*

*2. That the decision taken by the first and second respondents to refuse and expel the applicant from the first respondent's hostel be and is hereby declared unlawful, unconstitutional and set aside.*

*3. That the first and second respondents be and are hereby directed to pay the costs of this application.*"

Consequent upon this order applicant returned to the hostel. Matters unfortunately did not rest there, however, and further charges relating to alleged breaches of discipline by applicant were laid against her during August 2006. In her present affidavit applicant contends that these charges have in effect been falsely made by, *inter alia*, the School matron, Mrs. Strydom, who, so applicant alleges, was doing so at the instigation of and as an agent of first respondent. Applicant states that "*the principal together with her agents are engaged in manufacturing unmeritorious and spurious allegations against me*." She reiterates the averments made by her in the previous application to the effect that underlying the so-called vendetta is the altercation between her mother and first respondent concerning applicant having been put to task "*as a result of my African natural hairstyle for which principal seems to be taken an exception*" and states that "*the motive of the principal in expelling me from the hostel is not hard to find as it does not need the*

*skill of a rocket scientist or stretch of imagination that she maliciously decided to expel me from the hostel so that I may leave the school.*"

All these averments are denied by first respondent and Mrs. Strydom. First respondent avers that she has always been at pains to treat applicant with the greatest respect but that applicant's conduct had been such that the disciplinary procedures of the hostel have had to be invoked.

The respondents allege that in consequence of applicant's alleged misconduct a disciplinary enquiry was held on 4 September 2006, presided over by one Advocate Coetzee. These proceedings were mechanically recorded and transcribed by Snellers Transcription Services and a copy thereof is annexed to first respondent's papers as Annexure MS5.

The charges against applicant were formulated as follows:

"*She violated the terms of her suspended expulsion from hostel, formal disciplinary hearing held on 14 March 2006, the conditions were –*

*1.1 that Ms. Tshona attend weekly counselling sessions with the School Counsellor or any registered Counsellor approved by the school and paid by Ms. Tshona's parents, starting the week of 18 April 2006 and reports by a registered Counsellor must be submitted by the school on a regular basis.*

*1.2 that Ms. Tshona is not found guilty of gross misconduct in hostel inclusive of the accumulation of order marks.*

*2. She refused to cooperate from 10 August 2006 when she was gated for having received four order marks in the preceding week and she refused to accept the punishment given as standard procedure*."

Neither applicant nor her parents attended the disciplinary enquiry. First respondent testified in considerable detail at the commencement of the enquiry as to the efforts made by the school to contact applicant's parents which efforts included the sending of telefaxes to them such as that contained in Annexure E1 to applicant's original application. All these efforts met with no response. The reason for the lack of response appears from applicant's founding affidavit where she states:

"*I wish to mention that my parents were at certain instances invited in the meetings leading to my expulsion but advised the school that the matter was already decided by the Court*."

According to first respondent, however, it was only on 18 September 2006 that the school was so advised.

As regards the non-attendance of applicant herself first respondent stated that notice of the hearing was given to her by the hostel staff, for receipt of which she signed, as well as being put in the account addressed to her parents for
which she also signed. She was also "*informed again yesterday that she had to be present at today's hearing and today when she wanted to sign out to leave hostel she was told she couldn't leave hostel she had to stay in because she had a hearing at 3 o'clock and then she left hostel without the necessary permission.*"

The enquiry then proceeded in the absence of applicant and her parents. At the conclusion thereof applicant was found guilty on both charges against her. On each charge the sanction was expulsion from the hostel. Thereafter, on 7 September 2006, the Chairperson of the School Governing Body, Ms. Sewry, addressed a letter (E2) to applicant's parents. In this letter she advised them of the expulsion of their daughter and also of their right to make representations in

person on 14 September 2006 to a sub-committee. This letter was telefaxed to applicant's parents but there was no response from them or applicant.

On 15 September 2006 an extra-ordinary meeting of the School Governing Body was held at which the decision of the disciplinary committee was confirmed and it was decided that applicant's expulsion be effective from 17 September. The minutes of this meeting appear as Annexure MS12. On the same date the chairperson of the Governing Body wrote to applicant's parents advising them of the outcome of the meeting and of their rights to appeal (Annexure JS2). This letter was also telefaxed to applicant's parents on the same date.

It appears from first respondent's affidavit that she thereafter had a telephone conversation with applicant's father on 18 September 2006. First respondent recorded the contents of this conversation in a letter to applicant's father dated 19 September 2006 (MS4). The relevant paragraphs of this letter read as follows:

"*I hereby wish to confirm our telephonic conversation yesterday during which you informed me that the school was in contempt of a Court order by expelling your daughter from the hostel. You stated that you did not have time to come to Grahamstown and that we could throw her out onto the pavement. I pointed out to you that you could lodge an appeal against the decision of the School Governing Body and that it should be done within five school days as from 15 September 2006. You stated that you did not think that you would do that as we are under a* 'continuation of the Court order.'"

The letter further records in detail the train of events leading up to the disciplinary enquiry of 4 September 2006.

On 3 October 2006 a firm of attorneys, Messrs. Marongo and Co, acting on behalf of applicant, wrote to the Deputy Principal of the school stating, *inter alia*, as follows:

"*We advise that you have breached the Court order and thereby being in contempt by charging our client with the conditions which declared unlawful and unconstitutional and thereby set aside by the High Court (sic).*"

The present application followed.

I have not been assisted in the resolution of the issues before me by the extremely muddled, emotive and ineptly drawn affidavits filed on behalf of applicant. The one issue which does, however, clearly arise therefrom is whether the Court order (B) granted by consent on 26 April 2006 had the effect of setting aside the decision taken by the School Governing Body on 14 March 2006 to impose a suspended sentence of expulsion upon applicant, as is contended by applicant, or whether it merely set aside the decision to expel applicant taken on 30 March 2006, as contended by the respondents.

In this regard applicant states that:

"*The exact decision which was being set aside on the 26 April 2006 was the decision which appears on Annexure D on my previous founding affidavit which decision was taken on the 14 March 2006 but enforced on 30 March 2006.*"

The second issue, which was raised by applicant was whether, in the event of decision of 14 March 2006 having remained in force, the further disciplinary proceedings of 4 September 2006 were procedurally and substantively fair.

I turn then to consider the submissions relating to the order of 26 April 2006 and its effect, if any, upon the decision of 14 March 2006.

At the commencement of his submissions Mr. Kunju advanced an argument, not raised on the papers, to the effect that first and second respondents had no authority to expel applicant from the hostel. His submissions in this regard were based upon sections 9 and 12 of the South African Schools Act no 84 of 1996.

S 9(1) provides:

"*(1) The governing body may, on reasonable grounds and as a precautionary measure, suspend a learner who is suspected of serious misconduct from attending school, but may only enforce such suspension after the learner has been granted a reasonable opportunity to make representations to it in relation to such suspension.*

*(2) A learner at a public school may be expelled only –*

*(a) by the Head of Department; and*

*(b) if found guilty of serious misconduct after disciplinary proceedings contemplated in section 8 were conducted.*"

S 12(1) and (2) provide as follows:

"*(1) The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the Provincial Legislature.*

*(2) The provision of public schools referred to under subsection 1 may include the provision of hostels for the residential accommodation of learners.*"

Mr. Kunju submitted that by virtue of the provisions of s 12(1) and (2) the reference in s 9 to expulsion from a school must by necessary inference include a reference to a hostel.

I do not agree. S 9 and s 12 deal with completely disparate issues and the reference to hostels in s 12(2) is made in an entirely different context.

The expulsion of a learner from a school hostel clearly does not entail the expulsion of the learner from the school and, therefore, in my view, does not violate such learner's right to schooling as enshrined in s 29 of the Constitution. If applicant is now, as she alleges, unable to attend VGH school, this is in consequence of her parents, who are resident in Mthatha, having failed to provide alternative accommodation for her in Grahamstown.

In his submissions Mr. Paterson stated that in the limited time available to him he was unable to find any statutory authority specifically regulating hearings relating to hostel discipline. He referred to certain regulations which, however, as he submitted, relate only to disciplinary proceedings leading to the suspension or expulsion of a learner from a school and do not deal with expulsion from a hostel. These regulations, made by the MEC for Education, Eastern Cape in terms of s 9(3) of the South African Schools Act no 84 of 1996 are published under P N 10 of 2003.

The only reference to hostels in the Schools Act appears in s 20(1)(g) namely:

"*(1) Subject to this Act, the Governing Body of a school must –*

*(g) administer and control the school's property and buildings andgrounds occupied by the school, including school hostels, if applicable.*"

"*Administer*" in this subsection is, in my view, clearly used in a wider sense than merely to "*maintain*" in the physical sense. In my view the power to administer a school hostel would by necessary implication include the power to regulate the good governance of hostels including the right of access thereto. It would also include the right to formulate rules for the maintenance of good discipline in hostels and the concomitant right to expel a boarder who was guilty of serious misconduct.

In the case of VGHS such Hostel Rules exist. They are annexed to first respondent's affidavit as MS10.

In these Hostel Rules provision is made for an "order mark system" which, according to the Rules, is the instrument used to reward and punish behaviour. Boarders receive order marks for certain specified misbehaviour. Provision is further made for an order mark committee and for disciplinary action resulting from the order mark system. In terms of paragraph 38.7 of the Rules, should a boarder receive four or more order marks in a week for a third time in a term, she is liable for suspension for 5 days from the hostel pending an investigation by the School Governing Body.

Paragraph 39 of the Hostel Rules sets out certain examples of serious misconduct including smoking, the use of alcohol and drugs, theft, dishonesty and being absent from hostel without permission. The Rules provide further as follows:

"*Such behaviour cannot be tolerated in a hostel situation as it is to the detriment of all. The boarder and her parents will be called to a Formal Disciplinary Hearing (see procedure in the School Code of Conduct booklet). It is unlikely that a boarder convicted of serious misconduct will be allowed to remain in the hostel.*"

Mr. Paterson conceded in favour of applicant that a decision by the School Governing Body to expel a learner from a hostel would constitute the exercise of a public power which would fall within the ambit of s 1(b) of the Promotion of Administrative Justice Act no 3 of 2000 and would accordingly be reviewable by the Court.
In the light of this concession I need say no more thereanent.

I turn then to consider the issue of the effect of the order of 26 April 2006. Although the wording of the order is clear it is, as was submitted by Mr. Paterson, capable of bearing the respective interpretations contended for by applicant and respondents.

In Administrator, Cape And Another v Ntshwaqela and Others 1990 (1) Sa 705 (AD) the following appears at 715F-I:

"*In Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) Trollip JA made some general observations about the rules for interpreting a Court's judgment or order. He said (at 304D-H) that the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up the Court's granting the judgement or order may be investigated and regarded in order to clarify it.*"

See too ABSA Bank Ltd t/a Volkskas Bank v Page and Another 2002 (1) SA 617 (SCA) at 622A-B.

The order having been made by agreement there were obviously no reasons given therefor. On the face of the order it is not certain as to whether it relates to the decision of 14 March or to that of 30 March. In order to ascertain its meaning it is therefore necessary to have regard to the

applicant's undisputed allegations contained in her affidavits and to the extrinsic circumstances leading up to the agreement between the attorneys to the effect that the order be taken by consent.

Mr. Kunju submitted that the relief sought and granted in the first application was clearly aimed at the setting aside of the order of 14 March 2006. He referred to the fact that there were, in applicant's founding affidavit, two references to 14 March 2006. In the first such reference at paragraph 3.6 thereof applicant states:

"*Both the third and fourth respondents are cited purely on the basis of vicarious liability as I alleged that at all material times hereto and in particular on the 14 and 30 March 2006 and on the 18 April 2006 the first and second respondents were acting within the scope, directions and control of the third and fourth respondents…*"

This reference to 14 March in my view takes the matter no further in view of the fact that the decision to expel applicant on 30 March was based on the suspended sentence imposed on 14 March which could explain the reference thereto.

The second reference which is contained in paragraph 7.3 is more pertinent to the issue in hand. In this paragraph applicant states as follows:

"*I submit that such decision or ruling of the 14 March 2006 by the School Governing Body has been brought on appeal. The letter of appeal is attached hereto and despite the contents thereof the principal utterly refused me to get accommodation …*"

The statement that the decision of 14 March 2006 had been taken on appeal is incorrect. Nowhere in the plethora of affidavits and annexures is there any evidence of such an appeal having been noted. Indeed, as appears from annexure D to applicant's own affidavit, her father appears to have accepted the conditions of expulsion imposed upon applicant on 14 March 2006.

Be that as it may, the letter of appeal to which applicant is referring is the letter (Annexure E) dated 11 April 2006 written by Messrs. Nolte and Smit to first respondent. At the risk of undue repetition the contents thereof bear repeating, namely:

"*Our instructions are to note an appeal against the sanction imposed by the School Governing Body of VGHS on 30 March 2006 on a charge of contravening the conditions of her suspended expulsion. The appeal is noted on the following grounds:*

*1. The School Governing Body failed to adhere to the disciplinary guidelines as set out in Regulation 3 of the Provincial Notice no 3 of 25 June 1999.*

*2. The School Governing Body failed to take into account the personal circumstances of the learner, namely that she is a minor and does not reside in Grahamstown.*

*3. The School Governing Body failed to consider that the learner had not commenced attending counselling sessions with the school counsellor or any registered counsellor starting in the week of 18 April 2006 as directed by the Disciplinary Committee on the 14 March 2006.*

*4. The School Governing Body erred in not imposing an alternative form of sanction namely counselling despite the learner being found to be a suitable candidate in the disciplinary hearing held on the 14 March 2006.*

*5. The sanction imposed induces a sense of shock to both the child and the parents.*"

In the midst of the muddled confusion of applicant's papers this letter stands out as a beacon of clarity. Somewhat surprisingly, however, Mr. Kunju submitted that if the letter was read as a whole it clearly constituted an appeal against the decision of 14 March 2006. He referred in this regard to the references in paragraphs 3 and 4 thereof to the decision of 14 March. However, even a cursory reading thereof makes it clear that Mr. Kunju's submission is utterly without merit and that, on the contrary, implicit in paragraphs 3 and 4 is an acceptance of the decision of 14 March 2006.

Mr. Kunju then submitted that the author of the letter of the appeal, Mr. Mudenda, either must have misunderstood his instructions or else must have referred in error to 30 March 2006 whilst intending to refer to 14 March. The latter part of this submission is nonsensical having regard to the letter as a whole. As to Mr. Mudenda having misunderstood his instructions there is nothing on the papers to substantiate this submission which appears to have occurred to Mr. Kunju for the first time during the course of his argument. In the absence of an affidavit to that effect by Mr. Mudenda these submissions fall to be rejected as baseless speculation.

The contradiction between the averment that the decision of 14 March had been taken on appeal and the letter of appeal itself is yet another example of the careless, inept and confused manner in which applicant's case was presented. Far from being an appeal against the decision of 14 March this letter makes it clear that that decision is not in issue. All that is placed in issue in the letter is the sanction imposed upon applicant for having contravened the conditions of her suspended sentence.

Mr. Kunju then pointed to the fact that whereas second respondent had not been involved in the events of 30 March applicant had cited it as second respondent and the order had been granted against it as well as first respondent. In this regard he submitted that there was no reason for applicant to have cited second respondent unless she was taking the decision of 14 March on review.

There is equally no merit in this submission. The obvious answer thereto is that even if the relief sought related only to the decision of 30 March the School Governing Body had a direct and substantial interest in the matter despite it not having been a party to that decision.

In attempting to develop his argument further Mr. Kunju submitted that there was in fact no decision of 30 March which could be set aside and that, this being the case, the relief sought in

the application could only relate to the decision of 14 March. In this regard applicant stated as follows:

"*The applicant's contention and stance is that the letter of 30 March 2006 is not a decision but by merely a letter enforcing the decision which was taken on 14 March 2006. How could then on earth Court set aside a decision which never exists more so that the alleged on decision did not even form part of the Court record*." (sic)

This is, on the face of it, a startling and incomprehensible statement. In submitting that there was no decision of 30 March, Mr. Kunju made specific reference to the minutes of the meeting of 30 March (MS7) at which applicant was found guilty and expelled as well as to the letter written by first respondent to applicant's parents informing them of such expulsion (MS8). His submissions were based upon the following averments by applicant in her replying affidavit:

"*This show how mendacious the deponent is, how could she call annexure MS7 a decision. The contents hereof are hearsay until I have confirmed same. In this regard I do not confirm the contents hereof. This is as well one of the documents constructed by the respondents to make its case stronger until receipt of the deponents affidavits, these documents are never in my possession. If the legal representatives of the respondents suggests that the Court on the 26 April 2006 had set aside the so-called decision of 30 March 2006 that allegation is no more than belittling the integrity of this Honourable Court as no reasonable could trouble itself and set aside such a document.*" (sic)

As to the minutes of the meeting (MS7) Mr. Kunju's submissions were contradictory. He submitted firstly, if I understood him correctly, that no such meeting had occurred and that, in his words, "*applicant says that the contents of MS7 were manufactured and that she was never at such a meeting.*"

Nowhere does applicant deny having been at the meeting on 30 March and, questioned further about this, Mr. Kunju backtracked and conceded that she might have been at that meeting. He stated, however, that she denied that she had given the answers attributed to her in annexure MS7. He then stated that she was in fact at the meeting and was interrogated but that she further denied that the meeting constituted a disciplinary hearing or that a decision to expel her was taken thereat. He submitted accordingly that the letter of 30 March (MS8) merely purported to enforce a non-existent decision. It is, unfortunately, necessary to state that it is apparent from the above that Mr. Kunju was prepared to adapt his argument in order to suit the exigencies of the situation without regard to the actual facts as set out in the application itself. Applicant herself, apart from baldly stating that first respondent had "*constructed*" MS7, does not state what Mr. Kunju submitted she did. Being as charitable as I can to him it would seem that what he must have intended to argue was that the decision taken on 30 March was unlawful and invalid and that, in that sense, it was not a decision upon which the respondents could rely. If I have misunderstood him and that was not what he intended then his submissions are nonsensical and cannot be sustained.

It is further, in my view, wholly improbable that first respondent, as principal of a school, would have maliciously "*manufactured*" a false record of the meeting in order to bring about the expulsion of applicant from the hostel. This submission is of so far-fetched and untenable a nature that in the absence of any evidence to substantiate it it falls to be rejected. See: Administrator Transvaal v Theletsane 1991 (2) SA 112 (A) at 117A-B.

It is clear that a decision to expel applicant was indeed taken on 30 March and that this decision was conveyed to applicant's parents. This being so there is no substance to Mr. Kunju's submission that there was no decision of 30 March to be set aside.

Mr. Kunju submitted further, however, with regard to the minutes (MS7) that the contents thereof, insofar as they related to the alleged statements by applicant, constituted inadmissible

hearsay evidence, because, he said, applicant, being the person upon whose credibility the probative value of the evidence depended, had not confirmed them. This fundamentally flawed submission is devoid of merit. No more need be said.

Mr. Kunju then submitted that it was clear from paragraph 7.1 of applicant's affidavit that the decision of 14 March was in issue. In the first line of that paragraph applicant stated that:

"*During March 2006 I was accused of having left capsules and cell phone with me*."

Those accusations, he pointed out, formed the basis of the charges against applicant on 14 March. That is indeed so. Mr. Paterson, however, referred to the fact that according to applicant she was only informed of such accusations on the date of the hearing and that in the immediately following line she stated that "*on that particular morning of the hearing I was called from my class to attend something which was revealed to me as a meeting. An opportunity was never awarded to me or explained to me that my parents ought to assist me and in any event I was not even aware nor prepared for such a meeting*." As was submitted by Mr. Paterson it was never in dispute as regards the disciplinary hearing of 14 March that applicant had been timeously informed of the charges against her and had been afforded ample opportunity to prepare herself for that hearing. There is in the founding affidavit under case no 1428/2006 not a single complaint which can be shown to relate to the procedural or substantive fairness of the hearing on 14 March. Applicant's allegations in this regard cannot therefore be a reference to the hearing of 14 March but are clearly a reference to the events of 30 March. Indeed, applicant returns to this aspect later in her affidavit stating that "*it is trite that anybody before attending any disciplinary hearing should be awarded an ample opportunity so as to enable that party to arm his/herself with the view to defend him/herself against the allegations faced with.*"

Of particular significance are applicant's further averments to the effect that she is "*not even aware of the charges I am facing to enable me to prepare my defence in respect of the fresh*

*looming disciplinary hearing*." In this regard applicant is referring to the letter of 28 April 2006 addressed by Mr. Nunn to Mr. Kunju in which he proposes that a disciplinary hearing be held *de novo* by no later than 24 April to consider the charge against applicant that she violated the conditions attached to her suspended expulsion from the hostel. It is significant that in dealing with the contents of this letter applicant makes no reference whatsoever to the present allegation that the suspended expulsion had been set aside but instead deals with the matter on the basis that she is unable to prepare her defence properly in respect of the looming disciplinary enquiry.

The only pertinent reference to the possible setting aside of the order of 14 March is to be found in the letter written by Mr. Kunju to Mr. Nunn on 24 April (MS2) in which he states that he confirms having consulted with applicant regarding the settling of the matter:

"*On the basis that you are:*

*(a) not to oppose the application*

*(b) tender costs of the application on party and party scale.*

*We therefore advise that our client is inclined to accede to your instruction if you would further agree that the hearing in which the child was convicted and sentenced be declared null and void and with no force and effect*."

Bearing in mind that at this stage it was only the question of the scale of costs which was in issue the wording of this letter is significant. If the validity of the decision of 14 March was indeed in issue in the application then, in the light of respondents' statement that they would not oppose the application and would pay costs on the party and party scale, the addition by Mr. Kunju of the further rider that respondents should agree that the "*hearing in which the child was convicted and sentenced be declared null and void*" is inexplicable. On applicant's present argument the failure by respondents to oppose the application had precisely the effect that the order of 14 March was declared null and void. If that was so then the rider was unnecessary.

In all the circumstances I am satisfied that objectively viewed, all that the application under case no 1428/2006 sought to set aside was the decision of 30 March 2006 and that therefore the Court order of 26 April 2006 was only to this effect.

I turn then to consider the issue relating to the disciplinary hearing of 4 September 2006. I have dealt above in a different context with the jurisdiction of the Court to review these proceedings.

Applicant's complaints concerning the proceedings relating to her present expulsion are once again far from clear. In her founding affidavit she states as follows:

> "*29.1 I wish to indicate to the above Honourable Court that as I have indicated above the principal together with her agents are engaged in manufacturing unmeritorious and spurious allegations against me. I say so because I now make reference to the minutes of the 4 September 2006 read together with those of affidavit which served on the 26 April 2006 before the above*
>
> *Honourable Court.*
>
> *29.2 From the said documents and upon close examination thereof it would appear that there were representatives who in the past were wearing hats of being learner representative but now are wearing different hats.*
>
> *29.3 I wish to add that my parents advised me that at no stage were ever invited by the school to say for instance the child has been rude, in the contrary the school would convene a disciplinary meetings when they perceive necessary when they ought to have invited my parents at an early stage*." (sic)

The minutes of 4 September to which applicant is here referring are those set out in Annexure E3. Applicant avers that these minutes "*do not reveal and or support the basis of my expulsion and*

*therefore one is constrained to comprehend as to how did the disciplinary committee make a finding when there was no evidence before it suggesting a seriousness of the offence as alleged. Nor is it clear to me as to how and when did the School Governing Body decided to expel me in the absence of the minutes or letter from the School Governing Body sent to me or my parents since the respondent sent every piece of information relevant in this matter*." (sic)

In reply to these allegations first respondent annexed to her affidavit the full transcript of the disciplinary hearing (MS5). This elicited the following reply from applicant:

"*Our attorney addressed a letter to the principal requested minutes of the meeting held on the 4 September 2006. Such minutes where forwarded to us on the very same day as we requested. The aforesaid minutes are completely different with what is now termed minutes of 4 September 2006. The respondent is to blame herself as there was no indication she ever made that there was something outstanding. The respondent has now realised that I have raised a point that the minutes that I have appended on and marked E3 my founding papers does not disclose evidence tendered so as to expel me. In support of the afore going the deponent has accepted and admitted the contents of E3 which form part of my founding papers. It is clear therefore that the respondent has constructed a fabricated document so as to disprove my allegation*."

Applicant then alludes to what she said were certain telling discrepancies between the short minutes (E3) and the transcript (MS5), including the fact that the transcript makes no reference to Messrs. Msiwa and Chisaka having been present, they apparently being the persons wearing the different hats referred to in paragraph 29.2 of applicant's affidavit; that "*even the venue is not stated in which the alleged minutes of the meeting attached by the respondent I do not know the capacity or the structure which conducted the alleged disciplinary hearing contrary to annexure E3 which states that the meeting was held by the School Governing Body sub committee*." (sic); that according to E3 the investigating officer read out the charges whereas according to the transcript they were read out by Advocate Coetzee; and that, whereas according to E3 the

chairman, Advocate Coetzee, welcomed everybody to the meeting, the transcript reveals that in fact it was first respondent who did so.

Mr. Kunju submitted that in the light of all these what he referred to as being suspicious circumstances applicant did not accept that the transcript was a true reflection of what had happened. His initial submission was that applicant disputed that such a meeting as set out in the transcript had occurred and that it was in all probability a fabrication as stated by applicant in her affidavit. When it was put to him during the course of his argument that this was extremely improbable in view of the fact that the proceedings had been mechanically recorded and transcribed by Sneller Transcription Services and ran to 40 typed pages he then submitted that the proceedings were in all probability held at some stage after 4 September in order to create the impression that a genuine enquiry had been held so as "*to cover the respondents' tracks*" and to counter applicant's averments concerning the minutes (E3).

There is quite simply no evidence on the papers to substantiate this submission. If applicant was concerned as to the authenticity of the transcript it would have been a simple matter for her to have made enquiries from Sneller Transcription Services as to the date upon which the meeting had been held and to have obtained affidavits from the relevant employees. Affidavits could also have been obtained from Msiwa and Chisaka. In the event this was not done and no such objective evidence was placed before the Court. Applicant's averments in this regard are in any event wholly improbable, if not fanciful. On those averments there must have been a wholesale conspiracy, involving not merely first respondent, Advocate Coetzee and the remaining members of the disciplinary enquiry, but also all the witnesses who testified thereat as well as the employee or employees of Sneller Transcription Services who recorded the proceedings to hold what was in effect a charade. Such a proposition is so far-fetched and untenable that it can be rejected outright (Administrator Transvaal v Theletsane *supra*).

It is clear in all the circumstances that the allegations were recklessly made by applicant. It is a matter of some surprise that they were persisted in during argument at the hearing.

In the course of his argument Mr. Kunju submitted that applicant had been "*ambushed by the transcript*." Herein, it seems to me, lies the truth of the matter. Confronted by the transcript and appreciating the adverse impact thereof on the averments set out in her founding affidavit applicant resorted to the making of reckless and baseless allegations with regard to its authenticity. Mr. Kunju's submissions in this regard, such are they are, are devoid of substance.

It is clear from the transcript (MS5) that applicant and her parents were given sufficient notice of the hearing and afforded every opportunity to be present yet did not avail themselves thereof. In the case of applicant herself she not only absented herself but, contrary to instructions, left the hostel.

As set out above, the chairperson of the School Governing Body wrote to applicant's parents on 15 September advising them of the outcome and of their right to appeal (JS2). This letter was sent to applicant's parents by telefax. Applicant and her parents deny receipt thereof and applicant stated that it too "*has been constructed to assist respondents*."

It is, however, clear from the transmission journal relating to telefacsimiles sent from the school's telefax machine to the telefax numbers of applicant's parents that they must have received the letter. Despite this no appeal was lodged thereafter.

I should merely add for the sake of completion that in advancing his argument Mr. Kunju lost sight entirely of the principles set out so clearly in Plascon-Evans Paints Ltd v Van Riebeeck Paints (pty) Ltd 1984 (3) SA 623 (A) at 634H-I with regard to the proper approach to be adopted by a Court faced with disputes of fact in applications.

I am satisfied in all the circumstances that the proceedings of 4 September and the subsequent confirmation thereof by the School Governing Body on 15 September were procedurally fair. It is accordingly not necessary to deal with Mr. Paterson's further submissions that in the light of applicant's deliberate failure to exhaust her internal remedies with regard to appeals she was barred in terms of s 7(2) of the Promotion of Administrative Justice Act no 3 of 2000 from seeking relief from this Court.

It is furthermore clear from the transcript of the disciplinary proceedings that applicant was guilty of the conduct alleged. As to her sentence it appears from the transcript that the question as to the appropriate sanction to be imposed upon her was carefully considered. Alternatives to expulsion from the hostel were raised and weighed and the personal circumstances of the applicant were also weighed against the policy issues faced by the hostel as a whole. It is clear that all those involved in the determination of the sanction to be imposed upon applicant properly applied their minds thereto having regard to the definition of serious misconduct in the Hostel Rules. There is accordingly no basis upon which the decision to expel applicant from the hostel can be interfered with.

I turn then to consider the issue of costs. Mr. Paterson sought an order that applicant's parents be ordered to pay the costs of this application *de boniis propriis*.

The ordinary rule in the case of an application brought by a minor with the assistance of his or her guardian is that the minor alone is liable for the costs. In exceptional cases, however, the guardian will be ordered to pay costs *de boniis propriis* as a mark of the Court's disapproval of his or her conduct in bringing the application. It appears from the relevant authorities, all of which are usefully collected in Boberg: Law of Persons and the Family 2nd ed at p.914 that such an order will, however, be granted against the guardian in cases where the action or application was instituted frivolously or recklessly or where the guardian acted mala fide, unreasonably or

negligently. See for instance: Grobler v Potgieter 1954 (2) SA 188 (O) at 192A; Ex parte Hodgert 1955 (1) SA 371 (D) at 372B; Ex Parte Bloy 1984 (2) SA 410 (D) at 411H.

At p 914 the learned authors of Boberg refer to Sharp v Dales 1935 NPD 392 in which it was held that a father who merely assists his child in the bringing of an action, as distinct from bringing the action himself on the child's behalf, cannot be ordered to pay the costs *de boniis propriis* because he is not a party to the action. The learned authors subject that decision to trenchant criticism with which I respectfully agree. Sharp v Dales *supra*, stands alone against a wealth of authority to the contrary and it is, in my respectful view, clearly wrong for the reasons set out in Boberg.

Turning to the facts of the present matter it is clear that applicant's parents filed affidavits in support of the application and made common cause with the scurrilous attacks launched by the applicant upon the integrity of not only first respondent but also, by implication, the other members of the School Governing Body. In the course of these attacks allegations were made that first respondent was not only untruthful but that she "*and her agents*" were "*engaged in making unmeritorious and spurious allegations*" against applicant and were "*constructing and fabricating*" evidence in order to shore up their case. Those are extremely serious allegations. Furthermore, they allowed arguments to be advanced to the Court to the effect that they had not received certain letters or documents when the evidence was overwhelmingly to the contrary.
Mr. Kunju, apparently belatedly appreciating the serious implications of certain of these allegations, submitted that by accusing first respondent of being "*mendacious*" applicant had not intended to cast aspersions upon her integrity, this despite the fact that numerous such aspersions were scattered throughout the papers. The word "*mendacious*" so Mr. Kunju stated, had been used in the sense of "*mended*" namely, that first respondent had attempted to mend whatever defects there might have been in the disciplinary proceedings. Pressed during argument on this issue he stated that prior to settling applicant's affidavit he had personally consulted an Oxford Dictionary in which that meaning of the word appeared. I have consulted a number of

dictionaries including the Concise and Shorter Oxford dictionaries and, *mirabile dictu*, in none of these does such a definition of the word "*mendacious*" appear, the word being uniformly defined as "*lying or untruthful.*"

It appears unfortunately, that once again Mr. Kunju was prepared to adapt his argument in order to suit the exigencies of the situation. He would do well to bear in mind that he is first and foremost an officer of the Court and that, as was stated by Davis AJA in the foreword to Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa, a legal practitioner should not take up "*the utterly wrong attitude that his sole duty is to his client – as if he were that client's mere hireling.*"

Be that as it may, Mr. Kunju's efforts to downplay the use of the word "*mendacious*" overlooked the context in which the word was used namely, that respondents had "*constructed*" a document "*to make its case stronger*" as well as a number of other statements to similar effect such as "*I am now going to demonstrate that the respondent is apart from being untruthful misdirecting the above Honourable Court*" and that she has "*subconsciously confessed to this Honourable Court her capacity to distort*".

Mr. Kunju submitted further that applicant's parents were merely assisting their child and could hardly have been expected to stand by with their arms folded in the circumstances of this case. In my view, the fact that they were assisting their child did not, however, afford them licence to make common cause with wild, intemperate and unsubstantiated allegations of fraud, forgery and dishonesty on the part of high office holders of the school. In all these circumstances I am of the view that their conduct was such that they should bear the costs of this application *de boniis propriis.*

On 11 October 2006 when the matter first came before the Court it was postponed and costs were reserved. Although Mr. Kunju attempted to cast the blame therefor on respondents for not filing

their answering affidavits earlier than they did I am satisfied that respondents were not in any way dilatory and that those costs should be costs in the cause.

Accordingly the application is dismissed with costs including those costs which were previously reserved on 11 October 2006. The costs are to be paid by the applicant and by her parents, Mr. and Mrs. Tshona, *de boniis* propriis, the one paying the others to be absolved.

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**J.D. PICKERING**
**JUDGE OF THE HIGH COURT**