IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE No: 16385/2020

Before the Honourable Ms Acting Justice Gibson
on the 11th of December 2020

In the matter between:

MILNERTON HIGH SCHOOL	**First Applicant**
THE SCHOOL GOVERNING BODY,	**Second Applicant**
MILNERTON HIGH SHCHOOL	
and	
THE MINISTER FOR EDUCATION: WESTERN CAPE	**First Respondent**
KAMIL YUNUS N.O.	**Second Respondent**

JUDGMENT

GIBSON, AJ

[1] The second respondent applied for the admission of his son ("the learner") to the grade 8 intake at Milnerton High School for the year 2021. The second respondent also applied to Edgemead High School and Table View High School. The learner was initially refused admission by all three schools however, at the time of this application to court was instituted, the learner had been accepted at Table View High School, which is the school furthest from his home.

[2] Millnerton High School has an admission policy in terms of which it assesses its learners' applications based on, inter alia, the sporting and academic achievements of the learners as well as their residential proximity to the school. The school and governing body refers to such criteria as "*the selection criteria matrix*". The application by the second respondent for the admission of the learner to Milnerton High School was refused as his son the learner failed to score well on this system due to his non-participation in organized sport and his relatively poor academic performance at his primary school. The learner has undergone a kidney transplant and has a perforated eardrum however this was not disclosed to the school at the time of his initial application. The application form indicated that the learner is in good health. The first applicant alleges that this statement by the second respondent was misleading or incorrect and that, accordingly, the application was not properly submitted.

[3] The second respondent appealed to the first respondent. In his appeal, the second respondent explained that the learner was in good health despite the aforementioned transplant, his perforated eardrum and the fact that he was on chronic medication but that these circumstances only affect his ability to participate in school sporting activities. The second respondent considered and upheld the appeal due to the fact that the first applicant is the closest school to the learner's home, that the application was timeously submitted, the low ratio of learners to classes at the school, the fact that the school should have originally accepted the learner and that it had unfairly discriminated against the learner by admitting learners from outside the community. The first respondent maintains that, on a proper interpretation of the school's own admission policy, the application of the merit criteria can only take place where the proximity of the learner to the school does not favour the learner.

[4] The school and its governing body have brought this application, on an urgent basis, in terms of the Promotion of Administrative Justice Act 3 of 2000 to review the decision of the first respondent and has requested this court to substitute its decision for that of the Minister, refusing the learner admission to Milnerton High School.

[5] Section 5(1) of the South African Schools Act 84 of 1996 provides that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way and section 5(2) provides that *"the governing body may not*

administer any test relating to the admission of a learner to a public school…". The National Admission Policy for Ordinary Public Schools, in paragraph 8, provides that *"the HoD (head of department) must co-ordinate the provision of schools and the administration of admissions of learners to ordinary public schools with governing bodies to ensure that all eligible learners are suitably accommodated in terms of so the SASA (South African Schools Act)".* In terms of the SASA, section 5(5) and the National Admission Policy (paragraph 7) the governing body of a public school determines the admission policy of the school. The implementation of the policy lies with the principal of the school under the authority of the head of the department. In terms of paragraph 5 of the Western Cape Education Department policy for the management of the admission and registration of learners at ordinary public schools, *"the Member of the Executive Council (MEC) for education, considers appeals from a parent or learner who has been refused admission to a public school."*

[6] Our courts are reluctant to interfere with the governance and administration of schools. The Constitutional Court in **Welkom High School and the Governing Body of Welkom High School v Head of the Department, Department of Education of the Orange Free State** heard with the matter of **Harmony High School and the Governing Body of Harmony High School v the Head of Department, Department of Education of the Orange Free State** CCT 103/12 [2013] ZACC 25 at para 36 held that:

".....the state's obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is the Schools Act. That Act contains various provisions governing the relationships between the Minister, Members of Provincial Executive Councils responsible for education (MECs), HODs, principals and the governing bodies of public schools. It makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister. Its provisions are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system."

[7] The admission criteria for Milnerton High School are found in paragraph 2 of their admission policy which reads as follows:

"2. ADMISSION CRITERIA

2.1 The purpose of this admission policy is not exclusion but the rational and objective management of over subscription for the available places.

2.1.1 According to the SASA (WCED), preference will be given to learners who apply in the pre-determined window period. The sequence of application within the window period is not taken into account. Should demand exceed places available in a given year the following criteria will be applied:

2.1.2 Admission will generally favour learners who reside in the greater community with their parent/s and for whom Milnerton is the most convenient school, but subject to the additional criteria alluded to beneath.

"Parent" means:

a. The parent or legal guardian of the learner;
b. The person legally entitled to custody of the learner; or
c. The person who undertakes to fulfill the obligations of a person referred in paragraphs (a) and (b) towards the learner's education at school.

This is subject to timeous application, availability of capacity, compliance with statutory requirements, practical considerations relating to the nature of existing infrastructure and any special needs of an applicant learner and, in the case of applicants above grade 8 and 9, curriculum compatibility.

2.1.3 The criteria for consideration include:

- academic competence
- development of particular cultural or intellectual skills
- leadership qualities
- representivity
- service to the community
- sporting prowess

2.1.4 Where proximity as contemplated in 2.1.1 above does not favour an applicant this factor may be counterbalanced by significant merit within the criteria set out in 2.1.3.

2.1.5 When the school (or specific subject class) is full, as determined by the SGB in line with the WCED guidelines, applicants will be placed on waiting lists. The lists are addressed when a vacancy arises on the withdrawal of a learner from the school. In order to remain on the waiting list, parents need to re-apply every year."

Paragraph 10.4 of the Milnerton High School Policy reads as follows:

"10.4 Incomplete forms/erroneous forms/forms with false information will not be regarded as received for consideration until entirely complete and correct. Applicants are responsible to ensure that their applications are properly completed."

[8] The applicants contend that first respondent's decision falls to be reviewed as they were not given a fair hearing. It is their allegation that the appeal should have been a wide appeal allowing for the complete re-hearing of the matter. In addition, the applicants aver that the first respondent should have re-opened the case, hearing all the affected parties and that it should have been an oral hearing if necessary.

[9] In **Schoonbee and Others v MEC for Education, Mpumalanga & Another** 2002 (4) SA 877 Judge Moseneke stated:

"*In a society such as ours where we seek to create a constitutional State, rationality, reasonableness, fairness, and openness are very important considerations in evaluating the conduct of wielders of statutory executive power when under judicial review. One would readily find these principles in the Promotion of Administrative Justice Act 3 of 2000. Such administrative actions have to be supported by reasons. The intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representation as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that*

administrative act. These statutory injunctions must be observed and failure to do so of necessity leads to abortive administrative action."

[10] The applicants aver that the number of learners who applied for admission to grade 8 for the year commencing January 2021 at the school vastly outnumbered the available places at the school. On the admission appeal form completed by the principal, he indicated that there were 231 learners per grade, 451 unsuccessful applicants and 78 on the waiting list. It is precisely for this purpose that the school's selection criteria matrix exists and is applied to learners when assessing the applicants. The applicants' view the first respondent's application of the admission policy as too simplistic and opine that she overturned a decision of the principal without giving the first applicant the opportunity to make representations to her in respect of the decision taken by the principal. In addition, the applicants have sought to rely on 10.4 of the admission policy and have argued that the application contained misrepresentations as to the learner's health and that, accordingly, they were not obliged to admit him to the school. The applicants have suggested that first respondent does not have the authority to make a decision in relation to this matter and that the matter should have been referred back to the principal.

[11] The appeal was lodged prior to July 2020. The school replied to the appeal on the 4th of September 2020. Much correspondence took place between the office of the first respondent and the first applicant pursuant to this in order for the first respondent to consider the appeal. Her decision was communicated on the 22nd of September 2020. The first applicant requested that the first respondent reconsider her decision on the 28th of September 2020. She replied saying she was unable to mero motu do so and that, if the applicant wished, it could make application to court. On the 8th of October, the principal wrote to the first respondent indicating that the first and second applicants would be launching this application on the basis that her decision was irrational and offering her an opportunity to take legal advice. This correspondence was the met with the response that first respondent was now functus officio.

[12] The first respondent avers that the first applicant is a public school funded by the taxes paid by the residents of South Africa and that the only proper interpretation of this admission policy is that the merit criteria apply only in the event of applicants

who do not fall within the ambit of 2.1.2 above or where the class is oversubscribed by residents of the immediate community. The Marriam Webster dictionary defines a test or a **means** of **testing** as: *"something (such as a series of questions or exercises) for measuring the skill, knowledge, intelligence, capacities, or aptitudes of an individual or group."* The use of the selection criteria matrix falls squarely within this definition and therefore it must be that it can only be applied in the context of applicants who fall within the ambit of 2.1.4 of the Milnerton High School's admission policy or where the number of applicant learners who live within close proximity to the school exceed the number of places available in the specific year for which they have applied. To apply it to applicant learners who live within close proximity to the school and use it as a basis for refusing their application in order to admit learners who reside outside of the community within which the school is situated, but who are academically stronger or display greater sporting prowess, would fall foul of section 5(2) of SASA.

[13] In the ordinary course, in an application for the review of a decision by an administrative body, the matter is referred back to the relevant body for reconsideration, however, in this instance, the applicants do not wish this court to do so which would require the court to substitute its decision for that of the first respondent.

[14] The applicants allege that they were not given an opportunity to address the first respondent on all the issues to be considered. The first respondent addressed correspondence to the first applicant in considering the appeal, there appears to have been no express limitation imposed on what the first respondent could have dealt with under reply and therefore it appears, that there was nothing preventing the principal, on behalf of the first respondent, from making any representations he wished during the course of the correspondence with the office of the first respondent. It seems however this would not have made a difference as all the applicants seek to do, even in this application, is justify their departure from the school policy. Indeed no further material information has been put to this court than was provided to the first respondent during the appeal process which would justify such a departure. It cannot be therefore that the appeal required oral evidence or a hearing.

[15] I see no error in the finding of the first respondent. Section 5 (9) of the South African Schools Act expressly authorizes her to consider any appeal. The provision does not deal with the manner or form the appeal should take. The section does not state she has no authority to overrule any decision taken by the first applicant and makes no reference to referring the matter back to the principal of the first applicant, which would, in any event, be review proceedings. SASA provides for an appeal process. The first respondent considered the appeal within the framework of the school's policy and, to my mind, her finding was correct. A surprisingly large number of learners who do not live as close to the school as the learner were granted places in the school. Among these were, inter alia, children from disadvantaged communities, a child who was granted a sports scholarship, others were provided with a place due to their parents being alumni or because their siblings attended the school while yet others applications were approved by virtue of the fact that their parents' place of employment was in relatively close proximity to the school. These do not fall within the ambit of the school policy.

[16] The learner resides in extremely close proximity to the school and it is the most convenient school. The second respondent applied timeously and I do not consider his statement to the effect that the learner was in good health to be dishonest. It cannot be assumed that every child who has ever had an operation, suffered an injury or is on chronic medication is not in good health in the ordinary course, which is effectively what the applicants seem to be alleging. To my mind the first respondent has applied the school's policy correctly. I am however concerned that the applicants seem to believe that they are not obliged to admit the learner nowithstanding the decision taken by the first respondent. In the circumstances, I order as follows:

a. **The application is dismissed with costs**

b. **The applicants shall admit the learner to the school for Grade 8 2021.**

GIBSON, A J