IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2612/2018

In the application between:-

THE SCHOOL GOVERNING BODY GREY COLLEGE, BLOEMFONTEIN	Applicant
And	
DEON SCHEEPERS	1st Respondent
THE MEC: DEPARTMENT OF EDUCATION, FREE STATE PROVINCE	2nd Respondent
JURIE GELDENHUYS	3rd Respondent
THE NATIONAL MINISTER OF EDUCATION	4th Respondent
SOUTH AFRICAN TEACHERS UNION (SAOU)	Intervening Party

CORAM:	MUSI, AJP *et* VAN ZYL, ADJP
HEARD ON:	19 NOVEMBER 2018
JUDGMENT BY:	MUSI, AJP
DELIVERED ON:	17 JANUARY 2019

Introduction

[1] This is an application for leave to appeal against our judgment that was delivered on 6 September 2018, in which we made the following order:

> "1. The first respondent is ordered to pay the costs, including the costs of two counsel, of the intervening party in respect of the application to intervene and the striking out application.

2. The conditional counter-application is dismissed with costs, including the costs of two counsel.
3. Paragraphs 1 and 2 (excluding the alternative to paragraph 2) of the applicant's notice of motion and paragraph 2.1 of the intervening party's notice of motion are granted with costs, including the costs occasioned by each of them employing two counsel. Such costs to include the costs of 8 June 2018."

[2] The application for leave to appeal is sought on approximately 18 grounds. The costs orders made against the applicant are also the subject of this application. The applicant abandoned the suspension of the operation and execution of paragraph 3 of our order, excluding the parts dealing with costs.[1]

Section 17 (1)

[3] Applications for leave to appeal are regulated by Section 17(1) of the Superior Courts Act 10 of 2013 (SCA). It reads as follows:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (a) (i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] This application was predicated upon sections 17(1)(a)(i) and/or (ii). Section 17(1)(a)(i) has not only raised the bar for applications for leave to appeal but also fettered the Judge's discretion when considering such applications. Leave to appeal may only be given when the Judge or Judges are of the opinion that the appeal would have a reasonable prospect of success. The

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[1] Section 18 of the Superior Courts Act provides:

"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

word "only" is indicative of the fact that this section limits the Judge's discretion to grant leave to appeal. The Judge's discretion is circumscribed because he or she may not grant leave to appeal based on a reason other than the one mentioned in it. Considerations such as an applicant, for leave to appeal, having an arguable case or that there is a possibility of success on appeal are irrelevant.[2]

[5] It has correctly been said that the word "would" in the section points to the legislature's aim of raising the bar in applications for leave to appeal. In **The Mont Chevaux Trust v Tina Goosen and 18 Others**[3] it was stated that:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion... The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court which judgment is sought to be appealed against."[4]

[6] Whether there is a compelling reason why the appeal should be heard will depend on the facts of a particular case. There must be a strong reason for granting leave to appeal on this ground. Some reasons may be compelling whilst others may not be. The Court should give careful and proper consideration to the reason advanced before categorizing it as compelling. Section 17(1)(a)(ii) should therefore not be invoked for flimsy reasons.

[7] Although the applicants did not argue all the grounds of appeal, we decided to consider all of them, lest we be criticised for not considering them because they were not expressly abandoned. I now consider the grounds of appeal seriatim.

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[2] Mothuloe Incorporated Attorneys v The Law Society of the Northern Province 2017 JDR 533 (SCA) at para 18.
[3] Unreported judgment of the Land Claims Court of South Africa Case No LCC 14R/2014.
[4] Ibid para 6. See also Wools v Wools 2018 JDR 1191 (FB).

Grounds 1.1 and 1.2[5]

[8] These two grounds can be considered together. The applicants contended that we erred and misdirected ourselves in finding that the School Governing Body (SGB) abdicated its powers or functions because this was not the case or submissions of the principal or the SGB. Furthermore, that we should have declared the conduct of the principal unlawful and set it aside as prayed for in the conditional counter-application. These grounds of appeal are based on a total misunderstanding of the judgment. In paragraph [58] of the judgment we said the following:

> "In this case, counsel for the SGB correctly conceded that there was no express or tacit delegation of power by the SGB to the principal. The SGB therefore abdicated its power or functions in as far as the principal exercised functions that were in the exclusive preserve of the SGB. It can therefore be said that the principal usurped the powers and functions of the SGB. It must however be noted that the principal can only usurp powers or functions which are not functions and responsibilities entrusted to him by the Act, any other legislation or policy. If the Act, any other legislation or policy allows him or her to exercise a function or power that the SGB is also empowered to exercise then there cannot be any unlawful exercise of power."

[9] It is clear from the above paragraph that our finding was that the principal could not usurp a power or function that was in any event entrusted to him by legislation or policy. We proceeded to indicate in each instance, that the Schools Act and/or Departmental policy endowed the principal with the rights, powers or functions that the SGB endeavoured to take away. In the last sentence of para [58] we clearly stated that if legislation or policy allows the principal to exercise a power or function that the SGB is also empowered to exercise then there cannot be any unlawful exercise of power. The conditional counter-application would not have been of any assistance to the applicants.

[10] The SGB's case has always been that the principal exercised powers that ought to have been exercised by it. The principal's contention has always been that he exercised the powers and functions entrusted to him by the Schools Act. It is clear that the applicant's counsel conceded that the SGB did

[5] I use the applicant's numbering for the sake of convenience.

not expressly or tacitly delegate any powers or functions to the principal. This issue was therefore raised in argument.

Ground 1.3

[11] The third ground of appeal was that we erred in finding that the SGB's resolution had an adverse effect on the principal's right to manage the school and constituted administrative action which is subject to review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The applicants contended that the resolution amounted to a policy decision and that no rights were adversely affected. The applicants unduly restrict the meaning of the word "right" in PAJA.

[12] In **Secretary for Inland Revenue v Kirsch**[6] it was said that:

> "The word "right", in legal parlance, is not necessarily synonymous with the concept of a "legal right" which is the correlative of a duty or obligation. On the contrary, legal literature abounds with "right" being used in a much wider sense and, as is pointed out in Salmond on Jurisprudence 11th ed at 270, in a laxer sense to include any legally recognised interest whether it corresponds to a legal duty or not."[7]

[13] This principle was underscored in **Sandown Hotel v Kleinmond Drankwinkel**[8] where a privilege was held to be a right. Van Winsen J said the following:

> "Nevertheless, it is difficult to resist the conclusion that once he is afforded such privilege and for so long as he continues to retain it and claim to be exercising a "right" in the generally accepted sense of the word to do so. It is a protected interest afforded him under the operation of the machinery provided by the Liquor Act, and it is open to him to appeal to the Courts to assist him to have it protected. To that extent, too, it justifies the description of a right, and there is a correlative duty on everyone else to refrain from interfering with it. The fact that it is a right *vis-a-vis* the world in general and not merely one against another contracting party would not, in my view, exclude it from the concept of being a right."[9]

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[6] Secretary for Inland Revenue v Kirsch 1978 (3) SA 93 (T).
[7] Ibid p94.
[8] Sandown Hotel (Pty) Ltd v Kleinmond Drankwinkel (Edms) Bpk 1979 (1) SA 655 (C).
[9] Ibid 658.

[14] Fitzgerald[10] defines a legal right in the generic sense as "any advantage or benefit conferred upon a person by a rule of law".[11] He further identifies four kinds of rights, *viz* rights in the strict sense, liberties, powers and immunities.[12] A "right" therefore has a wider and a strict meaning. There is nothing in PAJA that suggests that only rights in the strict sense of the word are worthy of protection. Rights in the wider sense of the word may therefore be protected by using PAJA.

[15] In **Bullock NO v Provincial Government, North West Province**[13] it was said that "a decision of an organ of State may relate to a question of policy, and the policy itself may not be open to judicial scrutiny".[14]The decision to denude the principal of some of his rights was not a policy decision. It was, however, emphasised that "one of the ways in which the courts have in the past controlled, and will continue to control, the exercise of public power is to examine whether the organ of State which has exercised such power has complied with the requirements of the legislation which governs such exercise".[15]The South African Schools Act (SASA)[16] does not give a SGB the power to take away the principals rights.

[16] The SASA and the other policy documents mentioned in the judgment gives the principal, as a representative of the Head of Department and as an educator rights and powers. The principal had a right to perform the functions, powers and privileges entrusted to him by the SASA and policy documents. We have pointed out the various sections and instruments in the judgment and it is not necessary to repeat same herein. The resolution of the SGB denuded him of the right to exercise those powers, functions and privileges. His rights were therefore adversely affected by the SGB's decision.

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[10] PJ Fitzgerald: *Salmond on Jurisprudence* 12th ed Sweet & Maxwell 1966.
[11] Ibid p 41.
[12] Ibid.
[13] Bullock NO and Others v Provincial Government, North West Province and Another 2004 (5) SA 262 (SCA).
[14] Ibid para 15.
[15] Ibid para 17.
[16] Act 84 of 1996

Ground 1.4

[17] The applicant contended that we erred in finding that the resolution minimised the role and input of one partner. The SASA gives the principal duties to assist the SGB. The SGB took its resolution without consideration or proper consideration of the duties entrusted to the principal by, *inter alia*, section 16A of the SASA.

[18] The denuding of the principal's functions and giving or purportedly delegating the principal's financial functions to someone else was indeed vague, unstructured and unlawful. Worse still, they were given to an educator without involving that educator's employer. This ground is also without merit.

Ground 1.5

[19] The next ground is that we failed to consider that the principal is accountable to the SGB. This point was never part of the controversies in this case. We had no issue with the SGB's power to make policy that is lawful. The principal is accountable to the SGB for financial and property matters. The SGB governs the school and the principal manages the school and assists the SGB.

Ground 1.6

[20] The applicant contended that the Principal's Administrative Measures (PAM) are not binding between the principal and the SGB. The judgment does not say it is. It clearly states that the principal is bound by the PAM because it is a policy of his employer. He would have ignored it at his own peril and on pain of sanction, including dismissal.

Ground 1.7

[21] The contention that we should not have considered the PAM in order to discern what functions are given to the principal by legislation or official policy, is misplaced. Section 16A(3) makes plain that the principal may not act contrary to the PAM. It provides that:

"(3) The *principal* must assist the *governing body* in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with—

(*a*) instructions of the *Head of Department*;

(*b*) legislation or policy;

(*c*) an obligation that he or she has towards the *Head of Department*, the *Member of the Executive Council* or the *Minister*; or

(*d*) a provision of the Employment of Educators Act, 1998 (Act No. 76 of 1998), and the Personnel Administration Measures determined in terms thereof."

Ground 1.8

[22] The applicant contended that we erred in finding that "school activity" is defined very wide in the SASA. The regulations for safety measures at schools which were promulgated to support the SASA defines "school activity" as "any educational, cultural, sporting or social activity of the school within or outside the premises".[17] The centrality of the principal's role in school activities is comprehensively set out in the regulations. Both the SASA and the regulations define "school activity" widely. This ground has no merit.

Ground 1.9

[23] The applicant averred that we erred in finding that the SGB could not strip the principal of his responsibility over the hostel and related activities. We have referred to the provisions of the PAM and the duties which they impose on the principal. If the SGB wanted to strip him of those functions it could only do so with the permission of his employer or, if it had such power, by giving him a fair opportunity to make representation.

Grounds 1.10 to 1.14

[24] These grounds are fully canvassed and addressed in the judgment and no purpose would be served by elaborating on or repeating what was said in the judgment in respect of those issues.

Ground 1.15

[25] I find ground 1.15 very strange, to say the least. We specifically invited the applicant's legal team to address us on the conditional counter-application

[17] Regulations for Safety Measures Public Schools GN 1040 of 12 October 2001 as amended.

and they expressly said that they had no submissions to make on the conditional counter-application. To now allege that they argued that "the SGB would fall by its submission on papers (sic) and no further oral submission to be made (sic) in Court based on the interaction between the bench and the leader of the legal team" is extremely rich, considering that they were given an opportunity and decided to say nothing.

Ground 1.16

[26] The applicant argued that we erred in finding that section 41 of the Constitution does not apply to the facts of this particular case. This ground also lacks merit. The principal is both an educator and an organ of State. The dual role of a principal should not be conflated as the applicant endeavoured to do. "Principal" is defined in the SASA as an educator appointed or acting as the head of a school. "Educator" is defined as follows:

> "'***educator***' means any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a *school*;"

[27] The principal, when he asserts his rights as an educator is not an organ of State. When he acts as the HOD's representative, then he is an organ of State.[18] The principal in this matter acted as an employee of the Department of Education who is given certain rights, duties, privileges and responsibilities by legislation and official policy and not as an organ of State. He wanted to protect his rights as an educator and not as a representative of the HOD.

Grounds 1.17 and 1.18

[28] These grounds relate to the standing of the SAOU. We have set out all the bases on which it had standing. In any event, even if the point about section 38(e) of the Constitution is a good point it is not dispositive of the standing issue. We found that the union had standing on other grounds as well. The

[18] Izak "Sakkie" Prinsloo explains the dual role of a principal in the *South African Journal of Education* vol. 36 no 2 May 2016. The title of the article summarizes what the applicant is grappling with. The title is "The dual role of the principal as employee of the Department of Education and ex officio member of the governing body".

union convinced us that it had a direct and substantial interest in the subject-matter of this controversy. This finding is not challenged by the applicant.

Costs grounds

[29] The intervening party was ready to argue the application to intervene on 8 June 2018. The applicant was not. The principal came to Court to vindicate his rights and there was no reason not to grant him and the intervening party costs. We exercised our discretion based on the well accepted principle that costs follow the success and the general conduct of the SGB in this case. The HOD expressly asked them to rescind their resolution but they unnecessarily and stubbornly refused. The applicant did not argue that we granted the costs orders based upon a wrong principle or that we considered irrelevant issues when exercising our discretion against it.

[30] We are convinced that there are no reasonable prospects that this appeal would succeed.

Section 17(1)(a)(ii)

[31] I now consider section 17(1)(a)(ii) of the SCA. The applicant contended that leave to appeal should be granted since the entire relationship between the educational partners and the designation and allocation of functions are at stake. It averred that it would be in the public interest to have this matter heard by a higher Court.

[32] This is a surprising *volte-face*. In its papers opposing the intervention of the union it stated that this matter has no bearing on other principals. It further contended that its decision is clearly "not a legal precedent to be applied by all the SGBs in the country. It is not speaking on behalf of any other SGBs, but each case at a particular school will have to be determined on its own assessed merits pertaining to the prevailing circumstances at that particular school by its SGB and the relevant stakeholders".

[33] When we heard the application to intervene it was important to decide whether an SGB has the power to delegate and under what circumstances it

may retract its delegation. That would have had a bearing on other principals. Our findings with regard to those issues are not challenged by the SGB. The other findings are fact specific and are certainly not compelling reasons to grant leave to appeal. The interests of justice militate against leave to appeal being granted.

[34] What does our judgment say?

34.1) That a SGB may delegate some of its powers.

34.2) It may delegate it to the principal or any other person or committee.

34.3) In the case of the principal, it should consider carefully whether the powers which it intent to delegate are, in any event, powers which the principal may exercise in terms of an Act or any other policy instrument.

34.4) The SGB may retract, at any time, any of its powers delegated to the principle or any other person or committee. No formality is required where none is prescribed.

34.5) The SGB may not deploy an educator, employed by the MEC, without involving the MEC who is the employer of such educator. It may do so if it has employed the educator.

34.6) A principle has a dual role first, as a representative of the HOD and therefore an organ of State and second as an educator and not an organ of State in this capacity.

34.7) A principal's rights, in the wide sense, are sourced not only in the Act but also in the regulations, the PAM and other official Departmental policy documents.

34.8) When a SGB is of the view that it may interfere with a principal's right, it may only do so after adhering to the rules of natural or fundamental justice.

[35] All the findings in paragraph 34 are, in our view, beyond controversy. The argument that the Supreme Court of Appeal must determine what powers may be delegated by a SGB cannot be countenanced. That is a decision best left to a specific SGB and principal and is certainly not a compelling reason.

Order

[36] The following order is issued.

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

pp **C.J. MUSI, AJP**

I concur.

C. VAN ZYL, ADJP

Appearances:

For the Applicant: Adv MJ Engelbrecht
With Adv MJ Merabe
Instructed by Horn & Van Rensburg Attorneys
Bloemfontein

For the 1st Respondent: Adv WA Van Aswegen
Instructed by Peyper Attorneys
Bloemfontein

For the Intervening Party: Adv N Snellenburg SC
With Adv CD Pienaar
Instructed by Lovius Block Attorneys
Bloemfontein