# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Reportable
Case no:454/12

In the matter between:

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| **THE KENMONT SCHOOL** | **First Appellant** |
| **THE KENMONT SCHOOL GOVERNING BODY** | **Second Appellant** |
| and | |
| **D M** | **First Respondent** |
| **PROVINCIAL HEAD OF THE DEPARTMENT OF EDUCATION** | **Second Respondent** |
| **MEMBER OF THE EXECUTIVE COUNCIL** | **Third Respondent** |
| **MATSIE ANGELINA MOTSHEKGA NO** | **Fourth Respondent** |

**Neutral citation:** *The Kenmont School & another v Moodley & others* (454/12) [2013] ZASCA 79 (30 May 2013)

**Bench:** **PONNAN and TSHIQI JJA, PLASKET, VAN DER MERWE and SALDULKER AJJA**

**Heard:** **21 MAY 2013**

**Delivered:** **30 MAY 2013**

**Summary:** **Appeal – s 21A(1) of the Supreme Court Act – power of court to dismiss appeal where judgment or order sought would have no practical effect or result.**

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**ORDER**

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**On appeal from**: KwaZulu-Natal High Court (Pretoria) (Mbatha J sitting as court of first instance):

The appeal is dismissed with costs.

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**JUDGMENT**

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**PONNAN JA (TSHIQI JA and PLASKET, VAN DER MERWE and SALDULKER AJJA concurring):**

[1] In this appeal counsel were, at the outset of the hearing, required to address argument on the preliminary question of whether the appeal and any order made thereon would, within the meaning of Section 21A of the Supreme Court Act 59 of 1959, have any practical effect or result. After hearing argument on this issue the appeal was dismissed on 21 May 2013 in terms of that section and the appellants were ordered, jointly and severally, to pay the costs of the appeal. It was intimated then that reasons would follow. These are those reasons.

[2] Courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA), this court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits as the order sought would have no practical effect. It referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26 where the following was said:

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.'

Section 21A(1) of the Supreme Court Act 59 of 1959 provides:

'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

Of s 21A, this court stated in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.'

The primary question therefore, one to which I now turn, was whether the judgment sought in this appeal would have any practical effect or result. It arises against the backdrop of the following facts.

[3] The first appellant, the Kenmont School (the school), which is situated in Umlazi, KwaZulu Natal, is a school designated for children with specific learning disabilities. One such child is R, the son of DM, the first respondent (DM), who was first enrolled at the school some nine years ago as a grade four learner. On 15 January 2010 DM was informed that the second appellant, the governing body of the school (the governing body), had taken a decision to exclude R from attending the school. That decision by the governing body prompted DM to approach the KwaZulu-Natal High Court (Durban) by way of urgency for an order in effect that R be re-instated as a learner at the school. In addition to the school and the governing body, the Provincial Head of the Department of Education as contemplated in s 1 of the South African Schools Act 84 of 1996, the Member of the Executive Council (Education) of KwaZulu-Natal and the National Minister of Education, were cited as the third to fifth respondents. No relief was however sought against them and they accordingly chose to abide the decision of the High Court.

[4] The school and the governing body opposed the application primarily on two bases: first, that there had been prior litigation between the parties which had culminated in a settlement agreement in terms of which it had been agreed that R would leave the school at the end of 2009; and, second, because of R's on-going

behavioural problems and his propensity to resort to violent behaviour, which had placed the educators and other learners at risk, the governing body had resolved not to re-admit him to the school for the 2010 academic year.

[5] In support of its contention that it was entitled to refuse re-admission to R, the deputy principal of the school, who deposed to the answering affidavit on behalf of the school and the governing body stated:

'37.

Mindful of the need to balance the individual tolerance against the needs of the majority, towards the end of 2009, the Second Respondent [the governing body] implemented a revised admissions policy to govern admissions for the First Respondent [the school]. (I submit that [the governing body] has the power to do so in terms of Section 5(5) of the South African Schools Act, 1996.)

38.

The revised policy appears at paragraph 4 of Annexure "DM30". It effectively creates a situation where a learner would automatically qualify for annual re-admission unless one or more of the criteria for refusal of admission exist.

39.

In light of the revised admissions policy, the Second Respondent :

(a) considered that [R] did not qualify for re-admission to the First Respondent in 2010;

(b) invited representations from [DM] before it made a decision (see annexures "DM15" and "DM21";

(c) received no representations on the merits (see annexure "DM20");

(d) then determined that [R] did not qualify for re-admission in 2010, for the reasons set out in the minute of that meeting (copy of which is annexure "I").'

[6] On 18 February 2010 the matter came before Msimang DJP who, by consent, made the following order:

'3. Pending the hearing of the application on the Opposed Roll:

(a) The First and Second Respondents [the school and governing body] are directed to make available to [R] (the minor child):

(i) an office on the Kenmont school premises for the minor child to receive specialised education;

(ii) existing educators to teach the minor child his computer and Afrikaans subjects;

(b) the Third and Fourth Respondents are directed to employ an educator individually to educate the minor child in the remaining subjects, in such office at the school premises;

(c) the minor child shall enjoy breaks at different times to that enjoyed by other learners, so as to ensure that he does not interact with the other learners.

4. It is recorded that the First to Fourth Respondents have undertaken to make arrangements for the minor child to be examined and treated by a suitable psychologist.

5. The Applicant and the minor child are directed to co-operate fully with the psychologist and comply with any counselling or treatment recommended to the minor child and/or the Applicant.'

[7] The matter ultimately came to be argued before Mbatha AJ on 13 April 2011 who reserved judgment and notwithstanding the evident urgency of the matter handed down a written judgment approximately one year later on 30 March 2012. The learned Judge held that '... the amended Admission Policy of the school is not *ultra vires* for the reasons given by the third to fifth respondents'. She then proceeded to a consideration of '… whether the decision taken by the school in terms of the amended Admission Policy of the school to exclude the boy from the school in the beginning of 2010 should be reviewed and set aside'. In dealing with that enquiry the learned judge stated:

'[50] What remains to be considered is whether the decision taken by the school in terms of the amended Admission Policy of the school to exclude the boy from the school in the beginning of 2010 should be reviewed and set aside. In deliberating on this question I cannot even begin to assess the decision on its merits. The papers bristle with factual disputes about whether the boy is the menace that he is painted to be by the school or simply being the scapegoat of prejudice on the part of the school.'

That notwithstanding she proceeded to find for DM. She accordingly made the following order:

'(a) The decision/action of the First and Second Respondents [the school and governing body] not to re-admit or re-instate [R] to Kenmont School, Durban, is hereby reviewed and set aside.

(b) The First and Second Respondents are directed to immediately admit and re-instate [R] to Kenmont School, Durban, with immediate effect.

(c) The costs of this application are to be paid by the First and Second Respondents jointly and severally, including the reserved costs but excluding the costs incurred during November 2010 when the matter came before Ntshangase J.'

[8] In arriving at that conclusion the learned judge stated:

'[51] There are, however, certain findings that I can make on the papers without any difficulty on a balance of probabilities, that may have a bearing on this question and I list the facts that I find to be incontrovertible below:

(a) The boy was never convicted of any misconduct by a disciplinary hearing.

(b) The school was desperate to get rid of the boy for the 2010 school year as evidenced by its willingness to compromise the disciplinary process to achieve that objective.

(c) The school was distraught when it appeared that the applicant was not going to abide by the agreement for the boy not to be accommodated by the school during the 2010 school year.

(d) The school only came to know about the *volte face* of the applicant (concerning the undertaking to remove the boy from the school) in December 2009 and there would not have been time to resume the disciplinary hearing.

(e) The amended Admission Policy was implemented by the school with the boy in mind and designed to be used as a tool to preclude the boy from admission to the school during 2010. The amended Admission Policy was first mentioned in correspondence on 17 December 2009 and the school admitted that the boy was the only learner affected by this policy for the beginning of the 2010 school year.'

That impelled her to the finding that:

'[53] The amended Admission Policy of the school was implemented in bad faith and for the ulterior motive of excluding the boy from attending the school in 2010 without having to go through the rigours of a disciplinary hearing. The fact that the amended Admission Policy in itself may have been within the powers of the school to adopt cannot hide the sinister reason behind its adoption and offends against PAJA. Section 3 of PAJA enjoins a court to treat each case on its own merits and in my judgment the decision to refuse the boy entry to the school in 2010 offends against administrative fairness and ought to be reviewed and set aside.'

[9] I entertain some reservations as to whether it was permissible on the disputed allegations on the papers as they stood for the learned judge to have arrived at several of what she describes as the incontrovertible findings listed in paragraph 51 of her judgment. But it is not necessary that any firm view be expressed on the correctness of her judgment, for, by the time she delivered her judgment in the matter R was already in grade 12. And by the time she granted leave to appeal to this court half of that academic year had already run its course. In heads of argument

filed on behalf of the first respondent we were informed that R is no longer a learner at the school, having matriculated at the end of 2012. It was in those circumstances that the registrar of this court was directed to enquire of the appellants whether they still persisted in the appeal and inform them that at the outset of the hearing of the appeal they would be required to address argument on the preliminary question of whether the appeal and any order made thereon would within the meaning of s 21A have any practical effect or result.

[10] In the further heads of argument filed on behalf of the appellants to address the preliminary point raised, as also from the bar in this court, it was urged upon us that although the primary relief, the subject of the dispute in the high court, may well be moot, we should nonetheless proceed to a consideration of the appeal on the merits. Various reasons were sought to be advanced most notably that: (a) the school needs to know whether it has the power to amend its admission policy; (b) the school principal may be subject to disciplinary proceedings; (c) other learners at the school may in the future be affected by the outcome of this appeal; (d) other schools could possibly benefit from a judgment of this court; and (e) there may in the future be other litigation between the same parties.

[11] *As to (a):* The high court held in the appellant's favour that they had the power to adopt the amended admission policy. It found against the appellants on a much narrower basis, namely that in applying that policy they were motivated by an ulterior purpose. The finding that the appellants did indeed have the power to amend the policy and that in doing so they had not acted ultra vires is not the subject of a cross-appeal. That disposes of the point. *As to (b):* The matter commenced in January 2010. Some three years have elapsed since then. In that time not a single step has been taken by the principal's employer to discipline her. Counsel was thus constrained to concede that any likely possibility of her employer now doing so would be rather remote. Moreover, the principal having recused herself, was not a party to the decision to exclude R from the school. That decision was taken by the governing body. In those circumstances one can hardly imagine that charges of insubordination could be levelled against her.

[12] *As to (c), (d) and (e):* Given the common ground that has to be covered it may be convenient to consider these three points together. None of these issues present as discrete legal issues of public importance (*Qoboshiyane NO & others v Avusa Publishing Eastern Cape & others (Pty) Ltd* 2013 (3) SA 315 (SCA) para 5). All three are primarily fact-based enquiries. It is trite that every case has to be decided on its own facts. And efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. For, as we well know, parties frequently endeavour to distinguish their case on the facts from those reported decisions adverse to them. Moreover, absent an undisputed factual substratum, it would be extremely difficult to define the limits of any order that should issue in this case. In *Clear Enterprises (Pty) Ltd v SARS* (757/10) [2011] ZASCA 164 (29 September 2011) this court held:

'[17] Simply put, whatever issues do arise in the pending matters none of them are yet "ripe" for adjudication by this court. To borrow from Kriegler J in *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199:

"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, 'ripeness'. That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor *Sharpe* points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."

[18] Although expressed somewhat differently and in the different context of constitutional adjudication where "ripeness" has taken on a particular meaning, both the principles and policy considerations articulated by Kriegler J resonate with the jurisprudence of this court. Thus in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 9, Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington* [1987] 1 All ER 929 (HL), which concluded at 930*g*:

"It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

In a similar vein, in *Western Cape Education Department v George* 1998 (3) SA 77 (SCA) at 84E, Howie JA stated:

"Finally, it is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case."

And in *Radio Pretoria* (para 44), Navsa JA said:

"Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise (see the *Coin Security* case (*supra*) at paragraph [7] (875A-D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation."

[19] In effect what the parties are seeking is legal advice from this court. But as Innes CJ observed in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 footnote 18, the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said:

"A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."'

[13] The cumulative consequence of all the factors that I have alluded to is that no practical effect or result can be achieved in this case. For the aforegoing reasons the appeal was dismissed.

[14] That leaves costs. As early as May 2012, in an affidavit filed by R in opposition to the application for leave to appeal it was contended that by the time the appeal came to be heard it would have become moot. In that regard R stated:

'4.

I find it strange that the Respondents [the school and governing body] are proceeding with an application for leave to appeal when it is clear that by the time the appeal is heard (if leave to appeal is granted) the whole issue of my continued presence at the school will have become academic. Even if the leave to appeal was to be heard in June and leave granted in June it is highly unlikely that the appeal will be heard by October 2012.

5.

I am in my matric year and there are approximately three (3) month of the academic year prior to the examinations. The mid-year vacation begins on 22nd June 2012 and end 15th July 2012. School re-opens on 16th July 2012.

Shortly after school re-opens the syllabi in the different subjects will have to be completed and the trial examination held sometime between the period end of July and 28th September 2012. The final examination begins in October 2012 and is expected to be completed towards the end of November 2012. Two (2) weeks prior to the commencement of the final examinations I will be on study leave and will not be attending school.'

That notwithstanding, the appellants sought and obtained leave to appeal to this court. Even after 5 April 2013, when the registrar of this court had directed the attention of both parties to the provisions of s 21A and enquired whether the appeal was being persisted in there was no pause for reflection on the part of the appellants. Undaunted, they filed additional heads of argument and affidavits. Nor, even after further time for reflection, was there any modification of that stance in argument before us. And since the respondent was not brought before this court as a willing party no cause existed for departing from the normal rule as to costs which were accordingly ordered to follow the result with the consequence that the appellants have to pay them jointly and severally.

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**V PONNAN**
**JUDGE OF APPEAL**

APPEARANCES:

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|---|---|
| For Appellants: | J Marais SC |
| | Instructed by:<br>Norton Rose South Africa<br>La Lucia Ridge<br>Webbers<br>Bloemfontein |
| For Respondents: | D D Naidoo |
| | Instructed by:<br>Viren Singh & Company<br>Durban<br>Mthembu & Van Vuuren Inc<br>Bloemfontein |