



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 633/2016

In the matter between:

PRINCIPAL, MBILWI HIGH SCHOOL

FIRST APPELLANT

**CHAIRPERSON OF SCHOOL GOVERNING
BODY OF MBILWI HIGH SCHOOL**

SECOND APPELLANT

**SENIOR DISTRICT MANAGER, VHEMBE
DISTRICT, DEPARTMENT OF BASIC
EDUCATION**

THIRD APPELLANT

**MEC OF EDUCATION,
LIMPOPO PROVINCE**

FOURTH APPELLANT

and

RM (OBO OM)

RESPONDENT

Neutral citation: *Principal of Mbilwi High School v RM* (633/2016) [2017]
ZASCA 72 (1 June 2017)

Coram: Ponnann, Theron, Majiedt, Wallis and Zondi JJA

Heard: 16 May 2017

Delivered: 1 June 2017

Summary: Appeal: mootness: the court should exercise its discretion to hear an appeal where it relates to the proper construction and application of important provisions in the National Education Policy that will impact on the future conduct of education officials and learners.

Interpretation: the high court misinterpreted the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grade R-12.

ORDER

On appeal from: Limpopo Local Division of the High Court, Thohoyandou (Makhafola J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

‘(i) The Rule Nisi granted on 30 January 2015 is discharged.

(ii) The applicant is directed to pay the costs of this application.’

JUDGMENT

Theron JA (Ponnan, Majiedt, Wallis and Zondi JJA concurring):

[1] The main issue in this appeal is the interpretation and application of the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grade R-12 (the National Policy) issued by the

Department of Education. In particular it concerns the progression, promotion and retention of learners in the senior phase of the school program.

[2] The facts giving rise to this matter are largely common cause. OM, a minor, was a learner at Mbilwi High School (the school) from 2011 until 2014. He was in grade 11 in 2014. The school routinely assessed learners throughout the academic year and usually held at least two meetings with parents where such assessments were discussed. OM was assessed during the 2014 academic year. At the end of the first term he obtained an aggregate mark of 63.1%, during the second term 43.7% and during the third term 46.7%. The final assessment for the 2014 academic year was conducted in November and he obtained an aggregate of 49.7% but he failed two subjects, namely, Mathematics and Physical Sciences, having achieved less than 30 per cent in both subjects. According to the school, because he had failed to satisfy the requirements for promotion to grade 12, it was obliged to retain him in grade 11.

[3] During January 2015, the respondent, RM, the father and natural guardian of OM, lodged a complaint with the school about his son's retention in grade 11 and sought to have him progressed to grade 12. The school said that it was not entitled to do so and, after a re-mark of the mathematics and physical science papers did not result in an improvement in his marks, maintained that stance. On 6 January 2015, the respondent lodged an appeal with the third appellant, which appeal was dismissed.

[4] On 30 January 2015, the respondent, in his capacity as parent and natural guardian of OM, brought an urgent application in the Limpopo Local Division of the High Court (the high court), against the appellants. The first appellant is the

principal of the school. The second appellant is the chairperson of the Governing Body of the school. The third appellant is the Senior District Manager for the Vhembe District, Department of Education in Limpopo. The fourth respondent is the Member of the Executive Council, responsible for basic education in the province of Limpopo.

[5] The respondent, inter alia, sought the following urgent relief in the high court:

- (i) That the decision of the school management team in refusing to promote OM from grade 11 to grade 12 was unlawful and be set aside.
- (ii) That the decision of the third appellant in dismissing the respondent's appeal was unlawful and be set aside.
- (iii) Directing that the school promote OM from grade 11 to grade 12 with immediate effect.
- (iv) Directing that the school's non-compliance with the Procedure Manual for Promotion and Submission of 2014/11 GET Grades 9, and NSC Grades 10 and 11 schedules and summaries, instruction 47 of 2014 (the Procedure Manual), was unlawful.
- (v) Directing that the school comply with the provisions of the Procedure Manual.

[6] On that same day, 30 January 2015, and by agreement between the parties, an interim order was issued which essentially provided for the relief sought by the respondent. The interim order was confirmed on 31 March 2015. On 10 April 2015, the appellants applied for leave to appeal. On 14 April 2015, the respondent applied for and succeeded with an application in terms of Rule 49(11) for

execution of the order pending the application for leave to appeal. OM thus progressed to grade 12 in 2015.

[7] The reasons for the judgment were handed down on 18 October 2015. On 23 February 2016, the application for leave to appeal was refused by the high court. The first appellant appeals with the leave of this court. While there was an appearance for the respondent at the hearing of this matter, the matter was not opposed.

[8] It was common cause that the outcome of this appeal would have no practical effect as between the parties. By the time the reasons for judgment were handed down on 18 October 2015, the learner had almost completed grade 12. The preliminary question in this matter is whether this court should, in any event, entertain this appeal.

[9] Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 is relevant and reads:

‘When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

The primary object of s 16(2)(a)(i) is to alleviate the heavy workload of courts of appeal.¹ It is founded upon the principle that courts of law exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to advise upon differing contentions.²

¹ *Absa Bank Ltd v Van Rensburg* [2014] ZASCA 34;2014 (4) SA 626 (SCA) at 631E; *Premier, Provinsie Mpumalanga & ‘n ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) at 1137G-HD.

² *Tshwane City v Nambiti Technologies & others (Pty) Ltd* [2015] ZASCA 167; 2016 (2) SA 494 (SCA) paras 5-7; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, & another* 2005 (1) SA 47 (SCA) at 48B-C; *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) at 510H-511B; *The Merak S; Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) at 276G-I.

The Constitutional Court has stated that:

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract proposition of law.’³

[10] Section 16(2)(a)(i) confers a discretion on this court to hear an appeal notwithstanding mootness.⁴ Accordingly, the court on appeal may in appropriate cases, notwithstanding the mootness of the issue as between the parties to the litigation, hear an appeal where important questions of law are raised which are likely to arise in the future.⁵

[11] In my view, the proper interpretation and application of the provisions of the National Policy are important matters of law which will arise in future. The decision in this appeal extends beyond the parties. The precedential potential of this court’s decision is similar to that in *Motor Industry Staff Association v Macun NO & others*,⁶ where Navsa JA, writing for the court, stated:

‘Had it not been for the precedential potential of the present case, it might well have been liable to be dismissed in terms of s 16(2)(a)(i) of the Superior Courts Act 10 of 2013 on the basis that it would, in the circumstances of the present case, have no practical effect.’⁷

[12] Central to this matter is the question whether a learner may be progressed at all after having failed, for the first time, to meet the requirements for promotion.

³ *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 fn 18 and cases cited therein.

⁴ *Centre for Child Law v Hoërskool Fochville & another* [2015] ZASCA 155; 2016 (2) SA 121 (SCA) para 11; *Absa Bank v Van Rensburg*, supra, at 629F.

⁵ *Absa Bank v Van Rensburg*, supra, at 629F-630D (and cases referred to therein); *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) at 319B-E. *Centre for Child Law* supra para 11; *Sebola & another v Standard Bank of South Africa Ltd & another* [2012] ZACC 11; 2012 (5) SA 142 (CC); *Land en Landbouontwikkelingsbank van Suid-Afrika* supra; *The Merak S* supra.

⁶ *Motor Industry Staff Association v Macun NO & others* [2015] ZASCA 190; 2016 (5) SA 76 (SCA) [2016] 3 BLLR 284 (SCA).

⁷ *Ibid*, para 25.

The decision of the court a quo stands as a clear precedent that progression is to be considered by the National Department of Education (the department) in such cases. The issue in this matter on which the adjudication of this court is required involves the proper construction and application of provisions in the National Policy which will impact on the future conduct of the appellants as well as learners.⁸ In these circumstances, this court should exercise its discretion to entertain the appeal.

[13] The applicable legislative framework is primarily to be found in the National Policy and the Procedure Manual. The Procedure Manual consists of three Annexures. Annexure ‘A’ deals with promotion requirements. Annexure ‘B’ is titled ‘Procedure for SMT and Subject Teacher’s Meeting for Promotion, Retention and Progression of Grades 9, 10 and 11 Learners 2014’. Annexure ‘C’ sets out the procedure relating to the ‘Information Meeting with parents/guardians regarding progression and retention of Grades 9, 10 and 11 Learners 2014’.

[14] In the National Policy, promotion is defined as:

‘the movement of a learner from one grade to the next when that learner meets the minimum required level of achievement per subject in a particular grade’.

Progression is defined as:

‘the advancement of a learner from one grade to the next . . . in spite of the learner not having complied with all the promotion requirements.’

[15] Section 29(1) of the National Policy provides that a learner in grades 10-12 will be promoted from grade to grade if such a learner has, inter alia, completed end-of-year examination requirements in no fewer than seven subjects, and has

⁸ *Executive Officer, Financial Services Board v Dynamic Wealth Ltd & others* [2011] ZASCA 193; 2012 (1) SA 453 (SCA) paras 43 and 44.

achieved 40% in three subjects, one of which is an official language at Home Language level, and 30% in three subjects. The learner may fail, that is, obtain less than 30% in one subject provided they have completed the curriculum and written the examination. This was the stumbling block for OM. Section 29(1) is to be read with Annexures 'A', 'B' and 'C' of the Procedure Manual.

[16] Annexure 'A', sets out the promotion, retention and progression requirements, in relevant part, as follows:

2.4 Promotion of a Learner

2.4.1 For Grades 04 to 08 learners who meet promotion requirements, "RP" for "Ready to Progress" is written in the appropriate column against the name of the learner in the Promotion Schedule.

2.4.2 For Grades 9, 10 and 11 learners who meet promotion requirements, "P" for "Promoted" is written in the appropriate column against the name of the learner in the Promotion Schedule.

2.5 Retention of a Learner

2.5.1 A learner who does not meet the promotion requirements for the first time in the Intermediate, Senior or FET [Further Education and Training] phase, must be retained, and

2.5.2 For Grades 04, to 08 learners who do not meet the promotion requirements, "NR" for "Not Ready to Progress" is written in the appropriate column against the name of the learner in the Promotion Schedule.

2.5.3 For Grades 9, 10 and 11 learner, "R" for "Retained" is written in the appropriate column against the name of the learner in the Promotion Schedule.

2.6 Progression

2.6.1 Guiding Principle: a learner *may* only be retained once in phase in order to prevent the learner being retained in this phase for longer than four years

2.6.2 If the learner has already been retained in a phase, the learner ordinarily qualifies to be "Progressed".

2.6.3 If on the basis of the evidence available the school deems it is in the best interest of the learner to move to the next grade, then the learner is “Progressed”.

2.6.4 The “QP” for “Progressed” is written in the appropriate column against the name of the learner in the Promotion Schedule.

2.7 Retention of Learners who ordinarily qualify for progression

2.7.1 If a learner ordinarily qualifies for progression, but the school has educational reasons or evidence that it is in the best interest of the learner to be retained, then the learner is “Retained”.

[17] Clause 2.5.1 of Annexure ‘A’ provides in peremptory terms that a learner who does not meet the promotion requirements for the *first* time in the intermediate, Senior or FET phase, *must* be retained. This is the only provision dealing with the failure of a learner to achieve promotion to the next grade for the first time. Clauses 2.6, 2.7.4 and 5 deal with learners who have failed, for the second time, to achieve promotion after having been retained in a grade, and do not detract from clause 2.5.

[18] This view is fortified by clauses 3 and 4 of Annexure ‘B’ which read:

‘3 Consider the learners who do not qualify for progression. These are learners who have not met the promotion requirements for [the] first time in a phase. Write “R” for “Retained” against the name of the name of the learner.

4 Consider learners who ordinarily qualify for progression on the basis that they have already been retained once in the phase.

4.1 If evidence available is such that it serves the best interest of the learner to be progressed, then the learner is progressed . . .

4.2 If the evidence available or educational reasons are such that it is in the best interest of the learner to be retained, then the learner is retained . . .’

[19] The guiding principle in respect of progression is that a learner may only be retained once in a four year phase. If a learner has already been retained in a phase, such learner ordinarily qualifies to be progressed, if the school deems it is in the best interest of a learner to do so. The system is clear: a first failure to meet promotion standards results in a compulsory retention. A second failure has to be dealt with on a discretionary basis weighing the objective to avoid the learner being retained in this phase for longer than four years (which means that the learner ordinarily qualifies to be ‘progressed’) against the evidence available as to whether it would be in the best interest of the learner to be progressed. It is clear from this framework that progression is not to be afforded a learner who has failed to meet the promotion requirements for the first time. The school management only has a discretion whether or not to retain or progress the learner, following a second failure to achieve the requirements for promotion.

[20] Clause 4.1 of Annexure ‘A’ provides that the school management team must hold an information meeting with the parents of all learners who qualify for progression, irrespective of whether they are to be progressed or retained. If the parents of a learner who qualifies for progression agree with the decision of the school management team to either progress or retain the learner, a Partnership Contract must be entered into between the parties. In the event that the parents contest the decision of the school management team, they may appeal against such decision to the Senior District Manager.

[21] Annexure ‘C’ deals with the procedure for the information meeting with parents as envisaged in clause 4.1 of Annexure ‘A’ and the conclusion of the Partnership Contract provided for in clause 4.2 thereof. This only applies to learners who ordinarily qualify for progression, namely those who, in terms of

clause 4.1 have already been retained once in a phase. Annexure 'C' sets out the applicable procedure to be adopted, relating to either the progression or retention of such a learner for the second time and how this should be dealt with between the school, the parents and the learner. Whether or not progression is to follow (as opposed to a second retention) is then to be dealt with by way of proper discourse through an information meeting with the parents per clause 4 of annexure 'A' read with clauses 4 and 5 of annexure 'B' and the Partnership Contract provisions of annexure 'C'. It follows that both the information meeting and the appeal provided for in clause 5 of annexure 'A' will only come into play in respect of a learner who has failed to achieve the promotion requirements for the second time, and not the first time.

[22] It was common cause that OM had failed more than one subject and did not meet the minimum required level of achievement for promotion to grade 12. It was also common cause that he had not previously been retained in that phase. In the circumstances, he did not qualify for progression to grade 12. The terms of the National Policy, read with the Procedure Manual, dictated that he had to be retained in grade 11. The provisions of clause 2 of Annexure 'A', read together with Annexure 'C', with regard to the holding of an information meeting with his parents, was not applicable to his situation.

[23] On a proper construction and application of the National Policy and the Procedure Manual, a learner may only be progressed upon having failed to achieve the requirements for promotion for the second time. The first failure has to be dealt with by way of retention in the same grade. Should a second failure follow, the educational authorities have a discretion to decide whether a further retention, or progression, would be in the best interest of the learner. That decision is to be

taken in consultation with the parents and a Partnership Agreement is to be entered into between the parties. It is only the latter decision, i.e. how a second failure is to be dealt with, that is subject to an appeal in the event that the educational authorities and the parents do not agree.

[24] The flawed reasoning of the high court appears from the following paragraphs of the reasons for judgment:

‘[2] The dispute has turned uglier in that the learner has been tossed between Mbilwi High School and Nazarene School of Natural Sciences and this conduct of the 1st, 2nd and 3rd respondents has become an affront to the best interests of this child-learner impacting the core of the justness and fairness to him.

[3] It is on this basis that this court had to intervene and redirect the confronting parties to a solution in favour of the child. The court has acted in terms of the letter and spirit of Section 4(a) of the [C]hildren’s Act 38 of 2005 which provides: “In any matter concerning a child-(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided”. In the result, the confirmation of the *Rule Nisi* in favour of the applicant was found to serve the best interests of the child.

...

[18] The law concerning children is clear both in the [C]onstitution, and [C]hildren’s Act and other legislation relating to treatment of children. Further, the Education Department’s Regulations are lucid and have to be complied with to promote and protect the welfare of learners.

...

[19] The respondents did not act in terms of annexure “C” relating to procedure for information meeting with parents/guardians regarding progression and retention of grades 9, 10 and 11 learners 2014.’

[25] The high court found that the school had ‘flouted’ the national policy ‘by not following correct procedures’. The basis for this finding is to be found in para 19 of the judgment where it is stated that the appellants failed to act in accordance

with Annexure 'C' relating to the procedure for the holding of an information meeting with parents. This finding of the high court is based on the premise that the provisions pertaining to progression were applicable. The high court was wrong in that it had simply interpreted the policy incorrectly.

[26] It follows that an appeal did not lie to the third appellant against the decision by the school management team that the learner be retained in grade 11. This question did not arise in this matter. It was however dealt by the high court in the following manner:

'Paragraph 11 of the founding affidavit is a scathing attack on non-compliance with regulation[s] relating to the composition of the appeal panel. Without being ashamed, the respondents do not admit the irregularity Instead the deponent, justifies the irregularity and challenges the applicant to prove prejudice to himself (the applicant).'

Insofar as the high court made any findings in this regard, these are obiter and not binding.

[27] For these reasons the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'(i) The Rule Nisi granted on 30 January 2015 is discharged.

(ii) The applicant is directed to pay the costs of this application.'

LV Theron
Judge of Appeal

APPEARANCES:

For the Appellants:

R J Raath SC and T W G Bester SC

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