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FREE STATE HIGH COURT, BLOEMFONTEIN

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 1821/2013

In the matter between:

LERATO RADEBE	**1ST APPLICANT**
LEHLOHONOLO RADEBE	**2ND APPLICANT**
SELLOANE MOTLOUNG	**3RD APPLICANT**
EQUAL EDUCATION	**4TH APPLICANT**

and

PRINCIPAL OF LESEDING TECHNICAL SCHOOL	**1ST RESPONDENT**
CHAIRPERSON OF THE SCHOOL GOVERNING BODY, LESEDING TECHNICAL SCHOOL	**2ND RESPONDENT**
DISTRICT DIRECTOR, LEJWELEPUTSWA DISTRICT	**3RD RESPONDENT**
HEAD OF DEPARTMENT, BASIC EDUCATION, FREE STATE	**4TH RESPONDENT**
MEC FOR EDUCATION : FREE STATE	**5TH RESPONDENT**
MINISTER OF BASIC EDUCATION	**6TH RESPONDENT**

RESPONDENTS' BRIEF HEADS OF ARGUMENT

1.

URGENCY:

1.1 It is trite law that an Applicant cannot create his own urgency by simply waiting until the normal rules can no longer be applied.[1] An Applicant, when launching an urgent application, must in his founding affidavit set out the circumstances which he avers render the matter urgent and the reasons why he cannot obtain substantial redress at the hearing in due cause. Specific averments of urgency must be made and the facts upon which those averments are based must be set out in the affidavit. [2]

1.2 The Court is respectfully referred to paragraph 2 of the opposing affidavit, indicating that the Applicant did nothing since **February 2013**. No reasons are put forward why he was unable to approach the Court, since **February 2013**.

1.3 It is humbly submitted that this is a classic example where an Applicant created his own urgency by simply waiting for several months.

1.4 This is an important matter and it is not a matter where the Respondent should be forced into filing opposing affidavits without having any proper opportunity to investigate, consult and do the necessary research. It is submitted that the Applicants have not

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[1] **SWEIZER RENEKE VLEISMAATSKAPPY (EDMS) BPK v DIE MINISTER VAN LANDBOU (1971)1 PH F11 (T).**

[2] **SIKWE v SA MUTUAL FIRE AND GENERAL INSURANCE CO. LTD 1977(3) SA 438 (W) at 44G – 441 A.**

conducted themselves with the necessary expedition and urgency that one would expect from someone who approaches the Court on an urgent basis.

1.5 Applicant were in a position to approach this Court much earlier and to afford Respondents sufficient time to respond to the application. To act in the manner that they are currently doing, constitutes a gross abuse of the process and prejudice the Respondents in the conduct of their case.

1.6 Other factors to be considered in the urgency aspect is that the Applicants are now seeking final relief which is detrimental to the Respondents in not having sufficient time to respond to the application and further that it is clear from the facts as stated by the Respondents, that the matter became moot as far as the Leseding Technical School is concerned. The Constitutional Court held that "*a case is moot and therefore not justiciable if it no longer presents an existing or life controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.* [3]

1.7 The Court is respectfully request not to entertain the application for lack of urgency in circumstances where the Second Applicant created his own urgency in bringing the application at this late stage.

[3] **NATIONAL COALISION FOR GAY AND LESBIAN EQUALITY AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2000(2) SA 1 CC at FN18.**

2.

2.1 The law in regard to education is clear. The opposition in this case must not be seen as being obstructive of the right to basic education, but the Second Applicant is purely opposed on the particular facts of this case. The facts do not follow the law, but the law follows the facts.

2.2 The unfortunate situation has not been created or caused by Leseding Technical School or the Department, but must be squarely placed and blamed on the shoulders of the Second Applicant.

2.3 The Respondents are not in Court opposing the entrenched values of humanism, dignity, equality, non-racism and non-sexism, which the Constitution provides, including everyone has a right to basic education.

2.4 The Respondents embrace a commitment to substantive equality in which the right to equality includes not only protection against unfair discrimination, but also the duty on all South Africans to engage in positive measures to eradicate any patterns of inequality and unfair discrimination.

2.5 The Department and the school were pro-active in searching for a solution and assisted the Second Applicant to comply with Second Applicant’s wishes. It is the Second Applicant who continuously shifted the goal posts as soon as a solution has been found.

2.6 The facts in the Pillay matter differ materially from the present facts, namely:

(a) Pillay was enrolled and registered with the Durban Girls High School, one of the Respondents in the case.

(b) Pillay took the matter to the Equality Court.

(c) The High Court and the Constitutional Court, decided the matter only by looking at the Equality Act and whether the actions were unfair in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

(d) That Act was clearly the legislation contemplated in Section 9(4) of the Constitution which give content to the prohibition on unfair discrimination.

(e) The Constitutional Court therefore said that the first claims brought under the Equality Act must be considered within the four corners of that Act. The Constitutional Court has also held that in the context of both Administrative and Labour Law that the litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to fail to recognise the important task conferred upon the Legislature by the constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. That the same principle also applies to the Equality Act. [4]

[4] **MEC FOR EDUCATION, KWAZULU NATAL AND OTHERS v PILLAY 2008(1) SA 474 CC at PAR. 39 AND 40.**

(f) In the High Court Judge Kondile with whom Judge President Tshabalala concurred found, that there was no evidence in the Pillay case indicating that the Respondents have taken any steps to address the disadvantage caused by the discrimination suffered by the Appellant. That the Respondents have also not shown that they have initiated any process to redress the direct or indirect discrimination. The complete opposite and active involvement of the Department is present here to seek a solution to the problem. All of these solutions were, however, broken by the Second Respondent.

3.

THE FACTS:

3.1 This is an application for final relief and the Court will deal with the application on the undisputed facts, namely, on the facts stated by the Respondent together with the admitted facts in the Applicants' affidavit. If the Applicant is not entitled to relief on those facts, the application should be dismissed with cost.[5]

3.2 Every governing body of a public school must adopt a code of conduct for its learners after there has been consultation with the learners, parents and educators of the respective school.[6] Learners are obliged to comply with the code which must be aimed at establishing a disciplined school environment that enhances the

[5] **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984(3) SA 623 A at 634.**
[6] **SECION 18(1) : SOUTH AFRICAN SCHOOLS ACT, 84 OF 1996.**

quality of the learning process. It must contain provisions safeguarding the interest of the learner and any other party involved in disciplinary proceedings. [7]

3.3 Discipline of learners may result in suspension or expulsion from a public school. A government body may only suspend and may not expel a learner from a public school. This may only be done after there has been a fair hearing. With regard to expulsion, only the head of the relevant education department may expel a learner from a public school and only if after a fair hearing the learner is found guilty of serious misconduct. The head of a department must make an alternative arrangement for the placement of an expelled learner if such learner is subject to compulsory school attendance.[8]

3.4 A policy or code of conduct is an administrative decision by a governing body. The SCA followed the Oudekraal principle and held that until an unlawful and invalid administrative decision is set aside, whether it be unconstitutional or the corporate body not empowered by the Act to adopt such policies, such invalid administrative decision must be set aside by a Court in proceedings for judicial review and until then the policy has legal consequences that cannot simply be overlooked.[9]

3.5 The code of conduct fall within the exclusive domain of the school governing body which prescribe in section 4.3.3 thereof that no

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[7] **SECTION 8(2), (5) AND (6) : SCHOOLS ACT, 84 OF 1996.**
[8] **SECTION 9 : SOUTH AFRICAN SCHOOLS ACT, 84 OF 1996; ANTONY v GOVERNING BODY, SETTLERS HIGH SCHOOL 2002(4) SA 738 (C).**
[9] **DEPARTMENT OF EDUCATION, FREE STATE, WELKOM HIGH SCHOOL 2012(6) SA 525 (SCA), PAR. 23.**

elaborate hairstyle such as "*dreadlocks"* are allowed. *"Long hair may be simply braid … "*

3.6 On **13 October 2012** the Leseding Technical School held a meeting where the parents/guardian of Lerato was present. During this meeting the principal and a SGB member read and explained the full code of conduct, including this aforesaid rule 4.3.3. Only thereafter were application forms distributed.

3.7 The partent/guardian of Lerato completed these forms and signed them on **15 October 2012** and returned the forms to the school. There is no indication on the form that Lerato belongs to the Rastafarian religion or that she will not comply with the code of conduct. The parent/guardian had an opportunity to register Lerato in another school that allowed the wearing of dreadlocks. There were several schools in the immediate vicinity which allow this hairstyle.

3.8 It was only on **9 January 2013**, when Lerato attended school that the school became aware of her hairstyle, contrary to the code of conduct. The school gave Lerato a letter to invite her guardian to discuss the matter to seek a solution.

3.9 Instead of the grandmother, who raise all the children, including Lerato, did not arrive at this meeting, but the Second and Third Applicant. The principal invited them to present their case, but the principal has never encountered such rude behaviour. The Second Applicant was rude, aggressive, insulting and raised his voice, slammed the door and shouted several derogatory and threatening

things. Neither his wife, nor the teacher could calm him down. He just refused to listen and raised his voice louder and louder.

3.10 That he has an alternative agenda is clear. He immediately thereafter falsely represented that he is with persons from the district office, while they were in fact persons from the Lefika FM Local Radio Station.

3.11 The principal thereafter phoned Lerato's grandmother and she was again invited for a meeting to discuss the situation to see whether a solution could not be found. Of importance, what resulted from this meeting, is the following facts:

(a) The First Applicant, Lerato, is not a Rastafarian;

(b) The other two children of the Second and Third Applicant, also cared for by the grandmother, cut their hair regularly. The grandmother cut their hair to comply with the prescriptions of their school code;

(c) The grandmother confirm their awareness of the code of conduct which was discussed during the holidays. The grandmother indicated that she would see to Lerato returning to school without the dreadlocks. She was, however, insulted and threatened by the Second Applicant if she touch the dreadlocks of Lerato;

(d) The grandmother, who cared for these children from their very tender years, was always in full control and care of the children. The grandmother and the children have been regular

churchgoers for many years. They attend, however, the Roman Catholic Church. The grandmother through all these years. Raised the three children and was never aware that they were ever a part of the Rastafarian religion or faith. There was never any problem with her cutting the other two children's hair regularly. This was again done before the reopening of the schools in **January 2013**;

(e) The fact that the First Applicant is not of the Rastafarian faith is stated in the affidavit of the vice principal, Mrs. Monosi who attended the Roman Catholic Church service on **17 March 2013**. There she noticed that Lerato, with two other girls, partook in the Holy Communion. Other religions are not permitted to participate in Holy Communion and it is a general assumption and accepted that all of those who participate in the Holy Communion are members of the Catholic faith;

(f) As a compromise, she could plait Lerato's hair, but not in dreadlocks. This compromise was seemingly flatly rejected by the Second Applicant.

3.12 In Leseding, being a Technical School there is also a danger of wearing dreadlocks. The school is using machines and chemicals and long hair is causing a danger to the learner herself.

3.13 The scene then moved to the district office. The Court is respectfully referred to the supporting affidavit of Mr. I B Tshabangu. The father of Lerato approached the district office for assistance. The matter was discussed with the father to seek a solution. One of the

solutions, suggested by the Second Applicant, was the placement of Lerato in an alternative school.

3.14 The Second Applicant told Mr. Tshabangu that he had an argument with the principal and teachers at the Leseding Technical School and he thought it in the best interest of his child if she could be placed in an alternative school. He was worried that the principal and staff might victimise his child. This is clearly supported by the facts.

3.15 The Second Applicant himself told Mr. Tshabangu that he preferred that his daughter should not attend the Leseding Technical School. That his mother had placed Lerato in the school. He would have preferred Lenakeng Technical School, or the Thotagauta Secondary School in Welkom.

3.16 Mr. Tshabangu then assisted the Second Applicant in his request and plea. He phoned the Lenakeng Technical School. This school was, however, full and there was no possibility of placing Lerato there. Mr. Tshabangu then told the Second Applicant that he would now try the Thotagauta Secondary School. He phoned the principal, briefed him about the background and the principal said that he foresaw no problem if the child abide by the code of conduct of the school. Mr. Tshabangu talked to the Second Applicant with regard whether he would abide by the code of conduct and the Second Applicant confirmed that he would abide by the code of conduct, regarding the hairstyle as he was informed that the Thotagauta Secondary School’s code of conduct also make provision for specific hairstyles.

3.17 It was then arranged with the principal of the Thotagauta Secondary School, with the concurrence of the Second Applicant, that Lerato be admitted in his school.

3.18 Mr. Tshabangu thereafter drafted the letter and handed it to the Second Applicant. This letter is attached as annexure "**C**" to the founding affidavit of the Applicant.

3.19 It is clearly stated that Lerato has now been admitted in the Thotagauta Secondary School and also it was specifically noted that the parent agreed to abide by the code of conduct of learners regarding the hairstyle. The Department and Mr. Tshabangu and the district office and everybody else was happy that the problem has now been solved.

3.20 The Leseding Technical School was informed of this new development and Lerato was deregistered as a learner in the Leseding Technical School. The principal of the Leseding Technical School thought it advisable to arrange a meeting with all parents to discuss again the code of conduct. This meeting was held on **10 February 2013**. All the parents of the other children were unanimous that the Rastafarians, as part of their religion, use cannabis as part of their spiritual and inspirational religious purposes. The use thereof forms part of their religion observance. It was unclear to them how a child can be allowed to observe this religion and it was highly upsetting. All the parents were unanimous that the code of conduct should not accommodate the one learner. As aforesaid, this was a meeting to decide on principle matters as Lerato herself, was no longer admitted or registered at the Leseding Technical School, but

admitted and registered at the Thotagauta Secondary School, Welkom. The initiative of placing Lerato in the last mentioned school was that of the Second Applicant.

3.21 But, again, the Second Applicant reneged on his undertaking. After a few days he again brought Lerato to the Leseding Technical School, unaccompanied. The HOD was contacted and he found another school, the Unitas Secondary School in Welkom, which was willing to accommodate Lerato and which did not have a code of conduct which could be breached by the hairstyle of Lerato. The opposing affidavits refer to annexure "**O2**" but the wrong annexure, namely "**C**" was afforded. The correct "**O2**" is attached hereto, for convenience of the Court.

3.22 The principal of Unitas Secondary School, Mr. Mahalatsi, was fully aware of the whole situation and willing to assist Lerato. The Department also explained in a letter to the Second Applicant that they will provide all the necessary remedial assistance to Lerato to assist her with her adjustment and to support her as far as possible. Without avail. Again the Second Applicant decided to ignore this solution to the problem.

4.

4.1 The Applicant refrained from putting all the facts before the Court tells half-truths which are much more damaging that a lie. It is not the Leseding Technical School or the Department but the Second Applicant himself who is continuously shifting the goal posts to the

detriment of his own child. He seems bent to make a kind of a general impression, however, unrelated to the facts before the Court.

4.2 Lerato is admitted and should be presented by the Second Applicant to the principal of the Thotagauta Secondary School. If that school is also dissatisfied with the hairstyle, the next procedure, if she does not abide by the code of conduct, is to hold a disciplinary hearing. If the outcome of the disciplinary hearing is the suspension or even an expulsion, this must be presented to the Department, which will gather all the necessary facts and inputs to consider the matter.

4.3 The HOD could ask the school to amend their code of conduct or even approach the Court for a review of the code.

4.4 If Lerato cannot be placed in the Thotagauta Secondary School, the duty of the HOD is to see that she is placed in another school to receive her proper education. This has in a way already been done by providing the Applicants with an alternative school but it is the Second Applicant who refuses to allow his child to receive the necessary education. He is on an ulterior mission, in total disregard of the interest of his child.

5.

5.1 The Department of Education, Free State, is highly perturbed by the present situation. The First Applicant, Lerato, is still a learner subject to compulsory attendance of classes. If a learner, who is subject to compulsory attendance, is not enrolled at/or fails to attend a school, the HOD may investigate the circumstances, take appropriate

measures to remedy the situation and failing such remedy, to issue a written notice to the parent of the learner, requiring compliance with the Act.

5.2 The HOD, as seen from annexure "**O3**" already wrote a letter to the Second Applicant, who seemingly, without just cause, is causing Lerato not to attend the school in which she was registered or another school which is also being offered to the Second Applicant to enrol his child.

5.3 In terms of annexure "**O3**" the Second Applicant is again requested to see to it that his daughter attend the school which is available to her and in which she was enrolled and registered, on his request. This letter, was hand delivered to the Second Applicant. As with his previous dealings, he bluntly refused to sign for the letter, again an indication of the obstructive behaviour of the Second Applicant, all to the detriment of his young child.

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ADV. J Y CLAASEN SC

Assisted by:

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ADV. M MOPELI

CHAMBERS

BLOEMFONTEIN

16 MAY 2013.