

SOUTH AFRICA / JUDGMENT

Member of the Executive Council, Department of Education, Eastern Cape Province and Another v Eduplanet (Pty) Ltd (189/17) [2017] ZAECHGHC 9 (1 February 2017)

[2017] ZAECHGHC 9

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

189/17

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case No. 189/17

Date Heard: 27/1/17

Date Delivered: 1/2/17

Not

Reportable

In

the matter between:

Member
of the Executive Council,
Department
of Education, Eastern Cape Province
First Applicant
Head
of Department,
Department
of Education, Eastern Cape Province
Second
Applicant
and
Eduplanet
(Pty) Ltd
Respondent

JUDGMENT

Plasket, J:

[1] The applicants are the MEC for Education in the Eastern Cape Provincial Government (the MEC) and his Head of Department. The

respondent, Eduplanet (Pty) Ltd (Eduplanet), is a company that is operating an independent school without having been registered in terms of the applicable legislation. The applicants seek an order in the following terms:

‘1 That the application be heard as a matter of urgency in terms of Rule 6(12) with the abridgement of the time periods provided in the Uniform Rules of Court as contained herein.

2 It be declared that the conduct and operation by the Respondent of an independent school without being registered by the Second Applicant is unlawful.

3 The Respondent be interdicted and prohibited from conducting and or operating as an independent school, as defined in the Schools Act 84 of 1996 (“the Act”), until such time that it is registered by the Second Applicant in terms of Section 46(1) of the Act.

4 The Respondent pay the costs of the application on an attorney and client scale.

5 Further and/or alternative relief.’

[2] Eduplanet opposed the matter on the bases that it is not urgent and that, although it has not been registered, it has not acted

unlawfully and is entitled to operate. At the hearing of the matter, it was argued, in addition to the urgency point, that if I issue an interdict, I should suspend its operation for 12 months to enable Eduplanet’s application for registration to be considered and decided upon. That, so it was submitted, would promote the right of children registered as students at Eduplanet to education and also be in their best interests.

The legislative framework

[3] Section 29(1) of the Constitution provides that everyone has a fundamental right to basic education. Section 29(3) deals with

independent schools like Eduplanet. It provides:

‘Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and

- (c) maintain standards that are not inferior to standards at comparable public educational institutions.’

[4] Section 46 of the South African Schools Act 84 of 1996 gives effect to s 29(3) of the Constitution. It provides:

‘(1) No person may establish or maintain an independent school unless it is registered by the Head of Department.

(2) The Member of the Executive Council must, by notice in the Provincial Gazette, determine the grounds on which the registration of an independent school may be granted or withdrawn by the Head of Department.

(3) A Head of Department must register an independent school if he or she is satisfied that-

- (a) the standards to be maintained by such school will not be inferior to the standards in comparable public schools;
 - (b) the admission policy of the school does not discriminate on the grounds of race; and
 - (c) the school complies with the grounds for registration contemplated in subsection (2).
- (4) Any person who contravenes subsection (1) is guilty of an offence and upon conviction liable to a fine or imprisonment for a period of three months.’

[5] Section 46 envisages that provincial education heads of department play a central role in the registration of independent schools. For this reason, the Eastern Cape Schools Education Act 1 of 1999 contains provisions that overlap to an extent with the national

legislation and further regulate the registration process. For instance, s 27 re-iterates the right of any person to establish an independent school, provided that it is registered in terms of the Act. Section 28 requires a person wishing to run an independent

school to apply in writing to the Head of Department – the second applicant in this matter – for registration, and in doing so is required to ‘furnish such additional particulars . . . as the head of Department may require’. Section 29 empowers the Head of Department to decide on applications for registration. Section 30(5) creates two offences. They are the establishment, conduct or maintaining of an independent school that is not registered and the admission of a person to an unregistered

independent school.

The

facts

- [6] The material facts are common cause. They are that Eduplanet runs an independent school, and has done so since July 2016, and that the school is not registered.

The

issues

[7] I turn now to the three issues that require attention.

Urgency

[8] It was argued by Ms Bands, who appeared for Eduplanet, that the matter was not urgent. I disagree. By its very nature, the matter is urgent: the fundamental right to education of approximately 300 students registered at the school were and continue to be compromised

and criminal offences are and continue to be committed for as long as the school is running and remains unregistered.

[9] When, on 11 January 2017, the MEC was asked by a journalist about the functioning of the school without it being registered, he acted with commendable haste and purpose. He asked his staff in Port Elizabeth to investigate and report to him. On the same day, he, together with his staff, met with Mr Charl Meyer, Eduplanet's sole director. The MEC explained to him that the school could not continue to run while it was not registered. On 14 January 2017, a meeting was held with parents of the students in order to explain the situation to them. On 16 January 2017, the Head of Department made a demand of Eduplanet that it cease its operations 'with immediate effect' and that it give a written undertaking to that effect within 24 hours. The letter of demand was received by Mr Meyer at 13h28 on 17 January 2017. By letter dated 18 January 2017, Eduplanet's attorneys declined to give the undertaking and stated that any attempt to interdict the running of the school would be opposed.

[10] The application was launched on 23 January 2017. Eduplanet was required to file its notice of opposition by midday on 24 January

2017 and to file its answering papers by 09h00 on 26 January 2017. The MEC and Head of Department undertook to file any replying papers by 16h00 on 26 January 2017 and the matter was set down for 10h00 on 27 January 2017.

[11] Not only am I satisfied that the matter is urgent but also that the time periods prescribed by the MEC and Head of Department are reasonable. In the result, the challenge to the urgency of the matter fails.

Eduplanet's entitlement to operate while unregistered?

[12] The attitude adopted by Eduplanet is that, despite not having even filed an application for registration and despite the property from which it operates not having been zoned for education purposes, it could operate nonetheless with impunity. In the light of the legislative provisions I have cited, this is clearly not correct. The law is clear. What Eduplanet is doing is prohibited and constitutes criminal conduct.

- [13] Mr Meyer had obtained the registration forms in March 2016 but it was only after Eduplanet's attorney's letter of 18 January 2017 that he filed the application. (The MEC stated in his replying affidavit that the application is defective in various ways.) Mr Meyer's approach to the requirement of registration discloses a disturbing degree of contempt for the Constitution and the law and for the rights of students and their parents.

Suspending the operation of an interdict?

- [14] Ms Bands argued that now that an application for registration had been made, I should suspend the operation of the interdict that I may grant. She suggested that I suspend it for 12 months so that the registration process, which is a lengthy one, may be completed. This will allow the education of students registered at Eduplanet to continue. The argument is that this expedient will promote and protect the students' right to education and the paramountcy of their best interests.
- [15] It is far from certain that I have a discretion to suspend an interdict in circumstances in which the conduct complained of amounts to an ongoing criminal offence. In *Bitou Local Municipality v Timber Two Processors CC & another*[1] Fourie J, after a survey of the case law, concluded that while, in general terms, a court has a discretion in exceptional circumstances

to suspend the operation of a final interdict when it is just and equitable to do so,[2] when the conduct sought to be interdicted is criminal conduct, subject possibly only to the *de minimis* principle, no such discretion exists.[3] In arriving at this conclusion, he cited with approval the well-known full-bench judgment of Harms J in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council*[4] and a judgment written by me in *Nelson Mandela Metropolitan Municipality & others v Gryvenouw CC & others*. [5] The same conclusion was reached more recently by Eksteen J in *Ferreira & others v Baobab Agencies CC & others*. [6] In the result, I have no power to suspend an interdict in the circumstances of this case.

- [16] Even if I am wrong in my conclusion, I am of the view that there are no proper grounds upon which to do so if I could.
- [17] First, Eduplanet has behaved in a brazenly unlawful manner displaying nothing but contempt for the Constitution, the law and the students who have registered at the school as well as their parents. The students have, in effect, been enticed to register as students, and their parents have paid substantial amounts of money in order for them to do so, under false pretences: they would have been entitled to assume that Eduplanet complied with the law and was registered. It is a criminal offence in terms of s 30(5) of the Eastern Cape Schools Education Act not only to operate an unregistered independent school but to admit students to such a school.

- [18] To allow Eduplanet to continue with its unlawful conduct would be to allow it to benefit from its disregard of the Constitution and the law. It now cynically raises the right of its students to education and the paramountcy of their best interests to justify its continued unlawful conduct.
- [19] The MEC and the Head of Department have acted properly and with urgency to protect the public interest and safeguard the rule of law. It would undermine them and the rule of law to allow a blatant illegality to continue. To decline to come to their aid, even on a temporary basis, would amount to this court abrogating its duty to enforce the law. That failure would also undermine proper and effective government – a responsibility that has, in this instance, been placed in the hands of the MEC and the Head of Department.
- [20] The suspension of an interdict in these circumstances pending a decision on Eduplanet's belated application for registration
- would have the unfortunate effect of being an invitation to others to ignore the Constitution and the law – to open independent
- schools, run them for as long as it takes the government to take action and then apply for registration. That will undermine the
- legislation that has been put in place to regulate independent schools in the public interest.
- [21] Eduplanet has been operating since July 2016. It has done so in a completely unregulated way. It wants to continue to do so until a decision is taken. That is not in the best interests of the students. The legislation concerning the registration of independent schools is in place so that proper standards can be maintained in order to protect and promote the fundamental right of students to education in terms of s 29(1) of the Constitution. Its purpose is also to ensure that students at independent schools are educated by properly qualified teachers in a safe and healthy physical environment. None of this can be guaranteed in the unregulated circumstances contended for by Eduplanet.
- [22] The process of registration is a lengthy one. Applications for registration are required to be filed before 31 March of any year so that the process can be completed and the school can commence teaching at the beginning of the next year. I do not consider it to be conducive to the public interest and the rights and interests protected by the legislation that Eduplanet can operate in an unregulated environment for such a length of time.
- [23] The MEC and Head of Department have taken steps to ensure that the students are able to receive an education that meets the requirements of the law. At the meeting with parents on 14 January 2017, a list of registered independent schools in the district was made available to them. Thereafter, and on the same day, the MEC stated in his founding affidavit, 'an urgent meeting was convened by the Department's Education Social Support Services in Port Elizabeth to identify and establish possible placements for the learners registered with the Respondent at other registered independent schools in the district'. A panel was established that consisted of the principals and administrative staff of independent schools in order to

place students at those schools. Although this met with resistance from parents of students at Eduplanet, it strikes me as a the best option available in the circumstances – and one that goes a long way to ensure the protection of the best interests of those students.

[24] Finally, Eduplanet's case in its answering affidavit was that, despite it not being registered, it had done nothing unlawful and had not acted in contravention of s 46 of the South African Schools Act. It consequently did not lay any proper basis for the suspension of the interdict that I was asked by the applicants to grant. Mr

Meyer, in his affidavit, was completely unrepentant and unapologetic for Eduplanet's contraventions of the law.

[25] For the reasons that I have cited above, I would not suspend the operation of the interdict that I intend granting, even if I had the power to do so.

Costs

[26] The MEC and the Head of Department seek an attorney and client costs order against Eduplanet. They do so on the basis of its conduct of the matter. I am of the view that such a costs order is justified for the reasons that follow.

[27] As I have stated above, Eduplanet's case on the papers is that it has done nothing wrong, despite registering students and operating an unregistered independent school, and that it has not acted in contravention of s 46 of the South African Schools Act. This case was both unsustainable and mendacious. Its conduct constituted two criminal offences yet it has displayed no remorse and not a word of apology is to be found in its papers.

[28] Having operated since July 2016 in brazen defiance of the law, when Eduplanet was called upon to cease its unlawful activities, it refused to do so. Instead its attorneys 'instructed' the Head of Department to deal urgently with its application for registration, which it had yet to hand in. They also stated that Eduplanet would oppose any proceedings to interdict it from

functioning.

[29] In these circumstances, I am satisfied that a punitive costs order is necessary to indicate the court's displeasure at the conduct of Eduplanet.

The order

[30] In my view, the MEC and the Head of Department have made out a case for the relief that they seek. I make the following order.

- (a) It is declared that the operation by the respondent of an independent school, as defined in the South African Schools Act 84 of 1996 (the Act) without it being registered by the second applicant is unlawful.
- (b) The respondent is interdicted from operating as an independent school until such time as it is registered by the second applicant in terms of the Act.

- (c) The respondent is directed to pay the costs of this application on the attorney and client scale.

C Plasket

Judge of the High Court

APPEARANCES

For the applicants: K Watt instructed by NN Dullabh & Co

For the respondent: I Bands instructed by Netteltons

- [1] Bitou Local Municipality v Timber Two Processors CC & another 2009 (5) SA 618 (C).
[2] Para 31.
[3] Para 32.
[4] United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T).
[5] Nelson Mandela Metropolitan Municipality & others v Gryvenouw CC & others 2004 (2) SA 81 (SE).
[6] Ferreira & others v Baobab Agencies CC & others ECP 15 April 2014 (case no. 4026/12) unreported, para 82.

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Prepared on 13 October 2026 · Esheria