

SOUTH AFRICA / JUDGMENT

Phungula and Others v Institute Status Acres Combined School (NPO) and Others (8104/19) [2019] ZAGPJHC 88 (15 March 2019) [2019] ZAGPJHC 88

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ameer

CASE / FILE NUMBER

8104/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

No: 8104/19

In

the matter between:

VUZIMEZI

EPHRAIM PHUNGULA

First Applicant

LINDA

LUCAS SIKONYANA

Second Applicant

JACOBETH

MASONDO

Third Applicant

and

INSTITUTE

STATUS ACRES COMBINED SCHOOL (NPO)

First Respondent

THE

BOARD OF MEMBERS OF INSTITUTE

STATUS

ACRES COMBINED SCHOOL

(NPO)

Second Respondent

DAVID
MOEKETSI
Third Respondent
NKOSENYE
MASONDO
Fourth Respondent
TITIEN
KYAMBA
Fifth Respondent
NANCY
MARAVANYIKA
Sixth Respondent
VUSI
PRESLEY NTSIBANDE
Seventh Respondent
MUTSA
MAMINA
Eighth Respondent
APHIWE
MANTSHONGO
Ninth Respondent
NTENDE
MASONDO
Tenth Respondent
GAUTENG
DEPARTMENT OF EDUCATION
Eleventh Respondent
DEPARTMENT
OF SOCIAL DEVELOPMENT
Twelfth Respondent
ABSA
BANK
LIMITED
Thirteenth Respondent

JUDGMENT

AMEER, AJ

1. The application consists of two parts, part A and part B. Part B, in which final relief is sought, seeks an order from the Court, setting aside the resolutions taken at the AGM on 12 October 2017, and calling for the convening of a new AGM which must, amongst other things, elect a new board of members in compliance with the school's constitution.
2. The basis for that relief is that there are gross irregularities and mismanagement, including an allegation that school funds are being stolen by the current board members of the School.

3. At the outset, Mr Williamson, who appeared on behalf of the first to tenth respondents, indicated that the respondents wished to file a supplementary answering affidavit. I might add that at this point the matter was ripe for hearing with the replying affidavit having been filed and the papers complete. Mr Williamson sought to include a fourth set. Mr Mataboge, who appeared on behalf of the applicants, objected to the filing of a fourth set. The essence of his objection is that after the first answering affidavit was filed, the applicants' attorneys addressed a letter to the respondents' attorneys stating that if the respondents wished to supplement their answering affidavit, the applicants were amenable provided agreement was reached on that stage, i.e. 8 March 2019. The applicant then suggested that the respondent be allowed to file a supplementary affidavit by 12 March 2019 and that the applicants would reply by 14 March 2019 and that the matter would be set down for hearing in the week of 19 March 2019. It became apparent during argument that the respondents rejected that reasonable proposal by the applicants. Mr Williamson submitted that the respondents were entitled to reject that tender because an acceptance of the tender would mean that the matter would then have to be heard on 19 March 2019 and that the matter would be ripe for hearing on that day and, in consequence, the respondents

would lose their argument based on urgency. I did not quite understand that submission because, even if the papers are ready and

the matter is ripe for hearing in the urgent court, the final discretion as to whether the matter is to be entertained in the urgent court, rests with the urgent judge and the applicant is nonetheless obliged to make out a case for urgency. The fact that

three sets of papers have been filed before the Tuesday does not necessarily imply that the matter is urgent. It, of course, means

that the parties would have complied with the practice directive required for the matter to be entertained in the urgent court. The respondent's refusal to accept the proposal to file a supplementary was unreasonable. This court is now ready to hear the matter and so are the applicants.

4. Mr Williamson was unable to demonstrate any basis upon which the new affidavit was to be filed having regard to the established principles for the admission of a fourth set.[1]
5. I made a ruling prior to the hearing of the matter that the fourth set would not be admitted but that I would give my reasons in this judgment.
6. As a precursor to this, the applicants seek interim relief in the form of part A in which they seek to appoint an independent person as an administrator to assume control of the school's assets and particularly its finances so as to preserve the school's assets from being siphoned away. The applicant is required to make out a prima facie case, demonstrate that the balance of convenience favours the grant of the order, show that the harm will be irreparable if the order is not granted and that there is no alternate remedy.

7. Having read the papers and heard argument, I am satisfied that a sufficient *prima facie* case has been made out. The first applicant contends that he received a telephone call from the third applicant who had discovered from the bank statements that the current members of the board of the school and in particular the fourth and tenth respondents have been improperly withdrawing funds from the school's bank account. Upon an inspection, she discovered that there were very suspicious money transfers from the school's bank account. She used several examples between 30 January 2019 to 8 February 2019, a period of some eight days, reflecting what she contends to be unauthorised payments to the amount of just under R280 000.00. The references reflect descriptions such as "management salaries and creditors", "staff incentives" and simply "creditors". Further examples which were discovered in respect of November 2018 payments, were in the amount in excess of R500 000.00. The descriptions alongside the bank statements for these payments are as follows: "ZHG748GP – deposit loan", "Uniform loan", "Ops Management Fee Advance"; "ZHG748GP balance", "AV Equipment", "CTM tiles", "ISA Vent", "Benoni rent loan", "EXCO salaries", "EXCO salary top-up", "Founder Burial Service" – in the amount of R150 000.00.
8. The approach by the respondents is somewhat bizarre considering that they are accountable in that the funds that they are administering are public funds. The defences they raise in relation to the interim relief is that the application is not urgent; that the applicants do not have the requisite *locus standi*; that the applicants have failed to make out a case for the relief claimed and that there are material disputes of fact that cannot be resolved on papers, thereby disentitling the applicants to the relief sought. The respondents also raise a defence that the matter was reported at the South African Police Station and that nothing eventuated from such a report.
9. As far as the alleged irregular payments are concerned, the respondents give a bald and unsubstantiated responses. Amongst other things, the respondents state that they "are not answerable to the applicants for the funds expended by the school". Their explanation as to the description of creditors being the basis for the payments on the bank statement is that these are payments towards operating monthly costs, including telephone charges, electricity, water and so on. It would have been simple for the respondents to simply attach proof of the EFT payment and the corresponding invoices to justify the queries raised by the applicants. They are accountable to the public. This is not done and therein lies the *prima facie* case.
10. As far as the balance of convenience is concerned, the respondents' answering affidavit states that "the question of the balance of convenience similarly does not arise for the reasons already advanced". The contention by the respondents is that the relief sought is final in nature.

11. In opposing the relief, the respondents contend that “we, the respondents, but particularly the first respondent, will palpably be prejudiced if any of the relief sought is granted under part A of the notice of motion”, without explaining what the nature and extent of the prejudice will be.
12. To the contrary the balance of convenience overwhelmingly favours the applicants, and in turn, the interests they represent.
13. In the circumstances, I am satisfied that a strong prima facie case has been made out to the effect that if the interim relief appointing an independent administrator is not granted, the school

will suffer substantial losses to the ultimate detriment of its pupils. I am also satisfied that the balance of convenience overwhelmingly supports the grant of the order and is really in the school's best interests. There can be no prejudice to any of the respondents, especially the school, if an independent, reputable and accountable administrator manages the affairs of the school. No case has been made out that the proposed administrator is for any reason unsuitable or unfit to assume the position or that there is any basis upon which the appointment of the nominated administrator would be detrimental to the school's financial security.

14. In the circumstances, I am inclined to grant the interim relief sought by the applicants. I make the following interim order pending the finalisation of Part B:

14.1 The Institute Status Acres Combined School NPO (“the Institute”) is hereby placed under the interim administration of Mary Anne Mamahloko Makgoka (“Makgoka”) of Pansela Trading CC, CK No 2008/036328/24 who is hereby appointed as the interim administrator for the Institute.

14.2 Makgoka's appointment shall be effective forthwith until part B of the notice of motion is finally decided, after which this order will lapse unless extended suitably by the court hearing Part B.

14.3 Makgoka is granted the following interim powers:

14.3.1 To assume, within 5 (five) days of the granting of this order, the control and management of all the assets of the school, whether movable or immovable;

14.3.2 To assume control, forthwith, of the school's ABSA Bank Investment Account, being account number 9307867548 at the Kempton Park branch;

14.3.3 To assume control, forthwith, of the school's management account at ABSA Bank, being account number 4084245593 at the Kempton Park branch;

14.3.4 To assume control and management of any other account held by the school with any other bank, including ABSA Bank Limited;

14.3.5 To open a new account, within 5 (five) days of the granting of this order, which account shall be dedicated solely for the receipt and accountability of any funds which may be due to be paid by any government department, including the Gauteng Department of Education and the Department of Social Development;

14.3.6 To institute, proceed or pursue any legal proceedings on behalf of the school against anyone who is found to be in possession without just cause, of the school's property or assets, whether movable or immovable, and recover same and to claim all such amounts which may lawfully be due to the school, and to defend, oppose or proceed with any legal proceedings against the school;

14.3.7 To oversee the appointment of an interim school board by calling for a general meeting in terms of the school's constitution for the purposes of holding elections within 30 days from this order, to assist her with the management of the affairs of the school;

14.4 Makgoka shall report to the Department of Education and the Department of Social Development, within 30 (thirty) days of this interim order as to all findings made, including an inventory of the assets as well as all irregularities uncovered.

14.5 The third, fourth and tenth respondents are interdicted from accessing any of the school's assets, whether movable or immovable.

14.6 The second to the tenth respondents are interdicted from accessing any further amounts of the school's funds, including any financial sponsors, government departments, grants, funding or any subsidiary.

14.7 The second to the tenth respondents are interdicted from accessing any of the school's funds held at any financial institution in the country and more particularly those held at ABSA Bank Limited under account numbers 9307867548 and 4084245593.

14.8 The second and tenth respondents are directed to deliver within 24-hours of service of this order on them, all assets and movable property of the first respondent which includes: (1) all keys to the school's premises in possession of any of them; (2) laptops which are in possession of the third, fourth and tenth respondents; (3) a Mercedes Benz Vito, registration number ZHG748GP, in possession of the tenth respondent.

14.9 Should any of the respondents fail, neglect or refuse to comply with the provisions of the above order, the Deputy Sheriff of this Court is hereby authorised and directed to secure and take possession of all such assets and to take all reasonable steps to give effect to this order.

14.10 The third, fourth and tenth respondents are interdicted from entering or approaching the school premises from the date of this order;

15. The costs of part A of the application shall be costs in part B of the application.

AMEER AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANEESBURG

COUNSEL FOR APPLICANTS: Adv M Mataboge

APPLICANTS ATTORNEYS: Seleka Attorneys

COUNSEL FOR RESPONDENTS: Adv A Williamson

RESPONDENTS ATTORNEYS: B K Msimeki Attorneys

DATE OF HEARING: 14 March 2019

DATE OF JUDGMENT: 15 March 2019

[1] James Brown & Hamer (Pty) Ltd v Simmons NO 1963 (4) SA 656 (A).

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Prepared on 14 October 2026 · Esheria