REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

Case no: 37/2012
Date order granted:20.1.2012
Date reasons given: 31.1.2012

In the matter between:

LEON CHRISTIANS	**Applicant**
vs	
DALE COLLEGE BOYS PRIMARY SCHOOL	**1st Respondent**
THE SCHOOL GOVERNING BODY, DALE COLLEGE BOYS PRIMARY SCHOOL	**2nd Respondent**
THE MEMBER OF THE EXECUTIVE COMMITTEE RESPONSIBLE FOR EDUCATION, EASTERN CAPE PROVINCE	**3rd Respondent**
THE SUPERINTENDENT GENERAL, DEPARTMENT OF BASIC EDUCATION, EASTERN CAPE PROVINCE	**4th Respondent**

REASONS FOR JUDGMENT

Summary - After the first respondent school refused to admit applicant's son as a pupil applicant approached this Court to have the first respondent's refusal set aside. Applicant's grounds were that first respondent acted unlawfully in doing so because constitution provides that every child has the right to education. Court dismissed the application on the grounds that the applicant should have first appealed to the MEC for Education against the decision and in terms of section 5(9) of the South African School's Act 84 of 1996. Until that appeal is decided, Court has no powers to interfere.

TSHIKI J:

A) INTRODUCTION

[1] The applicant is the father of the minor child LIAM CHRISTIANS (Liam) and has instituted the present application proceedings for and on behalf of his minor son who is six years old. On 11 January 2012, applicant filed this application against respondents seeking an order in the following terms:

> "1. That the Applicant's non-compliance with the rules of the above Honourable Court relating to service, time periods and forms be condoned and that the Applicant be permitted to bring this Application forthwith as a matter of urgency in terms of Rule 6(12) of the Rules of this Honourable Court;
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> 2. That the non-compliance with Section 35 of the General Law Amendment Act, Act 62 of 1955, be condoned and that this Honourable Court grant the Applicant leave to bring this application on shorter notice;
>
> 3. That a rule *nisi* do hereby issue calling upon the Respondents to show cause, if any, to this Honourable Court on Thursday, 9 February 2012 at 10:00 or as soon thereafter as the matter may be heard, why the following order should not be made:
>
> 3.1 that the refusal by the First alternatively Second Respondent to admit LIAM CHRISTIANS entry to the First Respondent to study Grade 1 during the 2012 academic year be declared unconstitutional and unlawful, and be set aside;
>
> 3.2 that the failure of the Fourth Respondent to correct the decision of the First alternatively Second Respondent to admit LIAM CHRISTIANS entry to the First Respondent to study Grade 1 during the 2012 academic year be declared unconstitutional and unlawful, and be set aside;

3.3 that the First, Second and Fourth Respondents be directed to admit LIAM CHRISTIANS entry to the First Respondent to study Grade 1 during the 2012 academic year with effect from the school day following the service upon the Respondents of a copy of this Order;

3.4 that such Respondents as may oppose this application be ordered to pay the costs thereof, jointly and severally, the one paying, the other being absolved, on an attorney and own client scale;

3.5 that the Applicant be granted such further and / or alternative relief as this Honourable Court my deem fit.

4. That paragraphs 3.1, 3.2 and 3.3 above operate with immediate effect as an interim interdict pending the final outcome of this application; and

5. Further and or alternative relief."

[2] On 13 January 2012, the matter was postponed to 20 January 2012, for hearing and the costs of that day were reserved. It was then brought to me on 20 January 2012 for argument. At the inception of the hearing, I was informed that the third and fourth respondents have elected to abide by the Court's decision and confirmatory notices to that effect were handed up in Court.

[3] After the argument, I issued an order in the following terms:

"1. That the application is hereby dismissed.

2. That the applicant is ordered to pay the costs of the application, including costs reserved on 13th January 2012.

3. That the Applicant's attorneys are ordered not to charge the applicant attorney's fees occasioned by the filing of the so-called answering affidavit deposed to by Modidima Mannya, contents of which appear from pages 220-375 of the record."

[4] I then promised to furnish my reasons for the above order within a week from date of delivery thereof.

B) FACTS

[5] The salient facts in this case are that applicant as the father and natural guardian of Liam has brought these proceedings with the consent of his wife, the mother of Liam, and on behalf of Liam. Liam was born on 30 May 2005 and would turn 7 years old on 30 May 2012. After having made enquiries they made an application at Dale College Boys Primary School for the enrolment of Liam for the 2012 academic year to commence his grade one. They had submitted the application form for enrolment of Liam to the first respondent school by the due date during September 2011. Having been advised that the first respondent wanted to interview Liam, they took him to the school where he was one of about 10 or 12 boys. The interviews were held on or about 30 September 2011. Although applicant was not present during the interview, on enquiries from Liam, he was made to believe that during the interview the ball skills and the ability of Liam to remember were tested. In the same month they received a letter from the first respondent school that Liam's application had been unsuccessful and there were no reasons accompanying the notification. They then instructed an attorney who wrote a letter to the school requesting, *inter alia*, the reasons for not admitting Liam.

[6] A letter dated 3 November 2011, annexure "9"[1], was written to the applicant's attorneys with an explanation, the contents of which, *inter alia*, reads:

[1] Founding affidavit of Leon Christians

> "... Dale College Boys' Primary School has a Grade R class with 50 learners and we can only accommodate 57 learners in Grade 1. We have received 52 applications from outside learners for the 7 available places and have followed the school's Admission Policy to admit the 7 learners. No learner was subject to any test. Attached hereto is a copy of the Admission Policy of the school.
> The Department of Education is responsible to provide education in terms of the Constitution and the Schools' Act and not a specific school. You are therefore referred to Section 5(9) of the South African Schools' Act and you have the right to appeal to the M.E.C of Education..."

[7] The letter was signed by both the principal of the school and the Chairperson of the School Governing Body of first respondent.

[8] Receipt of the above letter by the applicant resulted in him instructing attorneys Messrs Whitesides to act on his behalf. Indeed the attorneys for applicant wrote an almost similarly worded letter to both the principal of the first respondent school and the Head of Department of Education of the Eastern Cape Province. The letter indicated, *inter alia*, that the letter dated 3 November 2011 addressed to the applicant's attorneys did not include reasons for the decision not to admit Liam and demanded compliance with the request to furnish reasons.

[9] Annexure "9" referred to *supra* was addressed and forwarded by the school to the applicant's attorneys owing to the fact that the first respondent school was no longer communicating with the applicant in respect of the matter, but with applicant's attorneys referred to above.

[10] When the first respondent refused to admit Liam, despite the threats by the officials of the Department of Education, the applicant launched the present

proceedings. This was now more than two months after the first respondent had delivered annexure “9” to applicant’s attorneys in response to applicant’s request for refusal to admit Liam reasons. In my view, it became clear to the applicant and or his attorneys that first respondent was not prepared to make any additions to the contents of annexure “9”. The application for review of the first, alternatively second and fourth respondents’ refusal to admit Liam at first respondent’s school was only launched on 11 January 2012, and on the basis of urgency.

[11] The application was opposed and was subsequently argued on 20 January 2012 on which date the order was granted.

[12] During the hearing of the application, Mr B.L. Boswell appeared for the applicant and Mr I. Smuts for the first and second respondents.

C) APPLICANT’S COMPLAINT

[13] Applicant’s main complaint against respondents is that first and second respondents in particular, have refused to admit Liam as a student of grade 1 at Dale College Boys Primary School for 2012 academic year. Having refused to do so, applicant contends further that the first respondent is obliged to admit Liam at first respondent’s school for the following reasons.

[13.1] Applicant, his wife and their child Liam live in the area where the first respondent is situated;

[13.2] The neighbouring school, Central Primary, is oversubscribed;

[13.3] There is no other English medium school within a reasonable distance from their home; and

[13.4] The provision of section 34 of the Admission Policy for Ordinary Public Schools (APOPS) apply in the circumstances of Liam's case;

[13.5] First and second respondents failed to have due regard to the close proximity of their home to the school;

[13.6] The proximity of their home to the school is a material consideration which should have been taken into account;

[13.7] First and second respondent's failure to take same into account amounts to a failure by them to exercise their discretion correctly; and

[13.8] The decision to deny Liam access to the school is reviewable in terms of the Promotion of Administrative Justice Act, 2000 (PAJA)[2].

[13.9] That the first respondent school should have considered that Liam's brother is a student at Dale High School.

[13.10] That the respondents are required by section 5(8) of the South African Schools Act[3] (SASA) to give reasons for their decision not to admit Liam.

[14] Further to the above, applicant contends that it has no other alternative remedy other than to approach this Court in the manner he has done, and that applicant's non-compliance with the Rules of the Court relating to service, time periods and forms must be condoned in terms of rule 6(12) of the Rules of this Court.

D) RESPONDENT'S CASE

[15] Respondent's opposition to applicant's averments is premised on, *inter alia*, the following.

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[2] Act 3 of 2000

[3] Act 84 of 1996

[15.1] That when Ms P. Thatcher, the principal of the first respondent school, made the decision not to admit Liam, she did so using the delegated powers conferred upon her by the fourth respondent as Head of Department of Education in the Eastern Cape Province, therefore:

[15.1.1] the applicant cannot then seek an order directing the first, second and in particular fourth respondents to admit Liam Christians to study grade 1 at first respondent school or to request the Head of Department to reconsider the matter. This is so because fourth respondent has already made the administrative decision not to admit he child;

[15.1.2] that in the circumstances the applicant's remedy is to appeal the decision in terms of section 5(9) of SASA. Section 5(9) of SASA provides:

> "Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council."

In this case, it is the third respondent.

[16] First and second respondents have raised four points *in limine* which are:

[16.1] That this Court, in terms of PAJA, is precluded from reviewing an administrative action unless any internal remedy provided for in any other law has first been exhausted. It is common cause that in this case the internal remedy lies within section 5(9) of SASA. Accordingly, first and second respondents contend that the applicant is not entitled to request this Court effectively to make a decision which the third respondent is obliged to make.

[16.2] The second point *in limine* is that in view of the fact that to succeed in an application for an interdict, the applicant has to first exhaust all the alternative

remedies available to him or her. Applicant therefore has not exhausted the remedy to appeal to the MEC for Basic Education, the third respondent herein.

[16.3] First and second respondents contend further that applicant had not made out a case for urgent relief. His entire case having been based upon the administrative decision which he received on 3 November 2011, applicant only approached this Court on 11 January 2012 for a remedy. Therefore the urgency, if any, herein has been self created.

[16.4] The last point *in limine*, is that of non-joinder of the National Minister of Education for the reason that in terms of section 100(1)(b) of the Constitution[4] the Department of Basic Education, Eastern Cape Province, was placed under administration by the National Minister. The latter then duly appointed an Intervention Co-ordinator, Mr Mweli. Therefore, the National Minister of Education has a direct and substantial interest in the present proceedings and should have been joined. The Intervention Co-ordinator should also have been cited to the present proceedings.

[17] It is also the contention of the first and second respondents that annexure "9" *supra* does contain the required reason for the decline of the application for the admission of Liam.

E) ISSUES

[18] In my view, the points *in limine* relating to failure to exhaust the internal and or alternative remedies, are decisive of this application. However, notwithstanding the

[4]Constitution of the Republic of South Africa , 1996

nature of my decision on the points *in limine*, I intend to also deal with the other issues raised in the case.

[19] The questions to decide are:

[19.1] Whether it was necessary for the applicant to first exhaust the internal remedies relating to section 5(9) of SASA and/or the alternative remedy required in cases of interdicts, before approaching this Court.

[19.2] Secondly, whether the matter should have been brought by way of urgency.

[19.3] Thirdly, whether there is merit in applicant's contention that no reasons for decision have been furnished to applicant by first and second respondents. In particular:

[19.3.1] whether the respondent's failure to provide reasons, if proved, rendered as a nullity the administrative action of the first and second respondents in refusing to admit Liam to the school and for that reason applicant need not first comply with section 5(9) of SASA before the reasons are furnished to him.

[20] The view I take of the issues herein, make it unnecessary for me to deal with the issue of the non-joinder of the National Minister of Education and the National Co-ordinator. In any event, none was said about it during argument by both counsel.

F) REASONS FOR JUDGMENT

[21] I prefer to first deal with the points *in limine* by their order of preference.

F1) FAILURE TO EXHAUST INTERNAL REMEDIES

[22] Section 7(1) and (2) of PAJA provides:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days after the date –
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) ...
>
> (2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances **and on application by the person concerned** exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice." (My emphasis)

[23] In my view, the provisions of the above Act are peremptory in nature unless the Court itself decides otherwise in terms of subsection (2)(c) and only upon application by the person concerned. Therefore the provisions of section (7)(2)(c) of PAJA have to be complied with. The wording of the above statute also suggests that the exercise of judicial review by the courts is also limited. This means that the

remedies associated with judicial review are not necessarily available as of right but depend to a greater or lesser extent on the discretion of the Court[5].

[24] In the present case, section 5(9) of SASA provides for the internal remedy to appeal to the Member of the Executive Council of the Department of Education.

[25] In my view, the purpose of this remedy is to provide for the easy and cheaper method of correcting any wrong made by the principal of the school in refusing to admit the learner. In many instances this method has succeeded when resorted to and thus saving the learner and the parent from further inconvenience. The wording of the statute in terms of section 5(9) of SASA indicates that it is a necessary remedy to take and is not discretionary. The refusal of the appeal to the MEC is the jurisdictional fact entitling the applicant to approach the Court for a review of the decision to refuse to admit the child. This was in fact succinctly explained in ***Queenstown Girls High School v MEC Department of Education, Eastern Cape, And Others***[6] a case where the parents of the minor schoolgirl proceeded to approach the High Court for review before exercising the right in terms of section 5(9) of SASA. At page 191B-D **Leach J** (as he then was) remarked as follows:

> "If the third and fourth respondents were unhappy with the refusal of their application, (**application for admission of child to the applicant school**) they had the right to appeal to the first respondent (MEC). Had they done so, the first respondent would have been obliged to hold a proper hearing and to receive the representations of all the interested parties, *viz* the parents, Edkins and the governing body of the school. No such appeal was held and, without that having

[5] See Cora Hoexter on Administrative Law in South Africa 2007 ed p161

[6] 2009 (5) SA 183 (CK)

> been done, neither of the respondents nor any other functionary was entitled to direct the school to admit Buhle as Zibi did." [My emphasis]

[26] The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies[7]. The right to judicial review will only be barred if such intention is clearly evident from the governing legislation[8].

[27] It seems to me that the position becomes clearer where the relevant legislation expressly states that recourse to the Courts is precluded until the domestic remedies are exhausted. In any event, the wording of statutes dealing with issues of this nature do not always have a clear and obvious intention and such intention has instead to be construed by the Court from the words used in the statute[9]. In ***Lawson v Cape Town Municipaility***[10] Comrie AJ (as he then was) held:

> "In considering the question whether, on the proper construction of a statute, judicial review is excluded or deferred, Courts have regard to a number of factors. Among these are: the subject matter of the statute, (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any "re-hearing" on appeal; the powers of the appellate tribunal, including its power to redress or "cure" wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains."

[7] Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) at 503 B.

[8] See Baxter on Administrative Law 1989 ed p 720, see also: Jockey Club of South Africa and others v Feldman 1942 (AD) 340; Lenz Township Co (Pty) Ltd v Lorentzo and others 1961 (2) SA 450 (A)

[9] Baxter at *supra* at page 720

[10] 1982 (4) SA 1 (C) at p 6H-7A

[28] In a situation where the domestic tribunal or body referred to by the enabling legislation may be able to deal with the matter effectively and satisfactorily, in the process of hearing evidence or representations afresh and doing so quicker and cheaper for the complainant, the Court will interpret the enabling legislation in a manner which favours the exhaustion of the domestic remedies before approaching the Court[11].

[29] In the present case the appeal to the MEC would involve the re-opening of the whole case. The MEC would have to hear all the parties to the dispute including the school authorities and the parents. Representations will be made and evidence led, if necessary, with a view to leave no stone unturned. The purpose being to come to a just and transparent decision. Such procedure is in fact encouraged by the wording of the statute under discussion. Not only do the provisions of SASA encourage such an approach, but the Constitution itself in terms of section 7(2)(c) of PAJA. If such procedure would be inclusive of everything, as I believe it should, including the hearing of the reasons for the decision, in cases where they were not adequately furnished, it would be to the advantage of the parent and his or her child to resort to such procedure. The Courts should would be perfectly correct to encourage it.

[30] This is more so when the applicant's remedies of approaching the Court are not ousted by first taking the initial procedure provided for in terms of section 5(9) of SASA.

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[11]Section 5(9) of SASA; Lawson v Cape Town Municipality *supra*; Moodley and others v Shri Siva Subramanier Aulayam 1979 (2) SA 696 (SE) at 700-701, Queenstown Girls High School v MEC Department of Education E.C *supra* at 191B-D

[31] The wording of section 7(2)(c) in this regard encourages the approach to first resort to domestic remedies before approaching the Court. In the present case the fact that the Act encourages an informalised process of redress shows clearly that such procedure must first be exhausted before approaching the Court. This is so whether or not the applicant has been given reasons.

[32] It would perhaps be proper to deal with the whether the contents of annexure "9" include the required reasons. In my view, one can easily ascertain from the wording of annexure "9" that the reason why Liam was not accepted at the first respondent's school was due to lack of accommodation. During argument, Mr Boswell was adamant that until the first and second respondents furnish reasons for the refusal of the application, applicant is in law not obliged to proceed by way of section 5(9) of SASA. He contended that first and or second respondent's refusal to furnish reasons renders the whole decision null and void. I do not agree. In my view, the requirement to appeal to the MEC before approaching the Court applies even in matters where the administrator has not furnished reasons. The procedure to exhaust the internal remedies takes effect and should be enforced even in such circumstances.

[33] However, and in any event, my view is that the applicant was furnished with reasons by the chairperson of the first respondent's School Governing Body (SGB) and the principal of the school. The reason being that the class in which Liam sought accommodation for grade 1 in 2012 is full. The first and second respondents

came to the conclusion to refuse the application after having followed, to its letter, the school policy. Applicant has not proffered any evidence as to how the respondents have not followed the proper procedure in terms of the School Admission Policy. Neither has the applicant convinced the Court that the first and second respondents have discriminated against Liam. There are no objective facts by the applicant to support any alleged wrong doing on the part of the school authorities. There is also no proof that the two schools Dale Boys Primary School and Dale Boys High School are the same school or entity for the applicant to be justified in contending that the first respondent should have given first preference to Liam. In any Court proceedings the plaintiff or applicant has to come to Court with a clear case and no defendant or respondent has any duty to prove the applicant's case.

[34] Applicant's attorneys have also compounded Liam's problems by writing a letter to the fourth respondent, directing him to overrule his decision to refuse admission of Liam. Paragraph 4 of the letter which is dated 8th November 2011 reads:

> "4. A principal, like you, may overrule the decision of an agent, like the principal and School Governing Body."

[35] It was absolutely incorrect for the applicant's attorneys to suggest to the Head of Department that he had a right to overrule the principal's decision even if the decision, according to him, was wrong. The principal's decision was that of the Head of Department, doing so as the functionary entitled to take the decision whether to

grant or refuse the application for admission to the school. In the matter of ***Queenstown GHS***[12] *supra* **Leach J** clarified this issue with the following relevant remark [para 13]:

> "The appellant's case was a simple one, *viz* that Edkins (the principal) was the functionary entitled to take the decision whether to grant or refuse an application for admission to the school, that there is a prescribed procedure (as more fully set out below) whereby a parent or learner aggrieved by such a decision can appeal, that this procedure had not been followed and no appeal had been heard, and that the Department was therefore not entitled to direct Edkins to reverse his decision." [My emphasis]

[36] SASA has provided for the required procedure which has to be followed when a prospective learner applies for admission to a public school. Section 5(7) of SASA provides that an application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department. Section 5(8) proceeds to provide that if an application in terms of subsection (7) is refused, the Head of Department must inform the parent in writing of such refusal and the reason thereof. The principal of a public school is the delegated functionary responsible for the administration of the admission of learners to a public school. The principal therefore administers the process of admission on behalf of the Head of Department[13].

[37] When he was confronted with the contents of the letter from applicant's attorneys suggesting that the decision of the principal to refuse admission of Liam was wrong and that he or she should countermand such decision, the Head of

[12] At 189 para [13]

[13] See The Governing Body of The Rivonia Primary School and Another v MEC for Education Gauteng Province and 5 Others – case no 08340/2011 delivered on 7 December 2011

Department fell into the trap and directed the Head of Department to reverse the decision. This was unprocedural and contrary to the provisions of section 5(9) of SASA. The conduct of the Head of Department in doing so was wrong even if he held the view that the decision of the principal was wrong. He should have directed the parents to note an appeal to the MEC in the manner suggested above.

[38] For the above reasons, I am satisfied that this Court cannot interfere at this stage until such time that the applicant has complied with the provisions of section 5(9) of SASA.

[39] Members of the SGB of any school cannot be expected to draft reasons for their decision as if such reasons are drafted by a Judge or lawyer who is trained in that expertise. It is sufficient if the administrator gives reasons capable of being understood and which disclose the nature of the reason why a particular decision was taken. To say the school has no accommodation due to the fact that the classes are full, in my view, does not require any further elaboration, especially when the letter also explaining that the school policy was followed when the process was done was attached. There was no discrimination herein and this is confirmed by the fact that Liam was not the only child who was refused entry in the school.

G) URGENCY

[40] I felt it necessary to deal with the question of urgency which was pertinently raised by the first and second respondents for consideration by the Court. It is common cause that applicant was furnished with annexure “9” on 3 November 2011. It would have been a miracle for the school to accommodate 52 applicants or at least

more than 7 boys. It is unfortunate that Liam was one of those who did not succeed. There is no valid explanation why the applicant did not approach the Court until the 11 January 2012. The position of the first and second respondents was made clear as far back as 3 November 2011, that it was not prepared to take Liam as one of their pupils. The interference by the officers of the Department of Education including Mr Sokutu did not persuade the first two respondents to change their attitude despite all the threats exerted on the school principal. I still wonder how a school which is said to be full could still be required and or expected to admit more learners. How and where would the additional child(ren) get space. I am of the view that what was expected from the first two respondents was virtually impossible to say the very least.

[41] The explanation by the applicant why they only approached the Court on 11 January 2012, cannot be a reason to defeat the respondent's allegation of self created urgency. Applicant instructed his attorney as far back as October 2011. In spite of that attitude by applicant, first respondent was not prepared to change its decision. I cannot accept the suggestion that the delay was occasioned by an attempt to settle the matter with a view of avoiding unnecessary payment of costs. One does not settle alone and cannot settle with an adamant opponent. This is more so when even the highest authorities of the Department of Education could not succeed in persuading the first and second respondents to change their minds.

[42] My view is that in the circumstances the matter was not urgent and if ever there was any urgency it was self created by the applicant himself. In view of the

decision I have made *supra* in respect of the first point *in limine*, I do not propose to take this matter any further.

H) COSTS

[43] Mr Smuts has argued that the applicant should be ordered to pay, on a punitive scale, costs occasioned by the filing of the long affidavit by Mr Mannya. It is clear to me that the expert, who is the applicant's attorney, should have known better. He or she was aware or should have been aware that the affidavit was irrelevant to the issues in this case. Nonetheless he or she filed it. This conduct was way out of applicant's control. The applicant's attorneys, not the applicant, are the guilty parties with regard to the filing of that affidavit and they do not deserve to be paid any amount in attorney and client fees related to anything done by them about or in connection with that affidavit. They, therefore, cannot claim costs from the applicant which are related to that affidavit. If they have already been paid they should reimburse their client of that money. It is for that reason that I made the order of costs concerning the affidavit by Mr Mannya.

[44] The above are my reasons for the order I granted on 20th January 2012.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the applicant	:	Mr B.L. Boswell
Instructed by	:	Whitesides Attorneys GRAHAMSTOWN

For the 1st and 2nd respondents	:	Mr I. Smuts SC
Instructed by	:	Nettletons GRAHAMSTOWN