IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. 1684/2024

In the matter between:

NOMANDLA MYANDLU	**1st APPLICANT**
BONGIWE NELANI	**2nd APPLICANT**
RUTH MARILLIER	**3rd APPLICANT**
JACQUELINE ANN THURSTON	**4th APPLICANT**
KIM CHANTELLE THURSTON	**5th APPLICANT**

and

LITHA HYBERT LUDIDI N.O	**1st RESPONDENT**
THEMBEKA ELLEN MGUDLWA N.O	**2nd RESPONDENT**
TABILE MZWAKALI N.O	**3rd RESPONDENT**
VIVA YOLANDE MGUDLWA N.O	**4th RESPONDENT**
REBECCA YOLISWA XABA N.O	**5th RESPONDENT**
VELA SCHOOL (Registration Number : 401398)	**6th RESPONDENT**

JUDGMENT

Jolwana J:

Introduction

[1] The applicants all work at Vela School and are employed in various capacities. They have approached this Court on an urgent basis seeking urgent interim relief interdicting an impending disciplinary inquiry pending the determination of their review application set out in part B of the notice of motion.

[2] At the centre of the dispute is the nature and character of the sixth respondent and therefore the *locus standi* of the first to the fifth respondents to subject the applicants to disciplinary processes. Vela School, having existed for over three decades, its workers and those who assert authority and right to run it do not seem to agree on what it is that they work for and what it is that they claim a right to run. Its legal persona has become a matter of dispute and huge controversy between the parties. It is that dispute that has resulted in the applicants launching these proceedings seeking interim interdictory relief on the basis that their employer is another entity, not the one represented by the first to the fifth respondents.

The parties

[3] The first applicant has been in the employ of Vela School for the past 38 years. Five years ago, she was elevated to the position of principal. The third to the fifth applicants hold various teaching positions in the school and it appears that the fourth applicant is also a head of department within the school. The second applicant is a bursar of the school. It is unclear when the second to fifth applicants got employed at Vela School.

[4] The first to fifth respondents are cited *nomino officio* as members of the board of trustees of Vela School Trust. It is common cause that they are trustees of Vela School

Trust. The sixth respondent is cited as a registered Non-Profit Company (NPC) with registration number 401398. The first respondent is the chairperson of the board of trustees. For the sake of brevity, the first to fifth respondents shall henceforth be referred to simply as the respondents save where it becomes necessary to refer to a specific respondent in which case such respondent shall be referred to as cited. The sixth respondent shall be referred to simply as Vela School.

Background information

[5] In 1991 a trust was registered under Deed of Trust No. T2/91. That trust is described in the trust deed as Vela School Trust. Its objects are described in that Deed of Trust (trust deed) as follows:

"2. OBJECTS OF THE TRUST

The objects of the Trust shall be to –

To run a private school known as Vela School and shall in fulfilment of this object

2.1 Acquire, develop and lease fixed property;

2.2 Solicit, for and accept monies"

[6] In 2011 the 1991 trust deed was amended by the lodgement with the Master of the High Court (the Master) of a new trust deed which was signed on 14 April 2011 and lodged with the Master on 29 June 2012. However, the trust deed number did not change. There are some eccentricities between the two trust deeds. I may mention a few that I consider to be of some significance.

[7] In the1991 trust deed the objects of the trust are reflected under the rubric of the objects of the trust and they are the ones referred to above. However, in the 2012 trust

deed that rubric is not there but there is a new rubric called trust purposes under which the listed objects do not include running Vela School[1].

[8] One can easily observe that the objects of the trust as they appear in the 2012 trust deed under the rubric of trust purposes do not expressly include the looking after and providing for the proprietary and financial needs of Vela school which has prominence as objects or purposes of the trust in the 1991 trust deed. One other significant

[1] "TRUST PURPOSE

The objects of the Trust shall be:

5.1 to establish a Board of Trustees to initiate, carry on or be concerned with the collection or raising of funds and the administration thereof in terms of the provisions of this Deed;

5.2 to receive any funds, property (movable or immovable property, corporeal or incorporeal) and/or money donated or otherwise made over to the Trust;

5.3 establish this Trust for the purpose of receiving donation to be used for the defrayal of any expenditure directly incurred in pursuing and achieving the Trust Purposes;

5.4 to invest and deal with the Trust Fund as set out herein;

5.5 to apply the Trust Fund in or towards;

5.5.1 the acquisition, development and leasing of fixed property(ies),

5.5.2 the furtherance of any of the objects of the Trust;

5.6 the Trust shall utilise the Trust Funds solely for the objects for which it has been established or invest such Trust Funds;

5.6.1 with a financial institution as defined in section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990);

5.6.2 in securities on a licenced stock exchange as defined in Section 1 of the Stock Exchange Control Act, 1985 (Act No.1 of 1985; or

5.6.3 in such other financial instruments as the Commissioner for Inland Revenue may approve.

5.7 At least 75% of the net revenue (excluding donations) of the Trust is to be expended in the furtherance of its objects within a period of twelve months from the end of the financial year during which it accounts, provided that where funds are to be accumulated for a specific capital project, the prior written permission of the Commissioner for the South African Revenue Services (to which the Trust submits its annual tax returns) must be obtained.

5.8 The activities of the Trust shall be confined to the Territory and the Trust Funds will be applied within this area."

peculiarity between the two trust deeds is that the original trustees were listed as Wiseman Lumkile Nkuhlu, Jiyana Maqubela, Dowa Vena Mgudlwa, Barnabas Sanele Titus and Wakeford Myolisi Dondashe in the 1991 trust deed. In the 2012 trust deed under the rubric of new trustees it is recorded therein that all the original trustees mentioned above were being removed save for Mr Dowa Vena Mgudlwa. In their stead Philip Horatius Sigqibo Zilwa, Paul Samuel Stafford, Bob Mazwana and Litha Ludidi were being substituted to join Mr Dowa Vena Mgudlwa. The latter, in his capacity as chairperson of the board of trustees, was the signatory to the letter of appointment of the first applicant when she was appointed to the position of principal. More about that letter of appointment later in this judgment.

[9] The other peculiarity also of some huge significance is that the object of the trust relating to Vela School as stated in the 1991 trust deed was not deleted from the 2012 trust deed. It appears under the rubric of "INTRODUCTION" below which the following is stated:

> "The Vela School Trust was established in 1991. Its main object is to assist in the administration and management of a private school known as Vela School, situated at Mthatha, through acquisition, development and leasing of fixed property(ies). The trust will also solicit and accept donations of any kind and monies."

It bears mentioning that in clause 2.2 of the 2012 trust deed the following appears: "*The headings to the clauses of this Deed have been inserted for reference purposes only and shall in no way govern or affect the interpretation of this Deed*".

The facts

[10] On 15 November 2023 the current chairperson of the board of trustees Mr Litha Hybert Ludidi wrote a letter to the first applicant notifying her of the board of trustees' decision to place her on precautionary suspension from work pending the finalisation of an investigation into serious allegations of misconduct. She was further told that the precautionary suspension was subject to certain conditions listed therein which include the fact that the suspension would be on full pay together with all the fringe benefits she ordinarily enjoyed. In that letter she was also told that her contact person during the suspension period would be the fourth respondent.

[11] On 28 February 2024 in the same capacity as just indicated hereinbefore, Mr L.H. Ludidi wrote another letter of suspension to the first applicant. In that letter the first applicant was being suspended from her role as principal of Vela School with effect from that date. The letter of suspension of the second applicant is dated 16 January 2024 whilst the letters of suspension of the third to the fifth applicants were all written on 27 February 2024. All the applicants were told in their individual letters of suspension that their suspensions would be on full pay together with all their fringe benefits to which they were ordinary entitled until the investigations were completed and a decision was made.

[12] On 10 April 2024 Mr L.H. Ludidi wrote letters notifying all the applicants of the date on which they were each required to appear in a disciplinary hearing. On 11 April 2024 the applicants' attorneys of record addressed a letter to the chairperson of the board of trustees on behalf of all the applicants indicating the applicants' instructions to challenge both the suspensions and the intended disciplinary inquiry. They demanded that pending the finalisation of a review application that was to be filed within five days of the

date of the said letter, the disciplinary inquiry should be postponed. The undertaking in that regard was required by the 12 April 2024. On the same date, the 12 April 2024 Mr L.H. Ludidi responded to the applicants' attorneys' letter. His response was in the form of a letter captioned "Firm Stance on Scheduled Disciplinary Hearings Despite Request for Postponement." It was indicated therein that the disciplinary inquiries would proceed as scheduled even if the applicants did not attend.

The applicants' case

[13] The genesis of the applicants' case, as I understand it, is that they have a right not to be subjected to an unlawful disciplinary process. They allege that the process embarked upon by the board of trustees is patently unlawful on the basis that Vela School is a registered Non-Profit Company with registration number 401398 (the NPC). The suspension letters and the invitation for the applicants to appear before a disciplinary inquiry were all issued on behalf of the board of trustees of the Vela School Trust. The applicants contend that the authority of the board of trustees of Vela School Trust to run Vela School was removed in 2011 and Vela School has since been run by the school management team in consultation with the school governing body. Most importantly, the applicants say that the board of trustees is not their employer. Therefore, it has no legal standing to subject them to disciplinary processes. The applicants say that they fear that if the unlawful disciplinary inquiry is allowed to take place it could unlawfully deprive them of their employment which would have disastrous consequences for them in various ways should it result in their dismissal.

The respondents' case

[14] The respondents deny that Vela School is an NPC. They insist that it is run under Vela School Trust and the applicants are employed by its board of trustees. They say that Vela School Trust is a Non-Profit Organisation (NPO) and not an NPC as the applicants allege. They say that as an NPO it is not profit driven but is established for the educational benefit of the community it serves. They explain that the number 401398 referred to by the applicants as its NPC registration number is the Education Management Information System (EMIS) number assigned to Vela School by the Department of Education for administrative and monitoring purposes. It is not a registration number of Vela School as an NPC. In this regard the respondents have annexed to their answering affidavit a certificate of registration issued by the Department of Education and it reflects the number 401398 as an EMIS number. That registration certificate bears the signature of the Superintended General of the Department of Education. It reflects the name of the school as Vela Private and it reflects that it is a certificate of registration as an independent school.

[15] With regard to the employment of the first applicant the respondents have annexed her letter of appointment dated 6 May 2019 signed by Mr D V Mgudlwa in terms of which it appears that the first applicant was being employed by the board of trustees of Vela School Trust. It is worth noting that Mr D.V. Mgudlwa was one of the original trustees as listed in the 1991 trust deed. He is the original trustee that was not removed when that trust deed was amended in 2011.

[16] The respondents further contend that the applicants have historically acknowledged the board of trustees as their employer and have, on its behalf, engaged in various formal communications. The respondents have, in this regard annexed a letter dated 7 February 2023 written on behalf of Vela School by the first applicant in her capacity as principal. That letter is addressed to Mr T Mzwakali, the deponent to the respondents' affidavit. It reads:

> "Dear Mr T Mzwakali
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> In the meeting of the Board of Trustees of Vela School held on 02 February 2023, the appointment of your firm was confirmed and endorsed as the Auditors of Vela School. Kindly avail yourself for a Board meeting to be held at 10:30 am on Thursday 09 March 2023 in the Senior School Library.
>
> We look forward to seeing you there.
>
> Sincerely
>
> **.....**
>
> N.D. Myandlu (MS)
>
> For and on behalf of Vela School."

[17] This letter appears to have been signed by the first applicant. Mr T Mzwakali is cited as the third respondent in his capacity as a member of the board of trustees in these proceedings. I must hasten to point out that the applicants have not filed a replying affidavit to deal with any of the issues raised by the respondents including the purported acknowledgment of the authority of the board of trustees and the respondents' assertion that the applicants are employed by the board of trustees of Vela School Trust. The first applicant has not disputed the purported authorship of that letter or even explained the circumstances in which she wrote the said letter.

[18] The respondents have also raised as a preliminary issue the non-joinder of the trustees for the time being of Vela School Trust. I do not understand the basis on which this preliminary issue is raised. This is because as indicated earlier, the respondents have been cited in the papers specifically as members of the board of trustees of Vela School Trust. In my view the issue of non-joinder is, on the facts of this case, totally misplaced and has no merit whatsoever. I do not think that more needs to be said on this issue.

[19] The second preliminary issue is that of urgency. The respondents do not seem to challenge the timelines that appear to be common cause regarding the date on which the notices to attend a disciplinary inquiry were issued and the dates set out for the sitting of the disciplinary inquiry. I may mention again that the invitations to the disciplinary inquiry were issued on 10 April 2024, and it was indicated therein that the hearing was scheduled for the 22 April 2024 to the 23 April 2024. It seems that it was these dates that triggered the launching of this application on an urgent basis. The papers were issued on 15 April 2024. I do not think that the applicants tarried in taking the steps they did in having the papers issued and setting out truncated timelines for the respondents to file their answering papers regard being had to the impending dates for the disciplinary inquiry.

[20] The respondents' challenge on urgency does not appear to be about the fact that the time frames were truncated. It appears to be about the matter not being urgent at all on the basis that there are other remedies that are ordinarily available to the applicants in the normal course. The respondents seem to accept that an employer's disciplinary processes can be interdicted. However, they contend that that could happen only if

exceptional circumstances are shown to exist where grave injustice would otherwise occur. They further contend that it remains open to the applicants at the inception of the disciplinary inquiry to object to any perceived unfairness that could jeopardise their right to a fair process. The respondents contend that this application was instituted prematurely in circumstances in which the issue of their authority to discipline the applicants could have been raised at the disciplinary inquiry as the applicants are legally represented. For whatever reason the applicants have not filed a replying affidavit to deal with all or any of these issues or points of objection to the applicants' application being necessary or even urgent.

The analysis

[21] Urgency is always a contested issue which unfortunately has, in some instances often been used to the point of being abused where the invocation of the urgency rules is not warranted and is sometimes calculated to circumvent the normal rules of court to get ahead of the que of the hearing of cases in the normal course. I consider it useful to make a timely reminder of what the rules of urgency generally require of an applicant. In *Caledon Street Restaurants*[2] Kroon J summarised our rules of urgency in the following terms:

"In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant the following principles are applicable. It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6(12) to dispose

[2] *Caledon Street Restaurants CC vs D'Aviera* 1998 JDR 0116 (SE)

of an urgent matter by procedures “which shall as far as practicable be in terms of these rules”. That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase “which shall as far as practicable be in terms of these rules” must not be treated as **pro non scripto**. The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2 (a) of the First Schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisor must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey rule 6(5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers). On the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a). It may be that the time elements involved, or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be met by using Form 2(a) with shortened time periods or by another adaptation of the form, e.g. advanced nomination of a date for the hearing of the matter or omitting notice to the registrar accompanied by changed wording where necessary. Adjustment, not abandonment of Form 2(a) is the method.”

[22] If regard is had solely to the date set out for the disciplinary inquiry against the date on which the applicants received the notice to present themselves thereat and if that was the sole criterion, the applicants would have indeed complied with these time honoured rules of urgency in my view. However, there is another important aspect. That is the existence or lack of an alternative remedy. This requirement is very central to the issue of urgency. It is unfortunate that more often than not lip service often gets

paid to it by simply mentioning it in passing in making an allegation about its non-existence.

[23] The applicants' case as explained in its heads of argument is that it is common cause that Vela School is a registered NPO and is therefore clearly a separate legal entity with its own legal persona distinct from its office-bearers. Therefore, it is the employer that has the power to deal with matters of discipline in relation to the applicants not the respondents. The applicants place much reliance for this contention on section 12 (2) of the Non-Profit Organisations Act No. 71 of 1997 (the NPO Act) which deals with the requirements for the registration of an NPO[3].

[3] Section 12 (2) reads:

"Unless the laws in terms of which a nonprofit organisation is established or incorporated make provisions for the matters in this subsection, the constitution of a nonprofit organisation that intends to register must –

(a) state the organisation's name;

(b) state the organisation's main and ancillary objectives;

(c) state that the organisation's income and property are not distributable to its members or office-bearers, except as reasonable compensation for services rendered;

(d) make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers;

(e) make provisions for the organisation's continued existence notwithstanding changes in the composition of its membership or office-bearers;

(f) ensure that the members or office-bearers have no rights in the property or other assets of the organisation solely by virtue of their being members or office-bearers.

(g) specify the powers of the organisation;

(h) specify the organisational structure and mechanisms for its governance;

(i) set out the rules for convening and conducting meetings, including quorums required for and the minutes to be kept of those meetings;

(j) determine the manner in which decisions are to be made;

(k) provide that the organisation's financial transactions must be conducted by means of a banking account;

(l) determine a date for the end of the organisation's financial year;

[24] The applicants base their contention that Vela School is an NPO on what they contend is a common cause fact that it is an NPO. They rely on the provisions of section 12(2) of the NPO Act for their contention that they are being subjected to a disciplinary process by another entity in the form of the board of trustees and not their employer which they argue is the NPO. It is not lost to me that the issue of the determination of what Vela School is, is a matter for determination by the court that will be hearing part B of this application. However, the applicants are facing this conundrum which chiefly is about them seeking protection of what they contend is their *prima facie* right not to be subjected to an unlawful disciplinary process. There is another undeniable fact that there is an entity known as Vela School Trust which in both trust deeds appears to be expressly concerned with the administration and management of Vela School and its running.

[25] In their founding affidavit, the applicants have not provided any form of evidence for the case they appear to be making which is that their employer is Vela School NPC with registration number 401398. There is not a single document that they have annexed to their founding affidavit in support of Vela School being an NPC in the first place and secondarily being their employer. There is no letter of appointment for any of them which shows that they were employed by Vela School NPC. There is no contract of employment, there is no communication from an outside entity or person to Vela School or from Vela School to any other entity or person suggestive of Vela School being their employer or even sending out any form of communication indicating that it is involved in

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(m) set out a procedure for changing the constitution;

(n) set out a procedure by which the organisation maybe wound up or dissolved; and

provide that when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another non-profit organisation having similar objectives."

some way with the employment of staff at Vela School. I emphasise the fact that the case made by the applicants in their founding affidavit and therefore under oath is that Vela School is an NPC.

[26] For a reason that defies fathomability the case argued by the applicants in their written submissions is not that Vela School is an NPC. It is that Vela School is an NPO. However, the word non-profit organisation or its acronym, NPO is not mentioned at all in the founding affidavit, not even once. Similarly, and almost inexplicably, the word non-profit company or its acronym NPC is not mentioned, not even once in the applicants' written submissions. This disjunction stands out very prominently as being unusual and it is difficult if not impossible to ignore. When the submission of the applicants in their written submissions is made about Vela School being an NPO as a common cause fact, they are not saying that with reference to their founding affidavit. It seems to be based on no more than their acceptance of the respondents' assertions in that regard. It seems to me that the applicants are relying on what the respondents put forward as their case, that Vela School is an NPO to foreground a case they have not even tried to make in their founding affidavit. One would have expected them to file a replying affidavit to explain their assertions in the founding affidavit about Vela School being an NPC. And their acceptance of the respondents' postulation that Vela School is an NPO.

[27] If one accepts the applicants' argument about Vela School NPO being a body corporate with its own identity, something that they did not even allege in their founding affidavit, it must therefore be that Vela School is not an NPC. Unless they are contending that an NPC is or can be an NPO. This is not the case the applicants are making as they have said nothing about Vela School being an NPO in their founding

affidavit. The applicants' case is largely based on bald averments without even an attempt to go into some detail in their founding affidavit which is characterised by terseness. My understanding of section 12(2) of the NPO Act is that it makes the NPO status of an organisation subject to the laws in terms of which that organisation is established. In this regard the respondents say that Vela School Trust is registered under the Trust Property Control Act 57 of 1988. Section 12(2) of the NPO Act makes it possible for an entity registered under another legislation to be registered as NPO. This means that there is no legal impediment in a trust or an NPC becoming an NPO and being registered as such. I do not understand the provisions of section 12(2) to mean that on being registered as an NPO a trust would then lose its status as a trust and that its board of trustees would cease to exist in law. The applicants' have not made that assertion in their founding affidavit in any event.

[28] There is yet another difficulty for the applicants. That is that a non-profit company that they say Vela School is, is registered in terms of section 8 of the Companies Act 71 of 2008[4]. An NPC is not registered in terms of section 12 (2) of the NPO Act. An NPC

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[4] Section 8 reads:

(1) Two types of companies may be formed and incorporated under this Act namely profit companies and non-profit companies.

(2) A profit company is –

(a) a state-owned company; or

(b) a private company if –

(i) it is not a state-owned company; and

(ii) its Memorandum of Incorporation –

(aa) prohibits it from offering any of its securities to the public; and

(bb) restricts the transferability of its securities;

(c) a personal liability company if –

(i) it meets the criteria for a private company; and

acquires its status as a juristic person by virtue of its existence as a registered company in terms of the Companies Act. The other difficulty is that section 1(1) (x) of the NPO Act defines a non-profit organisation as *"a trust, a company or other association of persons* –

(a) established for a public purpose; and

(b) the income and property of which are not distributable to its members or office-

bearers except as reasonable compensation for services rendered."

[29] My understanding of this definition is that both a trust and a company can be registered as an NPO. Registration of an entity which is an NPO is done in terms of section 13 of the NPO Act. That section merely provides for procedural requirements for an entity that intends to be registered as an NPO. The Minister responsible for NPOs is the Minister of Welfare and Population Development which I presume is now what is called the Minister of Social Development. What all of this means is that the fact that Vela School is or maybe an NPO as the respondents allege and the applicants seem to accept does not mean that it is or may not be a trust. The applicants' case is argued in

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(ii) its Memorundum of Incorporation states that it is a personal liability company; or

(d) a public company, in any other case.

(3) No association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual embers is or may be a company or other form of a body corporate unless it –

(a) is registered as a company under this Act;

(b) is formed pursuant to another law; or

(c) was formed pursuant to Letters Patent or Royal Charter before 31 May 1962.

their written submissions on the postulation that Vela School is an NPO and therefore not a trust. Part of the applicants' case is in part also expressed as follows in their heads of argument:

"9. Beyond the debate about the authority to run the school, it is important to keep in mind that the issue in this matter is much narrower than running the school. The issue specifically relates to the question of employment. The applicants are employed by Vela School, a separate entity. It is Vela School that concluded contracts of employment with the applicants and the board of trustees, which is a creature of a Trust, has no authority to suspend and discipline the employees of Vela School.

10. There exists no legal basis on which the 1st to 5th respondents can suspend or discipline the employees of Vela School, a separate legal entity. Any suspension or disciplinary process of Vela School employees by the 1st to 5th respondents is unlawful."

[30] Section 1(1)(xi) of the NPO Act defines an office-bearer of a NPO as a director, trustee or a person holding an executive position. A juristic person is obviously incapable of acting on its own. It must act through individuals who must be duly appointed persons in terms of the instrument that establishes the entity concerned. The applicants do not say who the office-bearers of Vela School NPO are and who on behalf of the NPO must discipline them when the need arises. This is important because as earlier indicated it is clear that even a trust can be an NPO in terms of the NPO Act. Therefore it is not enough for the applicants to merely say that the board of trustees has no authority to discipline them without saying who is the repository of that authority. This is more so that it is not their case that the school management team and the school governing body which they say run the school, is the one that must or can discipline them when the need arises.

[31] It is equally not enough for them merely to allege that it is Vela School NPO that is their employer with no evidence undergirding their allegations in this regard. On the other hand, the respondents do not simply deny that Vela School is an NPC. They say that Vela School exists under Vela School Trust which is registered with the Master under the Trust Property Control Act with registration number T02/1991. They further say that it is an NPO but it is not an NPC which has to be registered under the Companies Act. Herein lies another problem for the applicants. It is not the respondents' case that Vela School Trust is a registered NPO. They just say that it is an NPO. Section 12(2) of the NPO Act does not make it compulsory for an NPO to be so registered as such. What it requires is that if an NPO intends to be registered as such it must ensure that its constitution provides for the matters listed therein if those are not provided for in the primary legislation.

[32] The respondents also contend that a registration number of an NPC is different from the number that the applicants regard as the registration number of Vela School as an NPC. They explain that not only is that number not that of Vela School as an NPC which they say it is not. They say that that number is an EMIS number allocated to Vela School by the Department of Education for administrative and monitoring purposes. None of the facts placed before court by the respondents have been gainsaid by the applicants. The letter of appointment as principal of Vela School signed by Mr D.V. Mgudlwa on 6 May 2019 in his capacity as chairman of the board of trustees is similarly not gainsaid. So is the respondents' assertion that the applicants have historically always accepted the authority of the board of trustees. Besides their *ipse dixit* there is no evidence at all provided by the applicants in support of any of their contentions that

they are employed by Vela School NPO or Vela School NPC depending on whether regard is had to their evidence in their founding affidavit or their heads of argument. The first applicant says that as a teacher and principal she is familiar with the management, governance and day to day running of Vela School. Precisely for that reason she is well positioned to do more in the founding affidavit than basing her case on bald unsubstantiated averments.

[33] These are motion proceedings and how a matter is determined depends on the material before court in the form of pleadings. In *Molusi*[5] the Constitutional Court had this to say:

"It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:

> "If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties …should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who alleges [asserts] … must … formulate his case sufficiently clearly as to indicate what he is relying on.

The purpose of pleadings is to define for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

> 'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

[5] *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) para 27 - 28

This is what the applicants have, in my view, failed to do – to provide evidence sufficient to at least make out a *prima facie* case that they have a right not to be subjected to a disciplinary process by the board of trustees of Vela School Trust. I understand that the unlawfulness they say will taint the intended disciplinary process is said to arise from being subjected to a disciplinary process by an entity that is not their employer.

[34] This brings me to an issue raised by the respondents to which I alluded earlier. It is that in order to succeed in their quest for the type of an urgent interim interdict the applicants want, they are required to raise exceptional circumstances. The applicants have not dealt with this issue in their founding affidavit. The issue of an intervention by the court in *medias res* has a long history in our case law bestriding criminal and civil cases and *sui generis* proceedings like disciplinary inquiries. The requirement that exceptional circumstances justifying the required intervention by a court in ongoing proceedings must be set out in the pleadings has been restated by our courts a number of times. In *S v Makhubele 1987 (2) SA 541 (T)*[6] the court, per Kriegler J (as he then was) said:

> Trivial irregularities or procedural imperfections are immaterial; only where there has been a failure of justice, real and substantial prejudice to the accused, are the proceedings liable to interference. (See *Hiemstra (op cit* at 673 – 678). By the same token s 304A is not to be invoked in the absence of such a failure of justice.
>
> Indeed, in the case of a review in *medias res* such as is envisaged by s 304A, the test, if anything, is to be applied with even greater caution. For this there are a number of reasons. First and foremost, piecemeal litigation is inherently undesirable – *interest rei publicae ut sit finis litium*. The divergence of views evident in the cases referred to in the above quoted passage from *Hiemstra* is largely ascribable to judicial disapproval of untimely intervention and consequent prolongation and proliferation of proceedings. Hence, also, the formulation of strict

[6] *S v Makhubele* 1987 (2) SA 541 (T) at 545 A-D

criteria even in those cases where there was intervention before the conclusion of the case, eg *S v Mametja* 1979 (1) SA 767 (T) and *S v Taylor* 1976 (4) SA 185 (T)."

[35] In *Equisec (Pty) Ltd v Rodriques and Another 1999 (3) SA 113 (WLD)*[7] which was a civil matter Nugent J expressed himself as follows:

"Where a person is accused of having committed an act which exposes him to both a civil remedy and criminal prosecution, he may often find himself in a dilemma. While on the one hand he may prefer for the moment to say nothing at all about the matter so as not to compromise the conduct of his defence in the forthcoming prosecution, on the other hand, to do so may prevent him from fending off the immediate civil remedy which is being sought against him. Where he finds himself in that dilemma he might appeal to a court to resolve the issue for him, which is what has occurred in the case which is now before me.

…

The prejudice to which the first respondent is said to be exposed in the present case is not extraordinary. I think that on a fair reading of his affidavit it comes down to this: the first respondent would prefer for the moment to say nothing at all about the matters which have given rise to his prosecution, which of course he is ordinarily entitled to do. If the sequestration proceedings are not stayed, however, he might be called upon to disclose information relating to those self-same matters and he wishes to avoid being in that position. There are two circumstances in which the first respondent will face the prospect of disclosing information which may be relevant to whether he has committed the offence with which he is now charged. Firstly, he is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final liquidation under. There is, of course no legal compulsion on him to do so. Whether a court should intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in *Davis v Tipp N.O. and Others* 1996 (1) SA 1152 (W), which was subsequently followed in *Seapoint Computer Bureau (Pty) Ltd v Mcloughlin and De Wet NNO* 1997 (2) SA 636 (W). I see no reason to depart from the conclusion which was reached in those cases. In my view, the choice which the first respondent may face between abandoning his defence in civil proceedings or waiving his right to remain silent (cf Templeman LJ in *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 381,

[7] *Equisec (Pty) Ltd v Rodriques and Another* 1999 (3) SA 113 (WLD) at 115 A-B and I – J and 116 A-D.

especially at 423 D-G does not constitute prejudice against which he should expect to be protected by a Court and I would not exercise my discretion in favour of the first respondent on those grounds alone."

[36] Recently in *George v Nyoka and Others [2023] 7 BLLR 654 (LC)* [8] which was a labour matter like this one, Tlhotlhalemaje J expressed the legal position as follows:

"[1] This application is representative of the now familiar and habitual abuse of the urgent court by employees, especially those who occupy senior positions in all spheres of government, especially in municipalities. These employees, after being placed on prolonged periods of precautionary suspensions and when called upon to answer to the charges of misconduct, will take all means necessary in order to avoid the conclusion of those enquiries. When all the strategies deployed to avoid the hearing comes to nought, the next step is to seek sanctuary from this Court, with contrived and legally unsustainable urgent applications, with the hope that the serious charges of misconduct will vanish.

…

[11] The question whether the Court can intervene in on-going internal disciplinary proceedings has been before it on countless occasions and the principles are fairly settled. It is accepted that this Court has jurisdiction and discretion to intervene in on-going disciplinary proceedings. It is however specifically required of an applicant to demonstrate exceptional circumstances necessitating such intervention, and to also demonstrate that grave injustice will result should the Court not intervene. In this case, no such exceptional circumstances were pleaded in the founding affidavit."

[37] The matter of *George* is on all fours with this matter. The applicants have focused on the usual requirements in respect of interim interdicts. They have essentially pleaded a *prima facie* right not to be subjected to an unlawful disciplinary process and thereby have their contractual relationship with Vela School unjustifiably interfered with by a separate entity. They complain that if an interdict is not granted the disciplinary hearing could result in them being unlawfully dismissed. They could lose their salaries which

[8] *George v Nyoka and Others* [2023] 7 BLLR 654 (LC) para 1 and 11.

would result in them suffering irreparable financial harm including losing their homes, vehicles, insurance policies, medical aid policies and the ability to provide for their dependents. They complain that once dismissed they could be replaced even before the decision to dismiss them is set aside on review. On the basis of all of the above they contend that balance of convenience favours the granting of the interim interdict and that no prejudice will be suffered by the respondents if the disciplinary hearing is postponed pending the determination of part B of this application.

[38] While one understands the applicants' difficulties if all or some of these possibilities were to eventuate, the fact of the matter is that there is nothing exceptional or extraordinary about them. This is because every employee who has to go through a disciplinary inquiry especially for serious charges of misconduct faces these ominous possibilities. On applicants' postulation all disciplinary hearings in all work places could be interdicted if the general requirements for the granting of interim interdicts are met to prevent this kind of serious harm which may very well be irreparable. The cases referred to above show that more than just pleading the ordinary requirements for interim interdicts the applicants were required to plead exceptional circumstances justifying an intervention in *medias res* in what is essentially an internal disciplinary process in the workplace which has its own remedies. The applicants have not done so. Absent exceptional circumstances being pleaded, this Court lacks jurisdiction to exercise its discretion and interfere in ongoing disciplinary processes in the workplace.

Conclusion

[39] I am not unmindful of the fact that the main case and therefore the final determination of the important issue of the applicants' right not to be subjected to an

unlawful disciplinary process is due to be adjudicated finally in part B of this application. I am, however, required to consider some of the aspects of that very issue as I have done above for the sole purpose of determining if indeed I should halt the disciplinary processes that are currently under way. As Moseneke DCJ said in OUTA[9]:

"Having granted leave to appeal, we must now decide the merits of the appeal. To do that I need not determine the cogency of the review grounds. It would not be appropriate to ursurp the pending function of the review court and thereby anticipate its decision. I have kept in mind that the Rule 53 procedure might result in the lodging of a supplemented case record which may entail new matters or disputes of fact which will best be dealt with by the review court itself. I nonetheless proceed to describe the subject matter of the review for the restricted purpose of probing whether the High Court was right in granting the interim interdict."

[40] It was argued on behalf of the respondents that there is nothing preventing the applicants from raising the issue of the board of trustees of Vela School Trust not being their employer at the disciplinary hearing. The chairperson of the disciplinary inquiry will be at large to deal with that issue either as a point *in limine* or even deal with it through hearing oral evidence from which the agency of cross-examination of the respondents' witnesses and the discovery processes or exchange of documents will be most useful in probing that very issue. The respondents further contend that in the event of an adverse finding there are remedies including referring the matter to the Commission for Conciliation Mediation and Arbitration (the CCMA) which is an independent body that would have jurisdiction to deal with any employee or applicant against whom an adverse finding could be made. The CCMA's arbitration rulings are themselves subject to review by the Labour Court and all the way to the Labour Appeal Court and even further. The applicants have not shown why or how these alternative remedies would

[9] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 31.

not be appropriate or available to them. In all these circumstances the application must fail.

Costs

[41] The respondents have asked for costs on a punitive scale of attorney and client in the event that the applicants are not successful. There may very well be a prospect of the normal future employer/employee relations being restored in the event of the applicants being successful in respect of part B. If they are not successful in respect of the review application the ultimate outcome of the disciplinary process may very well be in their favour. It would therefore be inappropriate for costs to be on a punitive scale at this stage. I am of the view that ordinary costs albeit on scale C of Rule 69 of the Uniform Rules of Court in terms of Rule 67A thereof would be more appropriate especially this being essentially an employer/employee dispute.

Result

[42] In the result the following order is made:

1. The application is struck off the roll.

2. The applicants are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved on scale C of Rule 69 of the Uniform Rules of Court.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

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Instructed by	:	VV Msindo & Associates Inc. Mthatha
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Instructed by	:	M.P. Ncame Inc Attorneys East London
Date heard	:	19 April 2024
Date delivered	:	02 May 2024