

**REPUBLIC OF SOUTH AFRICA**



**SOUTH GAUTENG HIGH COURT  
JOHANNESBURG**

**CASE NO: 2013/08339**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

**RANDVIEW COLLEGE (PTY) LTD**

**First Applicant**

**ZANDILE NTULI**

**Second Applicant**

**ELSIE LUBHEDZE**

**Third Applicant**

**LINDIWE MBATHA**

**Fourth Applicant**

**VIOLET MASEKO**

**Fifth Applicant**

**MBULELO MZONDO**

**Sixth Applicant**

**TARAFI NHAMO**

**Seventh Applicant**

**GEORGE SHIMA**

**Eighth Applicant**

**SAMUEL TAMOPO**

**Ninth Applicant**

**LUCIA PALAZA**

**Tenth Applicant**

And

**MEC OF EDUCATION GAUTENG**

**First Respondent**

**GAUTENG DEPARTMENT OF EDUCATION**

**Second Respondent**

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## **JUDGMENT**

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RATSHIBVUMO AJ:

1. This matter was initially brought before this court on 07 March 2013 on urgent basis before being postponed to the normal roll. According to the notice of motion, the Applicants seek a declaratory order to the effect that the First Applicant's premises are suitable to conduct the exit grade 12 National Senior Certificate examination; an interdict against the first and the Second Respondents restraining them from withdrawing the registration of the First Applicant as 2013 National Senior Certificate examination centre and an order directing the first and an order directing the Second Respondent to register the grade 12 students currently enrolled with the First Applicant to sit for their grade 12 National Senior Certificate examination at the First Applicant's premises. The rest of the Applicants are the guardians of the grade 12 learners registered at with the First Applicant.
2. **Background:** Following is the background that led to this application. The First Applicant is an Independent School as envisaged by the South African Schools Act 84 of 1996 (the Act) and is registered with the Second Respondent as such. In accordance with the provisions of Regulation 27 (6) of the Regulations pertaining to the Conduct Administration and

Management of the National Senior Certificate<sup>1</sup> the First Applicant had signed an annual service contract with the Second Respondent together with the application to register as an examination centre for 2012<sup>2</sup>. The registration of the First Applicant as an examination centre for 2012 was as such granted.<sup>3</sup> As required in terms of Regulation 27 (6) above, the First Applicant submitted an application for registration as an examination centre for 2013, grade 12 exit examination on 31 October 2012. This application was refused by the Second Respondent and the same was communicated to the First Applicant through a letter dated 31 January 2013<sup>4</sup>. According to this letter, the grade 12 learners enrolled at the First Applicant would have to be channelled for examination through other institutions and the First Applicant could request to be re-evaluated once all areas of concern raised are addressed. No reasons were furnished and requests for reasons by the applicant went unheeded.

3. The application is opposed by the Respondents on the basis that the First Applicant failed to meet the minimum requirements for registration for National Senior Certificate examination centre and as such it failed to adhere to the annual service contract it signed with the Second Respondent.
4. **Issues for determination:** Whether the facts of the case warrant court intervention and if so, on what grounds and to what extent. The court has to decide if the decision by the Second Respondent is reviewable or not. Although it is not clear from the Notice of Motion as to the nature of the relief sought, it would appear from the Applicants' counsel reliance on

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<sup>1</sup> See Government Gazette no. 31337 R872 published on 29 August 2008.

<sup>2</sup> See Annexure RVC 16 attached to the first applicant's affidavit.

<sup>3</sup> See Annexure RVC 12 attached to the first applicant's affidavit.

<sup>4</sup> See Annexure RVC 27 attached to the first applicant's affidavit.

*Johannesburg Consolidated Investment Company LTD v Johannesburg Town Council*<sup>5</sup> that the Applicants seek a review of the respondent's decision.

5. Two issues were raised in the Applicants' heads of arguments. First, it was submitted that the decision by the Second Respondent is inconsistent with the Constitution of the Republic of South Africa which provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. Second, is the right that everyone adversely affected by the administrative action has which is to be given reasons for such an action. The second issue will not be dealt with here since the Applicants could have chosen to enforce their right to access to information in terms of section 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and they chose not to. Only the first issue would therefore be relevant for purposes of this judgment.
6. **Exhausting Internal Remedies:** Before visiting the statutory provisions pertaining to review, it is prudent to observe section 7 (2) (a) of PAJA which provides that 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. The first question would therefore be whether the Applicants have exhausted the internal remedies. Mr. Masilo, in the Answering Affidavit deposed for the Respondents avers that the Applicants brought this application to courts prematurely since they had not exhausted the internal remedies; in particular, the 14 days that the applicant has to lodge an appeal.<sup>6</sup> The First Applicant in his Replying Affidavit alleges that he was unaware of the regulations that make provisions for an appeal.<sup>7</sup>

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<sup>5</sup> 1903 TS 111.

<sup>6</sup> See paragraph 29.1.2 of the Answering Affidavit.

<sup>7</sup> See paragraph 27. 2 of the Replying Affidavit.

7. The Regulations issued in terms of the Act provide that the Assessment Irregularities Committee is empowered to recommend to the Head of Department or his or her nominee for deregistration of an independent school or learning institution as an examination centre; when there is evidence of *inter alia*, the flouting of policies, regulations and guidelines.<sup>8</sup> Regulation 10 of the same Regulations provides for an appeal process that may be lodged within 10 working days to the MEC of Education. It is therefore clear from the above that any decision to deregister an independent school from being an examination centre is appealable to the MEC irrespective of how it is worded (the Applicants argued that the letter referred to in footnote 4 above was worded as though the decision was final).

8. The contention by the Applicants suggests that the decision by the Respondents was unlawful, unreasonable and procedurally unfair. Sec 6 (2) of PAJA provides as follows,

- (2) A court or tribunal has the power to judicially review an administrative action if—
  - (a) the administrator who took it
  - (iii) was biased or reasonably suspected of bias;
  - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
  - (c) the action was procedurally unfair;
  - (i) the action is otherwise unconstitutional or unlawful.

Although there has not been any reference to this section of PAJA by the Applicants, the quoted parts of section 6 appear in my view to be the closest to the argument raised for them.

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<sup>8</sup> See Regulation 9 published in Government Gazette GN 1081 of 17 September 2004.

9. **Action to be reviewed.** I now turn to unpack the action complained about so as to answer if it is unreasonable, procedurally unfair or unlawful. All centres are expected to apply and register as examination centres on an annual basis before the end of October of the year prior to the examination.<sup>9</sup> Independent schools must apply to the relevant assessment body for registration as examination centres under their own names.<sup>10</sup> It follows from these provisions that the qualification by an institution for registration for examination centre on a particular year does not automatically qualify it for registration for the following year. All the information regarding how the First Applicant had qualified for registration for 2012 would therefore be irrelevant.

10. The First Applicant in this case is said to have submitted its application for 2013 registration by 31 October 2012<sup>11</sup>. Although Prayer 2 in the Notice of Motion refers to interdicting the Respondents from withdrawing the registration, it would appear from the facts that the Respondents did not actually withdraw the registration. A registration for 2013 was just not granted. A registration for 2012 lapsed with the 2012 examination. This is cleared by the words to the effect “this is valid for the year of examination (inclusive of the supplementary examination)” which appear at the bottom of the service contract signed between the First Applicant and the First Respondent.<sup>12</sup> Once the registration for a particular year is granted, it may be withdrawn for various reasons listed in the Regulations, but this applies only when it was granted. Of importance though is that an institution would be expected to qualify for registration each year without relying on merits of the previous year’s qualification.

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<sup>9</sup> See Regulation 27 (6) of Government Gazette no. 31337 R872 published on 29 August 2008.

<sup>10</sup> See Regulation 27 (3).

<sup>11</sup> See paragraph 8 of the Answering Affidavit.

<sup>12</sup> See Annexure RVC 16.

**11. Applicant's compliance with the requirements.** It is clear that the findings by the officers of the First Respondent regarding the suitability or readiness of the First Applicant to register as an examination centre are a matter of dispute. The Replying Affidavit prepared for the First Applicant suggests that the court should visit the premises to do inspection. In review proceedings, the responsibility of the court is not to determine if the decision by the statutory body is right or wrong or whether it is the decision the court would have granted had the matter been before it; but rather to determine if the decision was capriciously arrived at.<sup>13</sup> Unlike an appeal where the appeal body determines if the decision is right or wrong, in review, the courts determine the process of arriving at such a decision.<sup>14</sup> While I understand the frustration the First Applicant had in not being furnished with the reasons for the decision, the applicant had recourse in terms of PAJA where it could demand the same to be provided in accordance with the statutory provisions, giving the First Respondent 90 days to respond, but it opted not to exercise that right.

12. The fears the First Applicant harboured over the closing date as per Annexure RVC 33 which was recorded as 15 March 2013 does not help its plight. My understanding of Annexure RVC 33 is about the closing date for submission of the applications for registration as examination centres with the First Respondent. The First Applicant was covered since it submitted its application by 31 October 2012 already. I do not as such see how exercising the right to appeal can be said to be a submission later than 15 March 2013.

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<sup>13</sup> See *Shidiack v Union Government (Minister of Interior)* 1912 CPD 656 and *South African Railways v Swanepoel* 1933 AD 370

<sup>14</sup> *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA) at para 30.

13. Although the findings by the First Applicant's officers are disputed by the First Respondent, there is no dispute that when the First Applicant submitted its application in October 2012, it did not have some of the requirements such as clearance in terms of the local health and fire services bylaws.<sup>15</sup> It was rightly pointed in the Replying Affidavit prepared for the First Applicant that certificates are issued in advance for the following academic year. The certificate dated 28 July 2011 was issued for 2012 academic year for which the First Applicant qualified. No certificate was submitted for the year 2013. One would expect it to be dated in 2012 seeing the application was made in October 2012. A week after launching this application, the First Applicant produced letters suggesting that the inspection is currently underway with a view to have the First Applicant issued with the relevant clearance certificates.<sup>16</sup> Obviously the same will only be issued if the First Applicant complies with the necessary requirements. Until such time that the First Applicant is issued with the same, the Respondents remain in the dark on whether the First Applicant met this qualification. There obviously must be safety reasons for these requirements. Someone must take responsibility for ordering the issue of the registration for grade 12 examination centre ignoring the failure to comply with these statutory requirements exposed in this application. Such body should not be the courts.

14. I have also noted that the Respondents made available institutions whereby the grade 12 learners would be able to write examination at premises other than those of the First Applicant. According to the Respondents, the learners would be taught at the First Applicant premises and certificates would also be issued under its name in its premises. It is only the writing

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<sup>15</sup> See Regulation 27 (1) (b).

<sup>16</sup> See Annexure RVC 50 & 51

of examination that would not take place at the First Applicant's institution.

15.I am therefore unable to find the decision of the First Respondent to be unreasonable, unlawful or unfair. The First Applicant conceded in the Replying Affidavit that it had not complied with all the requirements for such registration on undisputed facts.

16.For the reasons stated above, I make the following order

**The application is dismissed with costs.**

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**T.V. RATSHIBVUMO**  
**ACTING JUDGE OF THE HIGH COURT**

**Date Heard:** 15 May 2013

**Judgment Delivered:** 13 June 2013

**For the Applicant:** Adv. MA Fhedzisani  
**Instructed by:** Denga Incorporated  
Johannesburg

**For the Respondent:** Adv. N Nharmuravate  
**Instructed by:** State Attorneys  
Johannesburg