IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.4327/06

In the matter between:

TITUS M. MLANGENI **APPLICANT**

VS

WATERFORD KAMHLABA UNITED

WORLD COLLEGE OF SOUTHERN AFRICA **1st RESPONDENT**

THE PRINCIPAL OF WATERFORD KAMHLABA

UNITED WORLD COLLEGE

OF SOUTHERN AFRICA **2nd RESPONDENT**

THE DISCIPLINARY COMMITTEE OF

WATERFORD - KAMHLABA UNITED

WORLD COLLEGE OF SOUTHERN AFRICA **3rd RESPONDENT**

CORAM **MAMBA AJ**

FOR THE APPLICANT **MR. NKOMONDZE**

FOR THE RESPONDENTS **ADV. M. VAN DER WALT**

(instructed by Cunie and Sibandze)

JUDGEMENT 14th
March, 2007

The applicant is Mr Titus M. Mlangeni an attorney of this court and has filed this application in his capacity as the legal guardian of his daughter, who is a minor born on the 4th day of December 1989.(hereinafter referred to as the minor).

The first Respondent is Waterford KaMhlaba United World College of Southern Africa, which is a school as defined in the Education Act of 1981 and is situate at KaMhlaba Park in Mbabane (hereinafter referred to as the school)

The second Respondent is the Principal of the 1st Respondent and cited herein in that capacity.

The 3rd Respondent is the Disciplinary Committee of the 1st Respondent whose functions and duties entails inter alia, hearing disciplinary' cases involving alleged transgressions of the rules and regulations of the school by pupils of that school.

The following facts are either common cause or not in dispute in this review application; namely:

(1) Besides the usual or ordinary High School study programs, the 1st respondent also offers a study of the International Baccalaurette Diploma Program at its premises at KaMhlaba Park.

(2) The International Baccalaurete Diploma (herein referred to as the IB Diploma is offered to students who have successfully completed their IGCSE studies. Students, whether already enrolled at the 1st Respondent for their Matric must specifically apply to pursue the IB Diploma at the school.

(3) During 2006, the minor was a final year IGCSE student at the school.

(4) In or about July, 2006 the minor applied and was admitted to pursue the IB Diploma at the school in 2007.

(5) The minor was offered a place to study the IB Diploma, subject to her confirming her acceptance in writing to the school by the 30th day of September 2006 and paying the required deposit and all outstanding fees. She fulfiled all these 3 conditions.

(6) The school offers at its premises separate hostel or boarding facilities for boys and girls.

(7) During 2006 the minor was a boarder at the school and was housed at ESIVENI RESIDENCE.

(h) The day to day life or conduct of all students at the school is governed and regulated by a set of written rules and regulations. The latest of these rules was updated in December 2005. These rules were known to the minor.

(i) On the 30th day of October, 2006 the minor was fcund in her rcom or cubicle with one Alex Wall, a boy and fellow pupil at the school.

(j) The presence of the boy in her room was a violation of one of the rules referred to as Mixed Socialising, (k) On the same day she was hauled before the 3rd respondent and charged with two offences namely ; (il engaging in sexual relation with Alex Wall (ii) Mixed Socializing - having or allowing a perscn of the opposite gender tc be witi: her in her room.

(lj On the same day she pleaded guilty and was found guilty as charged under fiii above and she o'.eaded not sud""" and

judgement was reserved in respect of the other offence

referred to above, (m) Following the verdict of guilty aforesaid, she was rusticated

and her admission to the IB diploma programme revoked,

but was allowed to write her Matric examinations, (n) The minor appealed to the Governing Council of the school

against the decision to revoke her admission to the IB

diploma programme, complaining that it is too harsh and

unprecedented at the school, (o) Her appeal failed and she then applied to this court for an

order *inter alia;*

"(2) Reviewing, correcting and or setting aside the decision of the 3rd Respondent to withdraw the admission of [the minor] to-the IB Diploma in 2007."

[6] The gravamen of the minor's application for review is to be sound, i believe in the following excerpts from her founding affidavits namely ;

"6. I am advised and verily believe that, regard being had to all the circumstances of the case and the provisions of the Code of Conduct for Students contained in the first Respondent's General Information Brochure, which '. have annexed hereto marked Annex TM 8, the third respondent's sanction to withdraw my admission to the 3 programme was grossly irregular, is unjustifiable and dees not fit the offence of which ! xas found guilty. ...

8.1 Furthermore. I verily believe that the third respondent acted grossly irregular by imposing the sanction as it did in that it did not take into consideration the prrris:cr_s of the Code of Conduct for students (annex TM9 herec.o<j which

states at page 18 that "the disciplinary committee is likely to suspend (at least from residence) and place on principal's warning students in the case of their first breach of this rule

8.2 I verily believe that had the third respondent taken into consideration this aspect of the Code of Conduct for students, it would not have imposed the sanction it did because the code envisages that students who have breached the Mixed Socialising rule for the first time may be suspended from residence and placed on the principal's warning. This being my first breach of the rule I believe that I deserved a lenient sanction being the minimum sanction stipulated by the code, that being suspended-from residence and placed on the principal's warning. ...

9.11 am advised and verily believe that yet another ground upon which it may please this honourable court to correct and or set aside the decision of the third respondent is that the offence with which I was charged does not justify the sanction imposed upon me by the third respondent.

9.2 I am advised and verily believe that the punishment must fit the offence and that it must be meted out as a corrective measure rather than be retributive. To withdraw an offer of a place to the IB program does not have a corrective effect but actually operates to destroy not only my future but my -Integrity as well. It is upon this further ground that I pray that it may please this honourable court to intervene and stop the injustice to which I am being subjected by the third respondent's decision. ...

11.2 The first respondent's acceptance of my application to the 13 Diploma program was not conditional either on me not breaching the Code of Conduct for students or anything. It is therefore wrongful and unlawful for the third respondent to withdraw its offer of a place to the IB Diploma program in 200" by reason that I have breached a rule of discipline whereas the acceptance of my application for an offer of a place to the IB Diploma program was not conditional.

11.3 It is my humble submission therefore that the withdrawal of the offer of a place to the IB Diploma program was wrongful and unlawful and as such must be corrected and or set aside by this honourable court."

[7] In her replying affidavit, the minor makes the point that she was not punished for the offence for which she was convicted but for a breach of the sexual relations rule on which verdict was reserved.

[8] Opposing the application the school has submitted that:

"1C.L.1 Acceptance into the college, at any level, is based on overall continued good conduct and behaviour, and it is an implied term, and only logical, that a candidate should measure up to high standards in all respects.

10.1 2 Moreover, the offer of a place is entirely in the discretion of the First Respondent and I respectfully draw the attention of the above Honourable Court to the preamble to the Code of Conduct, annexure TM 8/9" (hereinafter referred to as the "Code") or. p. 15 thereof, where it is stated in me first two paragraphs, inter alia, that: *Wherever*

possible, the College community aspires to relationships and discipline based on trust" *and* "*...the college community aspires to behaviour consistent with upholding the dignity and ideals...*"*of the College.*

10.1.3 Mere academic achievement and payment of prescribed fees therefore do not suffice.

12.2The sanction imposed on the deponent was also justified by virtue of *inter alia* the following aggravating circumstances:

12.2.1 Prior to the incident in question, the deponent and the boy who was in her room had been repeatedly told by staff to cool it in their relationship because of an apparendy intense relationship between them. This issue was discussed by staff in my presence. Due to the fact that most staff are currently on leave, confirmatory affidavits could not be ootained from all of them but I respectfully refer to the confirmatory affidavit of the Head of Esiveni Residence. **DONOVAN KING** hereto.

12.2.2Mr King went to the deponent's room as a result of a complaint by a fellow student about some problem m the deponent's room. (I was in the company of Mr King when he received this call). Mr King proceeded to the rocm and through the door saw the naked behind of the toy in question. I again respectfully refer to his commutator/ affidavit hereto.

12.2.3 The deponent consistently denied Mr King's statement that the boy's behind was naked, and in effect called Mr King a liar. This is unacceptable and destroys the rela.ucr_s.hin of trust between teacher and student The First Respondent cannot be exoected to admit *to* anv of their ongrv:—~es a

student who the First Respondent has good reason to believe is lying over a major disciplinary matter.

12.2.4 Although the disciplinary body reserved a verdict on the question of sexual relations, the facts that the boy was a: the very least, semi-naked and that the deponent was naked but for a towel, and had visible love bites, justify the inescapable inference of something more than simple hugging, kissing or holding hands. This is an aggravating circumstance and in the event of a conviction, would render a student liable to being expelled."

[9] .Although the minor also complained in her founding affidavit tha; me decision to revoke her admission into the.-IB diploma programme was taken by the 2nd Respondent without ±e necessary consultation, this complaint was, wisely in my view, ncc argued at all by Mr. Nkomondze on behalf of the applicant during me hearing of argument before me. The want of consultation :n ihe sanction imposed on the minor had been refuted by the l-a Respondent who pointed out that the persons mentioned in TV I participated in the process and were consulted. This is ai^: confirmed by Donovan King in Paragraph 4.6 of his confirmatory affidavit.

[10] The school further states thai :

"14.This case -.vent beyond mere residential mixed socialising, for the reasons aforestated. Moreover, tine C:o± stipulates a *likelihood* only, and does not postulate an absolute rule as :o an aooropriate sanction. ■ Also ai aforestated, each case is *zc* be decided with reference c.c _n= Own peculiar facts and circumstances, and in this instance

the sanction imposed was clearly justified and should ~*oz* be interfered with.

(8) It is denied that there is any merit in this mound advanced by the deponent. The deponent had prior warnings from teachers to correct her behaviour The deponent aggravated the posidon by, to this day, amusing Mr King of lying, and also admitted during the hearrm that she had lied to Mr King as to why she took so long cc open her door. She said she took a long time to open *zht* door because she was scared, i.e. she knew she was entity of wrongdoing, despite her protestations to the cmtrary. Further, denying the deponent a place in the IB promnme does not prevent her from completing her scmoiing elsewhere, she was not expelled i.e. she does not hare an expulsion on her record, and it is therefore somewhat melodramatic for the deponent to allege that her future is being destroyed.

(9) It is correct that precedents should be followed, bit :t is not be followed blindly since each and every case mtst be considered on its own merits. The Code, annexure **t*TBCS/9"** on p. 15 thereof expressly stipulates that precedents sraZ be considered but not necessarily followed. The discmumary hearing stopped short of finding the deponent ruity of engaging in sexual relations, for which the Code prcmces for a likelihood c:* expulsion. All the relevant farm and circumstances pertaining to the deponent's miscmcduct should have been, and were taken into consideration "

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The grounds upon which this court, as a review court may interfere with the decision of the 2nd Respondent are limited and have been stated in several judgements of our Court of Appeal, the courts in the Republic of South Africa and this Court, the latest being the case of **ATLAS MOTORS (PTY) LTD v ROBERTO MACHAVA AND ANOTHER, CASE 77/2003** (unreported). See also the cases cited therein and the case of **STANDARD BANK SWAZILAND LIMITED v THEMBI DLAMINI AND ANOTHER, CASE NUMBER 3420/2000.**

In the case of **JOHANNESBURG CONSOLIDATED INVESTMENT COMPANY v JOHANNESBURG CITY COUNCIL, 1903 TS 111** at

115 the court stated that:

> "broadly in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' ...Such failure may be shown by proof, *inter alia,* that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

Gross unreasonableness is, of course no longer the criterion. The court mav interfere where the decision under review is shown to

have been unfairly arrived at. In the **Atlas case *(supra)*** at paragraphs 15 and 16 the court stated that :

> "the emphasis is still on the conduct of the proceedings and not the result thereof. The requirement is still that the proceedings must be conducted in a fair manner in the sense that, for example, the rules of natural justice must be observed. Even doing away with the requirements of gross irregularity the words of **MASON J in ELLIS v MORGAN, ELLIS v DESSAI, 1909 TS 576 at 581** that "an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result but to the method "of a trial such as for example, some high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined,'' still applies.
>
> With the advent of the new Constitution in the Republic of South Africa, the position or test for review there, has fundamentally changed. There the Constitution requires that the action under review must be "justifiable according to the reasons given for it." This is to give expression to tine fundamental "values of accountability, responsiveness and openness." See **CAREPHONE (PTY) LTD v MARCUS N.O. AND OTHERS, 1999 (3) SA 304."**

The applicant bears the onus to prove or establish that the proceedings were conducted in such a manner that her case was not fairly heard by the Respondents. The minor submits in paragraph 6.3 and 6.4 of her replying affidavit that :

> 'According to the 1st Respondent's General Information • Brochure ...sanctions imposed by the 3rd Respondent for

> breach of specific rules are determined by an amplified Code of Conduct, however, **the Respondents have not shown** in
> their papers that the sanction imposed upon me is competent for the offence and is in accordance with the Code of Conduct.
>
> It is on this basis that I humbly submit that the sanction of withdrawal of the offer of the place into the IB program is unreasonable and unjustified regard being had *inter alia,* to that I was a first offender"

It is not for the respondents to justify their decision, but the onus is on the applicant to demonstrate to the court that the case under review was unfairly determined and must be corrected and or set aside.

It was argued before me on behalf of the minor that the withdrawal of the offer for a place in the IB diploma programme was unlawful inasmuch as she had complied with all the conditions stipulated by the 1st respondent, when the offer was made to her.

In response the school submitted that the minor's enrolment as an IB diploma programme student was always subject to good behaviour and or conduct on her part and adherence to the rules and regulations governing pupils at the school. I agree. I cannot see it as having been in any other way. To think otherwise would, in my view, be illogical and absurd. Her conduct was governed by the rales and regulations of the school so long as she was a pupil at tine school.