IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 19/2019**

In the matter between

REGIONAL EDUCATION OFFICER

FOR HHOHHO REGION **1ST Appellant**

ATTORNEY GENERAL **2nd Appellant**

AND

MESHACK MAKHUBU **1st Respondent**

SCHOOL COMMITTEE OF

ENHLANGANISWENI HIGH SCHOOL **2nd Respondent**

Neutral Citation: Regional Education Officer, Attorney General vs Meshack Makhubu School Committee of Enhlanganisweni High school (19/2019)[2019] SZSC...3(09th October, 2019)

Coram : MCB Maphalala CJ, MJ Dlamini JA and JM Currie AJA

Heard : 16 July, 2019

Delivered : 09th October, 2019

SUMMARY: *Civil Appeal – First Applicant a member and chairman of a school committee was alleged to have been absent from three consecutive meetings of the school committee contrary to an article of the Schools Committee Constitution – First Respondent as Regional Education Officer wrote a letter to First Applicant acknowledging the vacation of membership following First Applicant's alleged absence from the said meetings – First Applicant denied that he was ever absent from committee meetings as alleged in the letter from First Respondent – First Applicant applied to court alleging that First Respondent by the said letter had wrongfully terminated his school committee membership – First Respondent denied the allegation having regard to the terms of the article said to have been contravened – First Respondent plead automatic termination of said membership - Need for a proper understanding of the letter and the article in question – Minutes of the school committee meetings referred to – Section 33(1) of the Constitution, 2005, considered - Judgment of High Court reversed.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] The First Respondent and Second Respondent (hereinafter called the "First Applicant" and "Second Applicant'') brought an application before the High Court against the First Appellant and Second Appellant (hereinafter called the "First Respondent" and "Second Respondent'' respectively). In that application, the First Applicant sought, among other things, (a) that the "decision of the First Respondent purporting to relieve the First Applicant of his duties as chairman of the Second Applicant" be declared "as not being sanctioned by any law'' and, (b) that the "First Respondent's purported decision of relieving the First Applicant of his duties as chairman of the Second Applicant'' be reviewed and set aside. For some hardly satisfactory reason, the application was very urgent, filed on the 16th January 2019 and calling upon the respondents to file their notice to oppose, if any, by 8:00 am Thursday the 18th day of January 2019 and the matter to be heard on same Thursday 18th at 9:30 am or so soon thereafter. In their letter of 7th January,

2019, the Applicants demanded 'immediate recall' of the letter of 24th December 2018 but without a specific date therefor. It is not clear what the opening of school had to do with the proceedings since if in fact First Respondent had been dismissed from the school committee the school committee could still meet under the chairmanship of the deputy.

[2] The High Court (per Hlophe J) held as follows:

> *"[62] It is clear that for the foregoing reasons that the decision by the First Respondent effectively terminating the First Applicant's chairmanship and membership of the Second Applicant cannot stand and it is hereby set aside''.*
>
> *"[63] Taking into account the fact that the First Applicant was shown to have rendered the school and the school committee dysfunctional while insisting on certain demands which forced the First Respondent to terminate his chairmanship of the school committee. I will order that each party bears its own costs''.*

But before the learned Judge stated the above, he apparently had already preempted that conclusion much earlier in the judgment. The learned Judge had made the following early observations:

> *"[3] Whatever the position, ... the First Applicant considered himself the chairman and member of the School Committee of Enhlanganisweni High School and that he only viewed it as terminated after the said letter had stated the position referred to above. There is therefore no doubt in my mind that whatever one can say, the reality is that the effective termination of the First Applicant's chairmanship and membership of the school committee came about as a result of the said letter. This is how I will approach the matter going forward, therefore".*

[3] Half way through the judgment, the learned Judge *a quo* proceeded as follows:

"[25] The respondents argued further that the application before court was defective because there was allegedly no proceeding by the First Respondent resulting in the termination of the First Applicant as the chairman of the school committee in question. As I understand it this point seeks to suggest that there was no decision taken by the First Respondent to terminate the applicant's membership of Second Respondent[1] so much so that a review would not be appropriate as a remedy.

"[26] In so far as it cannot be denied that there was a decision taken by the First Respondent which had an effect on the First Applicant's continued chairmanship or membership of the school committee in question, I find it difficult to fathom this point fully. It may actually be that in the deeper analysis of the matters work against the First Respondent in the merits of the matter in the sense that it could indicate that the decision in question, in so far as it had the effect of terminating the applicant's membership or chairmanship of the school committee was handed improperly or arbitrarily without there having been proceedings to establish the propriety or otherwise of same.

"[27] Whatever the Respondents sought to suggest, one thing is certain to me namely, that the First Respondent took a decision which adversely affected the applicant in so far as it ensured his considering himself as the chairman of second applicant was up. I therefore find no merit in the Respondent's contention that a review was non-suited. I have no doubt that the First Respondent was exercising administrative power which in terms of both the common law and Section 33 of the Constitution of the country be challenged on review for the manner he sought to exercise it".

[4] From the foregoing paragraphs of the judgment, it should clearly be emphasized that the Respondents had in point of fact denied having taken a decision to terminate First

[1] The word "Respondent" should read "Applicant"

Applicant's membership in the school committee. In para 8.1 of her answering affidavit First Respondent stated: *". . . I particularly deny that I relieved the 1st Applicant of his duties.... By writing the letter, I did not in any way relieve the 1st Applicant of his duties but I was confirming what he already did..."* Instead, the learned Judge *a quo* proceeded as if respondents had conceded taking a decision to relieve First Applicant of his committee membership. That was not correct. It is not clear how the learned Judge came to the conclusion that *"....it cannot be denied that there was a decision taken by the First Respondent which had an effect on the First Applicant's continued chairmanship..."*. The learned Judge did not clearly articulate the basis for reaching the conclusion that "*it cannot be denied*...." This conclusion must logically follow from a given or stated premise. That premise is not given. The least one can say or infer is that the 'decision' was the 'writing of the letter of 24 December'. But even the decision to write the letter and the decision to relieve First Applicant of his membership in the school committee do not conflate: the two are independent decisions. The decision to write the letter is manifest in the existence of the letter and the decision to terminate must be manifest in the wording of the letter. With due respect, the letter evinces no such decision as alleged by the First Applicant and accepted by the learned Judge *a quo*. One may then conclude that the decision to terminate was presupposed from the mere existence of the letter regardless of what the letter expressly communicated. In all the circumstances of the matter, the presupposition was not justified and should not have been made. In my opinion, the assumption of the existence of a decision only served to justify the review proceedings as the learned Judge concluded in paras [26] and [27] quoted above.

[5] The learned Judge also stated that First Respondent *"took a decision which adversely affected the applicant in so far as it ensured his considering himself as chairman of second applicant was up"*. In so holding the Judge seems to have uncritically accepted the whimsical interpretation of the said letter by the First Applicant that the letter had been written to dismiss him from the school committee. The reasonableness of that

interpretation was not interrogated by the Judge *a quo*. There needed to be something more in the wording of the letter than the mere existence of it to terminate the membership of First Applicant in the school committee. The letter had to be read and understood in light of article 9.2.6. With that background, the letter did not terminate or intend to terminate First Applicant's membership in the school committee. A conclusion to the contrary must be condemned as irrational.

[6] The Respondents have raised eleven grounds of appeal against the decision of the court a quo. Among those grounds the following stand out for determination.

> "*2. The court a quo erred in law and in fact in holding that 2nd Respondent is a* ***universitas*** *or has a status of a* ***universitas*** *thus it can sue or be sued in its own name. The court ought to have found that 2nd Respondent is not a* ***universitas*** *or has no status of a* ***universitas*** *to sue or be sued in its own name.*
>
> *"8. The Court a quo erred in fact and in law that the 1st Appellant dismissed the 1st Respondent from the position as chairman of the 2nd Respondent through the letter dated the 24th December 2018. The court ought to have found that this letter merely confirmed a status the 1st Respondent had put himself into. The court's finding that the letter written by the 1st Respondent dismisses the 1st Respondent is based on assumption/speculation".*

[7] To consider and decide each and every one of the other grounds of appeal would be time consuming whilst adding no value to the final position I have taken of what I consider to be the critical issue for determination in this appeal in light of the conclusion reached by the court *a quo*. I take it to be trite that judicial review of administrative action is based on a 'decision' made in terms of an enabling statute, it being contended that the decision-maker failed to observe certain procedural requirements relevant to the decision. If the

assertion of non-compliance is true, the result would be the invalidation and setting aside of that decision. Accordingly, central to this appeal is whether the finding of the court *a quo* is supported that the First Respondent took a decision by writing the letter of 24th December 2018 allegedly having adverse consequences on the First Applicant. It also follows that if no decision was made judicial review would be incompetent: some other remedy might have to be considered.

Background

[8] It may be apposite to begin by saying that school committees in eSwatini are established in terms of the Education Act No. 9 of 1981, Part 1V thereof. The Act authorizes the Principal Secretary of the Ministry of Education to establish a school committee for each school and prepare and provide a constitution for each school committee. The Act also prescribes membership and functions of school committees. For our purpose, section 15 of the Act provides that the functions of a school committee "shall be (a) to look after the affairs of the school in respect of which the committee has been established; (b) to advise the District Education Advisory Board on any matter relating to the management or conduct of such school". In terms of section 10 (2) of the Act, the chairman of the District Education Advisory Board is the district education officer now called Regional Education Officer (REO). Section 6(1) of the schools committee constitution prescribed by the Principal Secretary and revised by him in 2011, states that the school committee shall "act in an advisory capacity to the REO as the head of the region concerned". The only concern is whether the constitution has been published in the Official Gazette in order for it to be law.

[9] In his notice of motion First Applicant prayed for a declaration that the decision of the First Respondent purporting to relieve the First Applicant of his duties as chairman of the Second Applicant (the "School Committee") was not sanctioned by any law, and that the said decision ought to be reviewed and set aside. In paragraph 6 of his founding affidavit First Applicant averred: "*This is an application in which the applicants are*

seeking an order declaring that the First Respondent has got no authority to relieve me as chairman of the Second Applicant..." In paragraph 10, First Applicant referred to the letter dated 24th December 2018 written by the First Respondent as a letter "purportedly relieving" him of his duties as chairman of the school committee on the allegation that First Applicant failed to attend three consecutive meetings of the school committee. The letter of the 24th December is in the vernacular and was never translated into English. To be sure, that was the letter allegedly carrying or transmitting the decision to dismiss the First Applicant from his position as member and chairman of the school committee. It is not clear why the letter was not translated into English. But that does not stop me from using it as siSwati is also an official language.

[10] The letter of 24th December 2018 is accordingly the epicentre of these proceedings giving rise to this appeal. The letter reads and I will translate it:

> "Mnumzane,
>
> **Re: Kuhocisa Bulunga Ekomidini Lesikolo: Mr Meshack Makhubu**
>
> *Mnumzane, kulandzela kungaphumeleli kwakho kufika emihlanganweni yelikomidi lesikolo lehleliwe emahlandla lamatsatfu ngekulandzelana (22 October, 2018; 25 October, 2018 na 15 November 2018), silihhovisi letemfundvo esifundzeni saka Hhohho sikutsatsa ngekutsi bulunga bakho kulelibandla sewubesulile.*
>
> *Lencwadzi ikwatisa kutsi sincumo sakho sekuyekela kulelibandla semukelekile. Lihhovisi letemfundvo litakwenta lokufanele kuvala sikhala lesesivulekile.*
>
> *Sibongile kubambisana (kwakho) nelitiko letemfundvo usesehhovisi.*
>
> *Lotitfobako.*
>
> T.T. Langwenya
>
> **Regional Education Officer-Hhohho.**

(Sir, Following from your failure to attend scheduled three consecutive school committee meetings (22 October 2018, 25 October 2018 and 15 November 2018), **we as the Regional Education Office for Hhohho Region take it that you have resigned your membership to the school committee.**

This letter informs you that your decision to leave the school committee is accepted. The Ministry of Education will do whatever is necessary to fill the vacancy created.

Grateful for your cooperation with the Ministry whilst you were in office.

Yours sincerely,

T.T. Langwenya

Regional Education Officer-Hhhohho)

[11] First Applicant denied knowledge of the three consecutive school committee meetings referred to in the letter. First Applicant stated that he never authorised the secretary of the school committee to issue the notices which convened the meetings in question and was himself never informed of the said meetings. On receipt of the letter dated 24th December, First Applicant averred that he and second applicant (the School Committee) approached their Attorney for legal advice. It is however not stated who represented the school committee during the search for legal advice. The three committee members who filed affidavits in support of the application seem to have done so on their own and not on behalf of the school committee. And even the purported school committee resolution, annexure 'R1', seemingly authorising the application to challenge the 'decision' of the First Respondent, does not expressly authorise the three supporting affiants to file any affidavit. The relevant aspect of 'R1' only records "...and any of the members is hereby forthwith authorised to sign all documentation inclusive of all court processes pertaining to the school committee". Even the First Applicant is apparently not authorised to act for the school committee.

[12] Following the search for legal advice Applicants' attorney wrote on 7th January 2019 to the First Respondent, copied the letter to the Attorney-General, the Principal Secretary of Ministry of Education, and the Head teacher of the school in question. That letter in effect accused the First Respondent of having wrongfully and unlawfully terminated First Applicant's membership of the school committee. The denial by the First Respondent of terminating First Applicant's chairmanship and membership of the school committee was to be contained in the answering affidavit. As a letter emanating from attorneys, it was for the Attorney General to reply to it.

[13] In her answering affidavit First Respondent denied all of First Applicant's allegations except writing the letter in question. First Respondent countered:

> *"8.1. . . I particularly deny that I relieved the 1st Applicant of his duties. I merely confirmed the 1st applicant's position which he voluntarily took by refusing to attend meetings of the school committee. In terms of article 9.2.6 of the Schools Committee Constitution (the Constitution) 'any member who fails to attend three consecutive meetings without good reasons acceptable to the committee shall be regarded as having vacated his on her seat from the committee, and his or her place shall be filled by co-option. By writing the letter, I did not in any way relieve the 1st applicant of his duties but I was confirming what he already did. The tone of the correspondence referred to by the applicants does not imply that the 1st applicant was relieved of his duties. It merely makes reference to the constitution article which provides that when a member absents himself from three consecutive meetings, he loses his membership.*
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> *"8.2. The operation of the Constitution Article is automatic. In short, a member automatically loses his committee membership if he absents himself or herself for 3 consecutive committee meetings without a reasonable explanation acceptable to the committee. In the absence of any explanation from the 1st Applicant, it is taken that the member has vacated office. Annexed herein are copies of the minutes taken from the meetings held in the 1st applicant's absence marked REO 1, REO 2, & REO 3''.*

[14] From her answering affidavit, it is reasonable to conclude that First Applicant knew about the meetings. It is fair to infer that First Applicant would not attend the school committee meetings as convened because he believed it was him alone who could call those meetings. *"Despite the fact that there is no provision for conducting a hearing"*, First Respondent says she called two special meetings to try and address the issue of First Applicant not attending school committee meetings but that her efforts were in vain *"as the 1st applicant refused to attend''*; and continues at para 11(1): *"I deny that the 1st Applicant was not aware of the meetings ..."* The First Respondent further averred:

> *"8.4. The Constitution states that the Committee is directly responsible to the REO hence the Committee reported to me about their predicament of the 1st applicant not attending meetings. I took it upon myself to call two special meetings to try and address the situation and hear the 1st applicant's side of the story.*
>
> *"8.5. The 1st applicant did not attend. I even called him on his mobile phone but he did not pick. I tried to use the other members to call him but he refused to come to our meetings. He insisted that he does not want to attend any meeting unless his grievances were addressed. One of the grievances was that they no longer need the Head teacher of the school. I decided he had lawfully vacated office in terms of article 9.2.6 thus my correspondence had no effect in law.*
>
> *"8.6 Had the 1st applicant furnished the committee with reasons after getting my correspondence that would have sufficed....."*

[15] The First Respondent admits that the meetings were convened by the Vice Chairman and the head teacher who is the secretary of the school committee: *"That was done because the whole of the 3rd term, the 1st applicant refused and / or failed to call even a single meeting of the school hence his Vice took over the role of chairman. This was in terms of article 9.2.9 of the constitution which provides that: 'If the chairperson refuses, fails or neglects to call a meeting of the school committee. . . the secretary shall consult the Vice-Chairperson to convene a special meeting'.* First Respondent continues in her answering

affidavit (para 11.2): "*...That is exactly what transpired. The school needed money for its operation and some other issues that needed the attention of the committee but 1st applicant was holding the school at ransom by refusing to sign on the school accounts and refusing to attend meetings*".

[16] The Vice Chairperson in her confirmatory affidavit agreed with the First Respondent: "4. *I confirm that due to the fact that 1st Applicant was no longer calling meetings of the school committee for the entire 3rd term, we met with the secretary of the school committee.... and we issued three notices to the members of the school committee convening special meetings but 1st applicant and another member by the name of Sibongile Simelane were not attending... I called the meetings pursuant to article 9.2.9 of the constitution...* 5. *The meetings were about the crisis faced by the school as there was no money to run the school because the 1st applicant was refusing to sign for the school monies*". The head teacher and secretary of the school committee also confirmed: "4. *I confirm that the 1st applicant was neither calling meetings of the committee nor he wanted (sic) to sign any document of the school especially for the procurement of the school funds simply because he no longer needed me at the school. He was all out to frustrate me by any means possible and in the process halting the smooth operation of the school. The school was in crisis. 5. I decided to approach the Vice Chairperson so that we call a special meeting to resolve the school crisis*". The First Applicant was also accused of inciting some committee members not to sign for monies that the school needed. As result the Vice-chairperson says the crisis was reported to the First Respondent who in turn called the First Applicant (and Sibongile Simelane) to attend at a school committee: "*The 1st applicant flatly refused to attend the meeting despite being called to do so by the secretary....and the 1st respondent*", the Vice Chairperson stated.

[17] In his reply, First Applicant did not deny that he failed to call a school committee meeting during the third term of the school as required by the constitution. This is important because the alleged three consecutive school committee meetings which First

Applicant was said to have failed to attend were said to have been convened by the secretary and the Vice-chairperson precisely because the First Applicant was failing to cooperate with the school committee and call meetings as required because he had some grievances against the secretary (head teacher) and the First Respondent for a letter not replied to by the Principal Secretary of the Ministry of Education. Ordinarily, in terms of the constitution, per article 9.2.10, meetings of the school committee are convened by the chairperson through the secretary by way of written notices. That the First Applicant did not authorize the meetings in question is not important if the Vice-Chairman did call the meetings as it is said he did because First Applicant was not cooperating.

The School Committee Meetings

[18] There is evidence of notices convening the school committee meetings. These notices are signed by the secretary on behalf of the chairperson. I understand this format of signing the notices as signifying that the secretary was not acting of her own volition but was acting after due consultation with or as instructed by the chairperson. In the present case, that chairperson was the Vice Chairperson who chaired the three meetings in question. In my opinion the notices convening committee meetings in the absence of First Applicant were in order and in accordance with the constitution. I can find no fault in the manner the notices calling for the school committee meetings were signed.[2] First Applicant in his founding affidavit stated that as chairperson of the school committee he was "*vested with the authority to,* inter alia, *manage and administrate the affairs of the Enhlanganisweni High School*", and that he "*never at any stage authorized such meetings....*". Accordingly, in the absence of the First Applicant as chairman of the school committee the Vice Chairman could also authorize the calling of school committee meetings. It is not as if in the absence of the First Applicant school committee meetings could not be held, which is the impression First Applicant wants to create. The constitution,

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[2] I note that not much attention was paid by the court a quo to the minutes of the school committee meetings and the letter of 24 December 2018. I have not found it imperative to refer the matter back for a holistic consideration by the High Court, including a formal translation of the letter and the minutes of the school committee meetings.

article 9.2.9, is very clear in this regard: If the chairman refuses or fails to call a meeting of the school committee the secretary shall consult the vice-chairman to convene a special meeting.

[19] Following the notice dated 17th October 2018, a meeting was held on 22 October, 2018 as the letter of 24 December shows. That meeting seems to have been duly convened and constituted in terms of article 9.2.3 which requires a quorum of four members of the school committee including the chairman or the vice chairman. The opening remarks of the acting chairman at the meeting were recorded as follows:

> "*Sihlalo wafuna kuva kutsi ngabe kukhona umbiko lovela kusihlalo mayelana nekubangekho kwakhe kulomhlangano kulandzela kutsi yena akambikeli lutfo kani futsi akamgunyati kutsi achubeke nemhlangano. Lilunga Ntshangase laveta kutsi sihlalo utsite yena vele angeke ete kulemihlangano yelikomidi, utoba khona naku khona umhlangano webatali. Lilunga Chirwa latsi kute inkinga ngoba ukhona vice, akachubeke nemhlangano.*"
>
> **(The (acting) chairman wanted to know if there was any report from the chairman regarding his absence from the meeting as the (acting) chairman had no information and the chairman had not authorized him (the vice chairman) to hold the meeting. Ntshangase stated that the chairman said he would not attend committee meetings except for a parents' meeting. Chirwa said there was no problem since the vice chairman was present; the meeting should go on).**

Ntshangase and Chirwa are school committee members. The meeting is then reported to have proceeded to deliberate on school matters such as the problem of firewood, water, payments and a duplicator (which I believe to be a photocopier).

[20] The second meeting not attended by the First Applicant was held on 25 October 2018, following the notice dated 22 October 2018. In that meeting again the vice chairman

wanted to know if any member had any report about the absence of the First Applicant. It is reported as follows:

> "*Vice wafuna kuva kutsi ingabe kukhona yini lokubikiwe ngasihlalo mayelana nekuba ngekho kwakhe. Lilunga Ntshangase laveta kutsi vele sihlalo utsite yena angeke abekhona kulemihlangano yelikomidi, lapho atobakhona khona kusemhlanganweni webatali*".
>
> **(The vice chairman wanted to know if there was any report from the Chairman regarding his absence from the meeting. Member Ntshangase revealed that the Chairman said he would not attend such committee meetings except a parents' meeting).**

The meeting then proceeded to discuss the logistics of buying the duplicator from South Africa at a cost of E27 847.47 plus associated costs of going to South Africa. The meeting also approved payment for other school needs in the amount of about E45,000.00.

[21] The minutes of the committee meeting of 15 November do not appear on the record, although there is a notice for it. But there are minutes of the school committee of the 17 December at the office of the REO with the REO and two of her departmental colleagues. The meeting seems to have been chaired by the REO. That was a consultative meeting at which the school committee had come to consult and express problems it was facing at the school. The REO allowed the vice chairman to explain the purpose of their visit:

> "**Bhembe**: *Waphawula kutsi Enhlanganisweni High school ubhekene nenkinga nakuba sesifike lapha emahlandla. Kulensayeya lesibhekene nayo sesite kutoshaya inyandzaleyo. Sesibe nemihlangano lemitsatfu inganaye sihlalo welikomidi lowakhetfwa batali, kanye nalelinye lilunga lekomidi. Likomidi selisebenta ngaphandle kwenhloko. Lokunyenti akusakhoni kwenteka esikolweni kulandzela kutsi sihlalo akekho kutsi atosayinela timali tesikolwa kani nalona lolilunga lelinye lebelisayina sihlalo ubese utsi akayekele kusayina. Sicela kwelulekwa kutsi ingabe*

nasekunje sesiphuma sibhekaphi. Umhlangano webatali kubete kani futsi ne budget yemnyaka lotako kute. Ngive sekutsiwa kunetimali lebesekutsiwa atisayinelwe egedeni lesikolwa".

(Bhembe. Narrated that at Enhlanganisweni High School he is facing a problem even though we have been to the REO on a number of occasions. As a result of the challenge we are facing we have come to raise the alarm. We have had meetings without the Chairman of the school committee who was elected by parents as well as another member of the committee. The committee is now operating without a head. The committee is unable to perform some of its functions due to the absence of the Chairman who has to sign for school funds; and the other member who used to sign was told by the Chairman not to do so. We need advice regarding this matter. A parents meeting has not been held and the budget for next year has not been prepared. I also heard that there were school funds which were signed to be signed for at the school gate.)

[22] The meeting continued with members addressing the problem and venting their feelings on the matter:

"Ntshangase: *Waphawula kutsi kube nekushaya emahlandla ehhovisini la REO asho kutsi sikolwa kumele sisebente singemi. Sihlalo utsite yena kwanyalo angeke ayingenele imihlangano yelikomidi kuze kubuye timphendvulo taletikhalo tabo ka REO..."*

(Ntshangase: **Made it known that there have been a number of telephone communications with the office of the REO who said that the school must continue operating and not stop. The Chairman said for the time being he would not attend school committee meetings until their grievances were answered by the REO . . .)**

"REO: *Wafuna kwati kutsi ngabe lona ngumhlangano webatali yini kulandzela kutsi Makhubu abachazele kahle kutsi yena utokuta nakungumhlangano webatali.*

Ngalokunye waphawula kutsi yena kute lakukweleda likomidi kulandzela kutsi indzaba yencwadzi kwashiwo kahle kutsi ibhalelwe PS ngako angeke ayiphendvule....Timali tesikolwa kumele tisayinelwe emhlanganweni welikomidi hhayi egedeni".

*(*REO: **Wanted to know if this was a parents meeting following that Makhubu had clearly explained that he would only attend a meeting of the parents. On the other hand, she remarked that she did not owe the committee anything following that it was clearly explained that the letter was directed to the PS; she could not respond to the letter... School funds must be signed for at committee meetings not at the school gate.)**

. . . .

"REO: *Sihlalo abeyilwa kahle lendzaba ngalesikhatsi asengekhatsi ekomidini; kodvwa nyalo kuloku lesakwentile sowuvele utikhiphile lokutsi angete angenela lemihlangano lemitsatfu".*

(REO: **The Chairman was dealing with the matter correctly while he was in the committee; but now, considering what he has done, he has removed himself from the committee by not attending the three committee meetings.)**

. . . .

[23] **"REO**: *Nentani vele? Uma kungasentjentwa kubita REO asebente ngendlela ye policy. Phela Makhubu wachaza nakucala kutsi nangabe lencwadzi yakhe ingaphendvuleki angamane aphume ehhovisini. Sewenta kona loko ke. . ."*

(REO: **What are you doing? If there is no work going on, it means that the REO must resort to policy. Even the last time Makhubu explained that if his letter is not answered he would rather leave the committee. He is doing exactly that...)**

"Bhembe: *Nasifundziswa ekungeneni kwetfu ekomidini kwachazwa lokutsi waze walova imihlangano yaba mitsatfu yalandzelana sowuvele utikhiphile ekomidini. Ngakulokunye Makhubu wachaza kutsi yena angeke aze aye esikolweni nangabe*

kusekhona madam Tembe. Ngabe kubita kutsi sikolwa sime nsi ngekutsi tsine siyalwa? Kudzingeke ngani timali tesikolwa tisayinelwe emagedeni? Kuyabonakala kutsi kulelikomidi singemacembu labamba imihlangano emakoneni…"

(Bhembe: **At our inauguration, it was explained that if a member should miss three consecutive meetings, he thereby removes himself from the committee. On the other hand, Makhubu explained that he would never go to the school whilst Madam Tembe was still there. Does it mean then that the school must come to a complete stop just because we are fighting? Why should school monies be signed for at the school gate? It is evident that in this committee we are groups which hold meetings at corners.)**

. . . .

Adjudication by court a quo

[24] We have noted that earlier on in the adjudication the learned Judge a quo took the position that First Respondent had effectively terminated the membership of First Applicant in the school committee, however, later in the judgment the learned Judge warned himself that before considering the issues for determination he needed first "*to decide if the First Respondent ever terminated the First Applicant's chairmanship*" of the school committee.

[25] The learned Judge *a quo* had noted against the First Applicant's allegation that the First Respondent "*argued that she never terminated the chairmanship or membership of the First Applicant in the second applicant. She argued further that the First Applicant's said membership or chairmanship…was automatically terminated when the latter failed to attend three consecutive meetings of the second applicant….The First Respondent, it was argued, merely confirmed that the First Applicant had his said chairmanship or membership….automatically terminated when he failed to attend the said meetings…*" The learned Judge then followed with these observations:

"[39] It is certain that before the letter in question was issued by the First Respondent the First Applicant considered himself a member and chairman of the Second Applicant. He in fact ceased considering himself as such after receipt of the letter in question. Some members of the Second Applicant who supported the institution of the proceedings by the First Applicant saw the matter in that light as well...

"[40] I agree with the First Applicant that whatever other interpretation the First Respondent gave to the letter (s)he wrote on the 24th December 2018 it cannot be denied that it had the effect of communicating a decision by the First Respondent to terminate the First Applicant's membership or chairmanship of the Second Applicant. If that is the case, ***as I have found it is****, the next question is whether the First Respondent had the power in law to terminate the membership or chairmanship of the First Applicant in the Second Applicant and later on whether such a decision was taken for procedurally correct and valid reasons".* (My emphasis).

[26] It is clear then that by both the First Applicant and the learned Judge *a quo* the chairmanship of the First Applicant was for all intents and purposes terminated by the letter written by First Respondent dated 24 December 2018. As for the 'decision' supposedly communicated by the letter, I must confess to have read and re-read the said letter but could not find the said 'decision', the basis and *condictio sine qua non*, for these proceedings. Having found a 'decision' the learned Judge *a quo* was entitled to go on and consider whether the First Respondent had the requisite power to act as alleged, that is, make the decision, and if so "whether such a decision was taken procedurally correctly and for valid reasons". But if First Respondent had no such power, the purported decision would be ultra vires and a nullity. That would be the end of the matter. No need to further inquire "whether such decision was taken procedurally correctly and for valid reasons". We deliberate these issues later below.

Whether Second Respondent (the School Committee) is an *universitas*

[27] Before turning to the main issue for consideration in this matter, I should say something, even in passing, on whether the school committee is a *universitas* as the court *a quo* found. Enough that its constitution does not expressly endow the school committee with power to sue and be sued in its own name. Nor does the Education Act 1981 do so. The Act provides that a school committee acts in an advisory capacity to the First Respondent. The Respondents argued that the school committee as Second Applicant cannot be a party since it had no standing in law. The learned Judge did not agree. He observed: *"[11] ... It is a body established by a constitution of its own and it takes decisions which impact on other people ever so frequently as an entity. I am certain that if it has no* locus standi in judicio *because its establishing document accords it no such a right, it certainly does have locus standi in terms of what has become known as a* universitas. *I say this because it interacts with members of the public as a body quite frequently where it takes decisions affecting such members. It would be anomalous in my view for such a body to then escape liability where it was otherwise meant to be liable, on the grounds that its establishing documents have* locus standi in judicio" (sic). It is unfortunate that the learned Judge did not specify the provision in terms of which the school committee is empowered to take decisions or the kind of decisions it may make. Even then, where the school committee takes a decision, that decision is only advisory in the sense that it is a decision in effect taken by the First Respondent who, herself or the Government, is to be held answerable for it. If the school committee is established by the Act can it at the same time exercise power as a common law *universitas?* That would be anomalous and might lead to unexpected results.

[28] Isaacs[3] says that: *"Whether an association, which has not been given corporate personality by statute, is a common law* universitas *depends on the nature of the association, its constitution, its objects and its activities. Two of the essentials of a common*

[3] **Beck's Theory and Principles of Pleading in Civil Actions, 4th ed.** p8

law universitas *are the capacity, in terms of its constitution, to acquire property apart from the capacity of its members to acquire property and the fact that in terms of its constitution it has perpetual succession"*. See also Robert Sharrock.[4] And Maasdorp[5] says: *"A* universitas personarum *in our law is a legal fiction or incorporeal abstraction consisting indeed in a collection or aggregation of real or natural persons, but having in itself no existence in nature, and existing merely in contemplation of law"*. Can the school committee acquire property in its own name? The school committee has no corporate status nor perpetual succession; it only acts for the school of which it is a committee as seen in its purchasing and fund-raising functions, and never for itself. To what extent it can hire and discipline its support staff is uncertain. But that the school committee cannot discipline its own members is not uncertain.

[29] In **Webb and Co. Ltd v Northern Rifles[6]**, a judgment concurred to by Innes CJ and Solomon J, in which the issue was whether a voluntary corps formed under the provisions of Ordinance 37 of 1904 was a universitas, Smith J. stated:

> *"The question depends entirely upon whether it was the intention of the legislature to create an* universitas, *and we have not in this case to consider the question which has given rise to discussion in other cases, as to whether an* universitas *can come into being otherwise than through the sanction of the legislature. Here the legislature has either created one or the defendant is merely an aggregation of individuals. The question depends entirely upon the construction to be placed upon the Ordinance. It will be convenient in the first place, to consider what an* universitas *is, and then proceed to inquire whether the legislature has created one. An* universitas personarum *in Roman Dutch law is a legal fiction, an aggregation of individuals forming a* ***persona*** *or entity having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An* universitas *is*

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[4] **BUSINESS Transactions Law,** 8th ed page 1
[5] Maasdorp, **Institutes of South African Law,** 8th ed p 244
[6] 1908 TS 462, pp 464-465

distinguished from a mere association of individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members. "Among the most important rights appertaining to an universitas *is the right to acquire and hold property. It continues to exist though the individual members comprising it change, so long as one member remains in whom the rights of the* universitas *can vest. . . . It has what is sometimes termed perpetual succession. Being formed of an aggregation of individuals, it is, if not a matter of necessity, at all events in the highest degree convenient that it should act through agents, ... The main characteristics of an* universitas, *therefore, are the capacity to acquire certain rights as apart from the rights of the individuals forming it, and perpetual succession".*

[30] In **Morrison**[7], the issue was whether a Society, established in 1891, had *locus standi in judicio* capable of suing and being sued, capable to acquire and alienate property and possess perpetual succession as a *universitas.* Wessels JA stated:

"The Society has brought many actions in its own name in the law courts. Even therefore if it has not obtained State sanction, it certainly has been allowed to carry on business in its corporate name, to hold property and to sue. It therefore falls under the category of associations which have been permitted or suffered to act as corporate bodies without let or hindrance. ... In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or universitas *then it can sue in its own name. ... The Society exists as such quite apart from the individuals who compose it, for these may change from day to day. It has perpetual succession and it is capable of owning property apart from its*

[7] **Morrison v Standard Building Society** 1932 AD 229 at 237-238

*members (**Webb v Northern Rifles** 1908 TS 462). It has therefore all the characteristics of a* universitas *and can sue in its own name".* (See also **Malebjoe v Bantu Methodist Church of South Africa** 1957 (4) SA 465, pp 466G – 467A).

[31] That the school committee has a constitution is not enough by itself to make it a *universitas*. The question is whether that constitution clothes the committee with the requisite characteristics of a *universitas*. The Education Act 1981 does not vest the school committee with such powers nor does the constitution provided by the Principal Secretary. The functions and purposes of a school committee according to the Act are only two, to look after the affairs of the school and advise the REO on the management of the school. Anything else not germane to these functions would be ultra vires and void. Importantly, the committee is advisory. Whatever it does, whatever impact its actions may have on other people and members of the public, that alone would not confer it with the status of a *universitas* – having a corporate status, capacity to acquire, hold and alienate property, capacity to sue and be sued in its own name and perpetual succession. As Smith J said in **Webb and Co,** *supra, "The intention of the legislature must in each particular case be ascertained from the language it has used, having regard to the scope of the enactment in which it occurs; ..."* (p 468). In my view the school committee or Second Applicant does not meet the requirements of a common law *universitas* and as such has no *locus standi in judicio.*

Did First Respondent terminate First Applicant's membership?

[32] It is evident that the learned Judge *a quo* took a short-cut to his main holding; and short-cuts have their own shortcomings. The learned Judge took it for granted and assumed that the letter was indeed determinative of First Applicant's membership of the school committee. First Respondent denied terminating the membership and chairmanship of First Applicant. First Respondent took the position that in terms of article 9.2.6 the First Applicant brought about the termination of his own membership himself by being absent from the school committee meeting on three consecutive occasions. First Respondent

asserted that the letter of 24 December which she wrote to First Applicant did not terminate the latter's membership of the school committee but merely stated the status of First Applicant in the school committee following First Applicant being absent from the school committee meetings on three successive instances. Thus, First Respondent argued, in accordance with the specific wording of article 9.2.6, it was First Applicant himself who terminated or brought about the termination of his own membership and not First Respondent. First Respondent had merely been the bearer of the message regarding the status otherwise generated and consummated by First Applicant himself. If First Respondent did not terminate or intend to terminate the membership of First Applicant, the question of *audi alteram partem* does not appear to arise since there is no decision to review.

[33] In para [44] the learned Judge *a quo* refers to article 9. 2. 6 and states the following:

> *" . . . Given its significance in the matter we are about herein, I am of the view that this particular clause merits a comment. Before any member of the committee, . . . can be taken to have vacated his seat through his failure to attend three consecutive meetings, I am convinced that should be because there are no good reasons acceptable to the school committee. Two things emerge: it is not just every failure to attend three consecutive meetings that would result in a member being taken to have vacated his or her seat. It should be without good reasons acceptable to the committee. Invariably, it should first be ascertained whether the reasons for the failure to attend are good and acceptable to the committee".*

On the contrary, it seems to me that the correct approach to the article is that once the member misses three consecutive meetings that member automatically vacates his or her seat on the committee. The member cannot just come in a committee meeting and carry on business as usual. The member must first purge his default before he can sit down and participate in committee matters. Thus, every consecutive three-time misses results in the vacation of a member's seat. The vacation is only voided by an acceptable explanation presented to the committee. I also think that the last sentence in the above statement needs

to be modified. The assessment or ascertainment of the reasons is not invariable. It is only where reasons have in fact been tendered that ascertainment of acceptability would take place. I agree with the First Respondent in para 8.2 of her answering affidavit where she says: "... *In the absence of any explanation from 1st Applicant, it is taken that the member has vacated office*". Even the ascertainment is not for the purpose of terminating the membership of the member concerned; it is purely to determine if the reasons are acceptable or not. Where no reasons have been tendered, as is the case *in casu,* no assessment at all occurs; the vacation of seat in the committee is immediate and automatic. If there must always be this prior inquiry, what is the value of the words that the member *shall be regarded to have vacated* his seat?

[34] The learned Judge continues in para [45] and says that the *"structure entitled to assess whether the reasons are good and acceptable is the School Committee itself"*. This, the learned Judge observes, *"suggests that there should be an inquiry by the school committee itself to try and establish whether the reasons for the failure to attend are good and acceptable to the committee"* and that *"where this inquiry has not been done then there is a shortcoming on whether the reasons for the failure to attend were good and acceptable to the committee which is a conclusion to be reached after an inquiry. This is the glaring shortcoming in the present case"*. The short answer to the foregoing is, absent explanation absent assessment. There is nothing to assess where no reasons have been presented. In para [46] the Judge further states that the letter which communicated *"the termination of the First applicant's membership"* said nothing about such an inquiry *"let alone its finding on whether the reasons for the termination were good and acceptable to the committee"*. It is not clear to me which "reasons for termination" the learned Judge is referring to since there were in fact no reasons tendered for consideration. And in para [47] the learned Judge also says that the *"letter in question further shows the REO as the person who terminated the First Applicant's membership when in actual fact that power resided with the committee itself"*. With due respect, how the said letter shows that First Respondent terminated the said membership is not at all clear to me. In my view the word 'inquiry' as

used by the learned Judge is a strong word fraught with serious procedural implications which I believe is not what article 9.2.6 is all about as no decision to terminate any membership is implied. A proper reading of the article will also show that the school committee also has no such power as alleged by the learned Judge. In the result even where reasons are submitted, there is no inquiry as such at the level of the committee.

[35] It is clear that the Judge *a quo* understood article 9. 2. 6 as requiring an inquiry in every case of three consecutive absences of a school committee member and that that inquiry had to be *"fair by affording the person whose conduct was being enquired into a fair hearing"*. In my view, an inquiry could only be required if a decision – to terminate - was envisaged under the article. It cannot be controverted that if an inquiry was conducted in terms of the article that inquiry would have to be fair and in accordance with the requirements of administrative justice as envisaged by section 33(1) of the Constitution. The problem as I see it with the approach taken by the learned Judge is that the Judge assumed that the letter of 24 December, 2018 terminated the First Applicant's membership and that in doing so a decision had been taken by the author of the letter; and that that decision must ordinarily result from an inquiry. But once the assumption of a decision to terminate is wiped clean from the mind it must become obvious that no such inquiry needed to take place *in casu.* Whilst it may have been necessary for some form of inquiry to take place in order to consider whether the reasons for not attending at meetings were good and acceptable, no such inquiry became necessary in the present matter since no reasons at all were furnished for the consideration of the committee. Even where reasons are tendered, the school committee is not required to terminate the affected member's membership: all that the committee is required to do is decide whether the reasons are acceptable to it. That is why, one may surmise, the letter in question said nothing about an inquiry or a decision. I cannot agree therefore with the conclusion of the learned Judge in para [47] where he says: *"On this ground alone the decision of the REO cannot stand as it was taken contrary to the enabling instrument, which means that it was* ultra vires".

Is judicial review competent in this matter?

[36] In paras [55] and [56] the learned Judge points to the common law as requiring the exercise of administrative power to observe rules of natural justice such as the right to be heard before a prejudicial decision is taken. The Judge highlights that the common law position has been elevated under section 33 of the Constitution, and the said section has been breached by First Respondent who purportedly terminated First Applicant's school committee membership without the latter being first heard. According to the authorities cited by the learned Judge, the result of the action of First Respondent in terminating the membership of First Applicant without due process of law, as it were, was that the purported termination was vitiated. The authorities referred to by the Judge in support of his conclusion speak to the same effect which is aptly summarized in **Traub and Others**[8] by Corbett CJ as follows:

> *"The right which is generally referred to by means of the maxim* ***audi alteram partem*** *has been discussed and analysed in a number of recent judgments of this Court (...). The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public officer to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (...), unless the statute expressly or by implication indicates the contrary".*

[37] What stands out clearly from the foregoing statement are the following (1) a statute which (2) empowers a public officer (3) to give a decision (prejudicially affecting an individual). On the basis of the foregoing elements the affected individual is entitled to be heard before the decision is taken. It is to be also noted that the decision taken by the public officer is generally characterized as an '*administrative action*' which is "*any kind of conduct (or the failure to take action) that has an administrative character and is taken in terms of an empowering provision*".[9] Thus, the exercise of public power manifests itself in

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[8] **Administrator, Transvaal and Others v Traub and Others** 1989 (4) SA 731 (A), at 748 E - H

[9] **Fetsha v Member of the Executive Council (Eastern Cape)** [2006] 3 All SA 542 (CK) para [19]

administrative action or decision. Does the present case fit into the framework of an administrative action as described above? Where is the statute which empowers the First Respondent to make a decision? Article 9. 2. 6 does not empower the First Respondent to take the decision in question or any other decision for that matter. In my opinion, the necessary administrative-action features are not present in the letter of 24 December which the learned Judge adjudged to embody a decision to terminate the First Applicant's membership. First Applicant in his notice of motion also refers to a 'decision' made by First Respondent. The failure to correctly characterize the letter led to this unnecessary proceeding. And, moreover, in light of the denial of First Respondent, the termination has not been proved or confirmed other than the bare allegation of the First Applicant.

[38] Lord Diplock has observed[10]: *"Judicial review, ... provides the means by which judicial control of administrative action is exercised. The subject-matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision.*
"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. ...
"For a decision to be susceptible to judicial review the decision-maker must be empowered by law (...) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph".

None of these characteristics of judicial review are present in the matter before Court. The letter that First Respondent wrote to First Applicant demanded nothing of First Applicant. The letter was not a requirement of any statute or regulation. The letter was just a friendly reminder. The First Applicant could very well have ignored the letter with impunity. Lord Diplock[11] has also stated: *"Where an Act of Parliament confers upon an administrative body functions which affect to their detriment the rights of other persons or curtail their*

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[10] **Council of Civil Service Unions v Minister of State for the Civil Service** 1985 AC 374 at 408
[11] **R v Commission for Racial Equality,** ex p. Hillingdon LBC [1982] AC 779; [1982] QB 276

liberty to do as they please, there is presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions". Acting fairly towards a person detrimentally affected by a decision ordinarily means affording that person the opportunity to disabuse the decision-maker. In the case before Court there is no such decision-maker duly empowered to make the 'decision' complained of for First Applicant to disabuse.

Automatic Termination ?

[39] In para [48], the learned Judge pertinently observed: *"The system introduced by the constitution seems self-regulatory …"* It is indeed on that basis that the Respondents argue that the vacation under article 9.2.6 is automatic, that is, self-realizing on the concatenation of the relevant facts. The argument is founded on the wording of the article, to wit, *"shall be regarded as having vacated his / her seat on the committee"*, which is a deeming expression. In **Louw**[12] the Appellate Division held as follows:

> *"The deeming provision of s 72 (1) of the Education Affairs Act (House of Assembly) 70 of 1988 (which provided that a 'person employed in a permanent capacity at a departmental institution and who – (a) is absent from his service for a period of more than 30 consecutive days without the consent of the Head of Education ... shall, unless the Minister directs otherwise, be deemed to have been discharged on account of misconduct ...) comes into operation if the employee (i) without the consent of the Head of Education, (ii) is absent from his service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that he had the necessary consent, and that allegation is disputed, the factual dispute is justiciable by a court. There is then no question of a review of an administrative decision. The coming into operation of the deeming provision is not dependent upon any decision. There is no room for reliance on the audi alteram partem rule which in its classic formulation is applicable when an administrative – and discretionary – decision may detrimentally affect the rights, privileges or liberty of a person. Where, as* ***in casu****, the employee is informed in a letter of discharge that he has been discharged in*

[12] **Minister van Onderwys en Kultuur en Andere v Louw** 1995 (4) 383 (AA)

terms of s 72 (1), it is not a consequence of a discretionary decision, but merely a notification of a result which occurred by operation of law".

[40] In **Frans**[13] it was observed that the termination of a municipal councilor's position in terms of the provisions of regulations 82 and 83 read with regulation 21 of the Election Regulations in Proclamation 101 of 1994 occurred by operation of law resulting from an objectively ascertainable fact and not as a consequence of an administrative action. It was consequently held -

*"... The principle of **audi alteram partem** was therefore not relevant as the termination of the applicant's term of office had occurred simply by operation of law as a result of the objectively ascertainable fact that the applicant had been in arrears for more than three months and not as a result of an administrative action in the form of the taking of a decision or the exercise of a discretionary power".*

In the above case the applicant had been elected councilor and appointed mayor of Great Brak River. He was informed by the first respondent that he was no longer a councilor as his municipal account had been in arrears for more than three months. Applicant's argument that he had not been given opportunity to state his case did not succeed. In other words, respondent's defence was that the relevant regulation did not incorporate the *audi* principle as applicant had argued. In **Frans** case the court relied on the decision in **Louw**'s case in coming to its decision. Likewise, in the present case, First Respondent argues in effect that article 9. 2. 6 provides for a similarly deeming effect in terms of which the termination or more specifically the vacation of a member's seat in the school committee is automatic, that is, it is not activated by a decision but is deemed to occur by operation of law, triggered not by a public functionary but by the convergence of the objectively ascertainable three consecutive non attendance at meetings of the school committee and reasons acceptable to the committee not having been presented, as in the instant case.

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[13] **Frans v Groot Brakrivierse Munisipaliteit en Andere** 1998 (2) 770 (KPA)

[41] In **Ngcwase and Others**[14] a similar argument of automatic termination as above was raised where the first applicant's membership of a school committee had been allegedly terminated by the first respondent. The defence was based on a regulation under the Bantu Education Act, 1953 which provided: *"Whenever any member of any school committee: ... (c) has been absent without leave from three consecutive meetings, he shall cease to be a member of the school committee concerned"*. It was then argued that the first applicant *"automatically ceased to be a member of the school committee because he had been absent without leave from three consecutive meetings of the school committee. . . ."* (p 802E). The defence was however defeated on the facts of that case it being found that the applicant had not been given proper notice of one of the three meetings which also turned out to have been without a quorum. In the case before Court the court *a quo* did not make any specific finding on the notices of and quorum at the meetings called by the secretary. Even though the First Applicant had denied knowledge of the meetings in question, a cursory glance at the minutes of the meetings and the notices convening the meetings shows that the First Applicant had been aware of the meetings and no issue as to the quorum was raised. The reason for this approach by the First Applicant could well be because he had approached the matter on the basis that First Respondent had no power to relieve him of his school committee membership, so that regardless of the propriety of the meetings the termination was still illegal.

[42] If the school committee was expected to apply formal fair-hearing procedures in operating article 9.2.6 that would have been spelt out succinctly and the system would not be self-regulatory as the learned Judge found and with which finding I agree. In any event, fair hearing requirements are associated with disciplinary proceedings. In the manner in which article 9.2.6 is framed, a form of hearing, hardly an inquiry, can only be undertaken by the school committee where the defaulting member, within a reasonable period, comes up and tenders an excuse and reasons for having been absent. The article in the spirit of

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[14] **Ngcwase and Others v Terblanche, N.O. and Others** 1977 (3) SA 796 (AD)

self-regulation does not anticipate the committee to write a letter to the defaulting member calling upon him to show cause on a date, time and place stated why he should not be regarded to have vacated his seat. That would be reading too much of article 9.2.6. A school committee should not be bogged down by a procedure that is not even prescribed in its enabling document. Otherwise the school could grind to a stop as a result, for instance, of incidents such as described in this case where the chairman allegedly decides not to call school committee meetings as required by article 9.2.1 and refuses to heed invitations to meetings by the REO to whom the school committee is answerable. I do not believe that article 9.2,6 was meant to be anything but a simple guide to getting things done in the least onerous manner. Otherwise the words 'regarded as having vacated' would be meaningless.

[43] In my understanding of the letter in question, the First Respondent was only relaying what she and no doubt a majority of the school committee members considered to be an accomplished factual situation regarding the First Applicant's standing as a member and chairman of the school committee. That situation was that since First Applicant had absented himself from meetings of the committee on three consecutive occasions, he was to be *"regarded as having vacated his seat from the committee"*, unless, of course, he acceptably explained himself. Thus understood, article 9.2.6 does not require any further action like a hearing or strict inquiry as to why the member was absent. That is the literal meaning of the expression *"be regarded as ..."*: that is, taken for granted and accepted or assumed without further inquiry. It is a self-regulating clause not requiring the committee to activate it or do anything for enforcement. That is how I understand the letter of 24 December 2018. Its existence or absence did not make any difference to the status of First Applicant in the committee. The *onus* was upon the First Applicant, if he was at all genuine in his intention to continue as a member, to come up to the committee and dispute any intention on his part to vacate his seat by advancing acceptable reasons for his alleged absence at the committee meetings. Instead, First Applicant approached his attorneys who wrote back on the 7th January 2019: "7. *We are accordingly advised by our clients that they want the chairman to finish his term of office and accordingly your letter terminating*

his position is rejected with the contempt it deserves". For First Respondent to have withdrawn the letter as demanded would have been an admission that she had terminated or intended to terminate First Applicant's membership and chairmanship in the school committee as alleged.

[44] It should be stressed that among the persons who spoke at the meeting of the 17th December none said anything in defence of the First Applicant. It was clear to the members including the First Respondent that First Applicant was deliberately shunning the committee meetings with the result that proper running of the affairs of the school had become a challenge for the school committee. The committee knew and understood the First Applicant to be having personal issues with the head teacher and the Ministry of Education. The First Applicant was only going to attend school committee meetings on condition his 'grievances' were met. That afforded a definite motive for his absence at the school committee meetings as alleged. First Respondent was naturally concerned that the school operated efficiently and finances were disbursed as required and in accordance with proper procedure and cheques not signed at the school gate as it was alleged. It would have been most remiss of First Respondent to fold her arms and let the situation drift unchecked. The letter of 24 December was terse, carefully worded and aligned to article 9. 2. 6.

[45] In para [40] the learned Judge also agreed with the First Applicant that *"whatever other interpretation"* might be proffered, the letter in question *"had the effect of communicating a decision by the First respondent to terminate the First applicant's membership or chairmanship of the Second applicant"*. It is noted that in coming to his finding that by the letter of 24 December the First Respondent terminated the chairmanship and membership of First Applicant in the school committee the learned Judge did not refer to any part of the text of the letter in question. The interpretation leading to the conclusion of the learned Judge that the letter terminated or for that matter that the letter conveyed a decision by the First Respondent to terminate the said membership and chairmanship was not based on any textual reading of the said letter. For some inexplicable reason the learned

Judge adopted the meaning of the letter given to it by the First Applicant. Nowhere in his founding or replying affidavit does First Applicant refer to any part of the letter as supportive of his interpretation of it. Hence, in my view, First Applicant's reading of the letter was not faithful to its actual wording. In the result the Respondents have submitted that the court's finding that the letter dismissed First Applicant was not based on any factual finding but was a mere assumption or speculation.

Is judicial review competent in casu?

[46] The court *a quo* seems to have assumed that by merely writing the letter regardless of what it said but depending on how First Applicant felt about it, First Respondent had dismissed the First Applicant from membership of the school committee. The Judge did not address himself to the specific text of the said letter before coming to his conclusion. The learned Judge contented himself by observing that: "*Whatever the position, that is, whether the First applicant had his chairmanship terminated by the First respondent or whether the letter merely confirmed the termination of his membership, it is clear that before the issuing of the letter concerned, the First Applicant considered himself the chairman and member of the School Committee.... There is therefore no doubt in my mind that whatever one can say, the reality is that the effective termination...came about as a result of the said letter*". That was a strange rationalization of the situation which did not depend on the wording of the impugned letter, but rather on the mere feeling of the First Applicant. That cannot be a legitimate basis for judicial proceedings. Surely, the effect of an adverse administrative action must be objectively ascertainable to be the foundation of legal challenge.

[47] The learned Judge ought to have expressed what it was that he found in the wording of the said letter that spoke to termination of membership or that points to the REO as the decision-maker other than the mere fact she wrote the letter. Following the reasoning of the learned Judge that it was the First Respondent who terminated First Applicant's membership of the school committee because "*before the issuing of the letter concerned*",

the First Applicant considered himself the chairman *and* after the issuing of the letter he considered himself no longer the chairman of the committee. The telling and concerning question not answered in the judgment *a quo* is whether the stance adopted by First Applicant relative to his status in the school committee was rational having regard to the wording of article 9.2.6. A court of law should not accept a complainant's 'understanding' of events without interrogating the rationality therefor. Instead of accepting that he had brought about the termination of his own membership from the school committee, First Applicant blamed the First Respondent just because of the said letter without regard to what the letter actually stated and meant.

[48] As I understand the review application, the issue is not the writing of the letter as such: the issue is the alleged dismissal effect the letter allegedly had on First Applicant as a member of the school committee. First Respondent was free to write the letter so long as it was not meant to dismiss First Applicant from membership. Unless First Respondent had the power to dismiss, a pre-hearing would serve no useful purpose. Barnett[15] writes: *"Judicial review of administrative action is the mechanism by which the judges ensure that those to whom powers are given by Parliament are kept within the scope of power granted. In judicial review proceedings the court is concerned with whether the decision-maker reached the decision in accordance with the correct rules and principles, not with whether the decision was just or unjust, right or wrong"*. The powers granted by Parliament must be exercised within the four corners of the enabling legislation. It is of course a basic principle of our law that whoever decides anything adversely against some other person must act fairly. That is what section 33 (1) of the Constitution requires. But that section is not implicated in the instant case since no decision has been shown to have been made or that First Respondent had the power to decide as alleged. Since First Respondent by the letter of 24 December did not decide anything, she was never under any duty to act fairly.

[49] In light of the many authorities in this jurisdiction and outside in this area of the law, the following summary of the law since the passing of the Constitution in 2005 may be apposite. The exercise of public power must comply with the Constitution, 2005 and the principle of legality. Section 33 of the Constitution of eSwatini, 2005, is the basis of the

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[15] Barnett H. **Constitutional and Administrative Law,** 8th ed p 755

right to just administrative action. In order to succeed on the basis of section 33(1) of the Constitution, it must first be established that the relevant functionary performed an administrative action. Administrative action is, broadly described, the conduct of the administration when it exercises a public power. The question in the present matter is whether the decision of the First Respondent, that is, the writing of the letter supposedly dismissing First Applicant from the school committee, could be characterized as 'administrative action'. See **Fetsha,** supra, where the learned Judge also states that " ... *what would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality ...* "

[50] It is enough to point out that when First Respondent wrote the letter of 24 December she did not do so as a functionary acting in terms of a particular enabling provision. In the result her action was not amenable or susceptible to the provisions of section 33(1) of the Constitution. The common law does not apply in the case of a public functionary under section 33(1). It would be wrong to apply both the common law and section 33(1) because contradictory or divergent results might be realized, meaning there are two systems of law that do not always converge. Yet the common law rules should be treated as supplementing the Constitution as section 268 enjoins and must accordingly be developed and interpreted by the courts to fulfil the broader purposes of the Constitution in the progressive development of Swati society. It will be seen then that judicial review of the exercise of public power is a constitutional function. Van Zyl J. in **Fetsha**, supra, para [9] might as well have been addressing section 33 of the eSwatini Constitution where he says: *"The principle function of section 33 of the Constitution is to regulate conduct of the public administration and, in particular, to ensure that when any action taken by the administration affects or threatens an individual, the procedures followed comply with the constitutional standards of administrative justice. The common- law administrative law had been subsumed by the Constitution and the standards of constitutional administrative justice are informed by the common-law principles of administrative law. ... The*

constitutional right to procedurally fair administrative action entrenches the common-law rules of natural justice and in particular the audi principle."

[51] In **Attorney General v Ryan** [1980] AC 718 Lord Diplock, that doyen of administrative law, stated thus: " ... *the Minister was a person having legal authority to determine a question affecting the rights of individuals. This being so it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity".* The flipside to Lord Diplock's pronouncement, for our purposes, is to be found in Russell LJ[16]: *"We can deal more shortly with the alleged failure of natural justice in that there was no formal hearing before the principal before he passed the academic board's recommendation to the governing body. We can see no possible reason why there should have been. Like the academic board, the principal had no power to expel a student, but only to recommend his expulsion".* In **Pridwin**[17], even though the decision turned on a contract binding between the parties, the judgment is very informative where the Justice of Appeal, Cachalia JA, stated as follows in para [49]: " ... *in cancelling the contracts Pridwin was not exercising a public power or performing a public function. It was exercising a contractual right that did not constitute administrative action".* In a way, the majority judgment dismissing the appeal supports the view implicit in the case before Court that *"the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth"*, as Tucker LJ said in **Russell v Duke of Norfolk** [1949] 1 All ER 109 at 118. And Lord Bridge[18] concurred: *"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has*

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[16] **Herring v Templeman** [1973] 3 All ER 569 (CA), at 586f
[17] **AB v Pridwin Preparatory School** [2018] ZASCA 150 (01 November 2018)
[18] **Lloyd v McMahon** [1987] 1 All ER 1118, p

to make a decision which will affect the rights of individuals, depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates". It is my view that even if First Respondent had decided to terminate First Applicant's membership in the circumstances of the case she would not have been obliged to abide by the requirements of administrative justice and give fair hearing to the First Applicant.

Conclusion

[52] It has been said that the words of a statute must be given their ordinary grammatical meaning in the search for the intention of the law-maker; the same must be true of the words of the letter in question. This was not done by the First Applicant and the court *a quo*. There is nothing in the judgment to demonstrate that such a construction of the letter was undertaken. Indeed, even Advocate Mabila for the applicant could not say which words rendered the said letter a 'decision' liable to be reviewed. All that Advocate Mabila could say of the letter was that: "*The said letter speaks for itself*". (Para 29 of Applicants' heads of argument). In so speaking for itself, one may ask: What exactly does it say? Counsel did not elaborate to spell out what exactly the letter says that constitutes a decision to terminate. With due respect, the finding that the letter terminated the membership of First Applicant was arbitrary and unreasonable. The meaning of the letter must turn on the wording employed in composing it and not on the self-serving reaction of the First Applicant and his supporters. As Lord Greene MR[19] once said *"If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used".* And it is further stated that *"if language is clear and explicit, the court must give effect to it"* for in that case the words of the document speak the intention of the author. It has also been stated: *"The cardinal rule*

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14 **Re A Debtor (No.335 of 1947)** [1948] 2 All ER 533, 536

of construction is that words must be given their ordinary, literal, grammatical meaning".[20]

[53] The words of the second paragraph of the letter of 24 December are clear, explicit and unambiguous: "*Lencwadzi ikwatisa kutsi sincumo sakho sekuyekela kulelibandla semukelekile. Lihhovisi letemfundvo litakwenta lokufanele kuvala sikhala lesesivulekile".* **[This letter informs you that your decision to leave the school committee is acceptable. The Ministry will do whatever is necessary to fill the vacancy that has been created].** Even the first paragraph of the said letter speaks of the Ministry of Education regarding that by not attending three consecutive school committee meetings the First Applicant had resigned his membership of the school committee. Nowhere in the letter does First Respondent purport to act of her own or that the conclusion that First Applicant had resigned his membership to the school committee was her own opinion. Where then does the idea of First Respondent unilaterally terminating the First Applicant's membership to the school committee come from? It cannot be that by merely writing the letter of 24 December First Respondent terminated or intended to terminate First Applicant's membership no matter what the letter actually said.

[54] Even though he denied it, in my view, there was sufficient evidence that First Applicant knew of the meetings called by the secretary and the vice chairman but deliberately did not attend for the reasons indicated in the minutes, that is, that the head teacher had become unwanted and his letter to the Principal Secretary had not been answered. Otherwise I do not understand why the First Applicant should have been singled out and left out of the meetings of the school committee which he is alleged to have not attended. Also, First Applicant did not deny that he did not call a school committee meeting for the third term of the school. First Applicant is accused of wanting to hold the school at ransom no doubt in pursuit of the above said issues. It is explained that First Applicant had stated he would only attend parents' meeting not those of the school committee and

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[20] **Volschenk v Volschenk** 1946 TPD 486, 487

that he would rather resign his membership of the committee if his letter to the Principal Secretary were not to be answered.

[55] From the minutes there were clear and legitimate school needs including a budget for the following year that needed the school committee to meet and take decisions. The First Respondent also averred having endeavoured to have First Applicant to attend meetings but without success. Why should the First Respondent lie about the First Applicant? All the school committee meetings preceded the launching of the application in January 2019. Why should Respondents trump up a story against the First Applicant? Why would First Respondent not want First Applicant as a member of the school committee? There is no motive indicated on the papers before Court.

[56] The reason article 9.2.6 is worded as it is was probably to obviate the legalistic approach of instituting and conducting fair-hearing proceedings as in normal situations. The article was intended to make it easy to operate and run the affairs of school committees by providing a simple mechanism whereby after three consecutive absences from committee meetings a member would be deemed or regarded to have vacated his membership. The article allows the school committee to presume vacation of a seat without any formal notice or application by that member on the one hand and allows the defaulting member to absolve himself and purge his potential resignation by coming forward and presenting acceptable explanation of his default to the school committee on the other hand. Nothing formal; nothing complicated. The formal procedure would be time-consuming and generally undesirable for a school committee. Hence the view adopted by the respondents that the procedure provided by article 9.2.6 was automatic, self-induced vacation. In the result, the *onus* is upon the defaulting member to explain himself before the school committee.

[57] It will be remembered that the Respondents have also submitted in their heads of argument that *"the court ought to have found that the 1st Respondent's chairmanship with the committee automatically terminated when he absented himself from three consecutive*

school committee meetings in 2018". Indeed, properly understood, article 9.2.6 does not require anybody's 'decision to terminate' anybody's membership in the school committee. All that the article requires, when an explanation for absence is proffered, is for the school committee to decide whether the explanation is acceptable or not. If the explanation is not acceptable, what happens to the affected member is a consequence or function of the wording of the article not a decision by the committee or anybody to terminate the membership of the person affected. Where the explanation is not acceptable, what may be said to the member concerned is that: "Well, you are now *regarded* as having vacated your seat", as the article provides. No need for a *decision* to terminate the membership. Given the wording of the article, to speak of a 'decision to terminate' would be a form of inaccurate or faulty speaking or reasoning.

[58] The First Applicant should have sought to explain the reason for his apparent non-attendance at the said meetings when he received the letter of 24 December, even if he had not received the notices for the meetings. That would have ascertained if in fact he was being fired from the school committee. He could thereafter, if necessary, approach his attorneys. The urgency was not justified in the circumstances of the case where First Applicant had neglected to hold the necessary school committee meetings as required. The move adopted by the First Applicant unduly complicated an otherwise simple matter, assuming that First Applicant did have a *bona fide* and acceptable explanation for his alleged non-attendance at the consecutive committee meetings. As the First Respondent stated in paras 8.6 and 8.7 of her answering affidavit: *"Had the 1st Applicant furnished the committee with reasons after getting my correspondence, that would have sufficed"* instead *"The 1st applicant did nothing to rebut the presumption that he had vacated office in terms of article 9.2.6 ... He should have done so instead of coming to court ... with this unnecessary application"*. But probably due to the alleged grievances First Applicant is said to have had, that explains why he chose to approach his attorneys and not the school committee or First Respondent. But that does not assist First Applicant or in any way

justify his reaction to the said letter: if anything, it confirms the rather toxic relations that existed between the First Applicant and some members of the school committee and the Ministry of Education as it had been told.

[59] The letter of 24 December must be read closely with article 9.2.6 to which it specifically referred by its reference to a member who had missed three consecutive school committee meetings. The minutes of the committee referred to above clearly indicate that there was no acceptable explanation presented before the committee. The articles of the constitution had been explained to the members at their inauguration into office as Ms. Bhembe, the vice chairperson, clarified during the meeting at the office of the REO. The First Applicant must have known the consequences of missing three consecutive meetings even before he received the letter in question. In believing, if at all, that he was still a member of the committee just before he received the letter, the First Applicant could not have been honest in that belief. The letter as shown from its wording was directed to a person who was familiar with the state of affairs relative to the non-attendance at school committee meetings. To be sure, the membership of First Applicant in the school committee was not terminated by First Respondent but terminated itself at the instance of First Applicant by failing to attend school committee meetings on three successive times.

[60] In the result –

1. The appeal succeeds.
2. The decision of the High Court is reversed.
3. No order as to costs.

MJ Dlamini JA

MCB Maphalala CJ

JM Currie AJA

Atty S. Dlamini	**for**	**Appellants**
Adv M. Mabila	**for**	**1st Respondent**
(Instr. by Atty L.Dlamini)		