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MRS HIP FERREIRA

## DEPARTEMENT VAN JUSTISIE EN KONSTITUSIONELE ONTWIKKELING DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT REPUBLIEK VAN SUID-AFRIKA - REPUBLIC OF SOUTH AFRICA

LANDDROSKANTOOR MAGISTRATE'S OFFICE

WITBANK

MR BAFANA MALUNGA LEGAL SERVICES PROGRAMME MPUMALANGA PROVINCIAL OFFICE P Q BQX 6574 NELSPRUIT 1200

03RD DECEMBER 2010

CASE FLOW MANAGEMENT LETTE HAZEL-GORTMAN/STTHOMAS AQUINAS PRIVATE SCHOOL AND BERNARD LANGTON EQUALITY COURT CASE NO: 1/2010 YOUR FAX DATED 30" NOVEMBER 2010 REFERS

A copy of the written judgment may be obtained from the Clerk of the Civil Court.

H P FERREIRA

**MAGISTRATE: WITBANK** 

FROM

It was common cause between the parties that there was no school available in Witbank for disabled children.

Despite of her physical disabilities, first respondent accepted her as pupil. It can be assumed that the School Governing Body was fully aware of her physical disabilities when she was accepted as pupil in 2002.

It was also common cause between the parties that Chelsea was accommodated by the School Governing Body (on behalf of first respondent) on several aspects.

She was supported by:

- (a) arranging all her class-rooms to be on ground level.
- (b) giving her access to a totlet.
- (c) arranging transport for her during school—and sport functions and trips. (She used to travel with a teacher),
- (d) granting bursaries for her to study.
- (e) providing a breathing apparatus for her use.
- (f) providing a wheelchair for her use in the classes.
- (g) providing a special table for her use in the class.
- (h) regulating access to the tuck shop to allow her to go in first.

All these actions taken by the respondents are praiseworthy.

However, despite of all the abovementioned steps taken by respondents, Chelsea still experienced problems at school.

The problems experienced by her were:

- (a) all her class-rooms as well as the toilet that was allocated to her, have a high step which prevented her to enter the rooms with the wheelchair.
- (b) the toilet allocated to her was most of the time locked and when she wanted to use it, she first ....
  had to ask a teacher to unlock the door for her
- (c) the library is on the first floor. Chelsea had to climb many steps to have access to it.
- (d) some of the teachers were (allegedly) not always helpful with the wheelchair. Some of the teachers were impatient with her. None of the teachers are trained to work with disabled persons.

- (e) the washbasin are too high for her to reach to enable her to wash her hands.
- (f) the toilet allocated to her is a normal toilet (and not a special toilet for disabled persons).

The questions raised in this application were:

- (a) did respondents discriminate against Chelsea by not providing all the necessary facilities to her as a physical disable person?
- (h) if they discriminated against her, was it fair or unfair discrimination?

In terms of section 9(1) of the Constitution of the Republic of South Africa, Act No. 108 of 1996, everyone is equal before the law and has the right to equal protection and benefit of the law.

No person may unfairly discriminate directly or indirectly against another person on the ground of physical disability – Section 9(4) of the Constitution and Section 6 of the Equality Act, No. 4 of 2000.

Section I of the Equality Act defines "discrimination as:

"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly

- imposes burdens, obligations or disadvantage on, or
- (b) withholds benefits, opportunities or advantages from, any person, on one or more of the prohibited grounds."

"Disability" is one of the prohibited grounds – Section I of the Equality Act.

Section 9 of the Equality Act prohibits unfair discrimination against any person on grounds of disability. It reads:

## 9 Prohibition of unfair discrimination on ground of disability

Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility:
- (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

011-484-1360

FROM

The equality court has to determine whether unfair discrimination has taken place. The court has to determine whether the complainant has shown that there has been an act or omission that caused harm to her daughter by imposing a burden or withholding a benefit on a prohibited ground. Once the complainant established this, discrimination has been established. Then it is for the respondent to show that the discrimination was not unfair. (MEC for Education, Kwa Zulu - Natal, and Others v Pillay 2008 (1) SA 474 (CC) at paragraph [138]).

To return to the facts of this application: on the date of admission of Chelsea as a pupil in 2002, the school was aware of her physical disability.

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Several praiseworthy steps were taken by respondents to accommodate Chelsea (as discussed above), but unfortunately not all reasonable steps were taken to remove obstacles to enable her to have access to the classes, a toilet and a washbasin.

It is so that she is able to walk and climb steps, but she sometimes get tired and then she has to use the wheelchair provided to her by the school.

On the other hand, a wheelchair will be of little use if she can not use it to move from class to class, to toilet, to the playgrounds, etc.

To build ramps at the class-rooms that she has to attend and at the toilet allocated to her, should not be expensive.

The school building is old. No provision was made to accommodate pupils that have to use wheelchairs. The School Governing Body should, when doing the budget each year, make provision for renovations and maintenance of the building.

However, the school failed to take the necessary and reasonable steps to renovate the building.

If a ramp is build at the toilet that was allocated to her, she will be able to use the wheelchair on her own to go to the toilet and to wash her hands at the washbasin.

The complaint about some of Chelsea's teachers can easily (and maybe costless) be solved by the second respondent by having discussions with all relevant parties.

He can even instruct some teachers to attend a course on how to work with disabled persons.

The toiles, specially allocated to her, should not be locked and should not be used by other persons.

FROM

It is an unnecessary burden on her to expect from her to ask the teachers first to unlock the toilet door, before she can use the toilet.

The problem about the library being on the first floor can eastly be solved by bringing the needed library books to her class-room – where she will be able to do her research.

In the light of abovementioned conclusions. I came to the finding that the school unfairly discriminated against Chelsea by failing to take the necessary steps to accommodate her.

Second respondent confirmed in his affidavit dated  $19^{th}$  January 2010 that Chelsea is a learner at the school.

In his evidence under oath he told the court that he had a discussion with complainant about Chelsea. The conversation between them was about the fact that Chelsea failed almost every year since she has been enrolled at the school.

Complainant admitted that Chelsea failed several times.

She, however, testified that Mr. Langton reminded her that there are no schools in Witbank available for disabled children.

He then suggested that complainant must come with a positive answer about this problem.

Mr. Langton testified that they never discussed Chelsea's disability.

Complainant there and then decided to take Chelsea out of the school.

She testified that Chelsea does not want to go back to the school.

Presently she is doing home-schooling.

Complainant, however, want to take her back to ST Thomas Aquinas School.

The respondent's lawyer, Mr. Oelofse, argued that the matter is moot as Chelsea has left school.

The majority of the constitutional court in the Pillay – case, supra, paragraph 115/512 A, decided that the fact that the matter is most does not alter that position.

The equality court may make a declaratory order and also grant an interdict restraining unfair discrimination. (Section 21 of the Equality Act).

HO:

In the light of abovementioned findings, the following order is made:

011-484-1360

- Respondents may not refuse to re-admit Chelsea as a learner at ST Thomas Aquinas
   Private School on the ground of her physical disability.
- In the case of Chelsea being re-admitted on complaint's request, the first respondent is ordered to take reasonable steps to remove all obstacles to enable Chelsea to have access to all the class-rooms and the toilet allocated to her by using a wheelchair. Reasonable steps that can be taken are:
  - a) to build ramps at the classes and toilet where she has to attend and to
  - build in a toilet and a washbasin for disable persons. (The door should not be locked).

    To take these necessary steps, would be to the benefit of not only Chelsea but also to other persons with a physical disability in the future.

Wes

- 3) Second respondent is ordered to investigate the alleged strained relationship between Chelsea and her teachers and to take the necessary steps to solve the problems.

  Teachers should get the necessary training and gain experience in handling children with disabilities.
- Neither of the parties requested costs in this application.
   No order to costs is accordingly made.

GE DU PLOOY

ADDITIONAL MAGISTRATE
FOULLITY COURT DISTRICT

EQUALITY COURT, DISTRICT WITBANK

OIST DECEMBER 2010