CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 297/20

In the matter between:

JOHANNES MOKO	Applicant
and	
ACTING PRINCIPAL OF MALUSI SECONDARY SCHOOL, TLOU MOKGONYANA	First Respondent
MEMBER OF EXECUTIVE COUNCIL; LIMPOPO DEPARTMENT OF EDUCATION	Second Respondent
HEAD OF DEPARTMENT; LIMPOPO DEPARTMENT OF EDUCATION	Third Respondent
MINISTER OF BASIC EDUCATION	Fourth Respondent
UMALUSI	Fifth Respondent

Neutral citation:	*Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Khampepe J (unanimous)
Decided on:	28 December 2020
Summary:	Direct access — urgent application — right to education — section 29(1) of the Constitution

ORDER

On application for direct access to the Constitutional Court on an urgent basis:

1. Leave for direct access on an urgent basis is granted.
2. The conduct of the first respondent, which resulted in the applicant's inability to sit for the Business Studies Paper 2 examination on 25 November 2020, is declared to be a violation of the applicant's right to education in section 29(1) of the Constitution.
3. The second to fifth respondents are ordered to grant the applicant the opportunity to write the Business Studies Paper 2 examination by 15 January 2021.
4. The result of the examination written in terms of paragraph 3 of this order is to be released simultaneously with the general release of the 2020 National Senior Certificate examination results in January or February 2021.
5. The first, second, third and fourth respondents are jointly and severally liable to pay the costs of the applicant, including the costs of two counsel, in both this Court and the High Court of South Africa, Limpopo Division, Polokwane.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were only before ever dreamt of. I am not exaggerating when I say that education changes lives. It enriches and develops our children so that they may reach the height of their potential. And, as our citizens are empowered through education to improve their future and achieve their dreams, our nation will undoubtedly prosper too.[1]

[2] The fundamental importance of education is recognised by our Constitution, which entrenches the right to education in the Bill of Rights. Section 29(1) of the Constitution provides:

> "Everyone has the right—
> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[3] The case before us concerns a young man who asks this Court to assist him, as a matter of urgency, in protecting and vindicating this right to education.

[4] Mr Johannes Moko, the applicant, is a Grade 12 learner at Malusi Secondary School in Limpopo. The first respondent is the Acting Principal of Malusi Secondary School, Mr Tlou Mokgonyana. The second and third respondents are the Member of the Executive Council and the Head of the Department of Education, Limpopo

[1] This Court has spoken before of the important transformative nature of education for individuals and for our society in general. See *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) (*Pridwin*) at paras 1 and 158 and *Governing Body of the Juma Musjid Primary School v Essay N.O.* [2011] ZACC 13; 2011 JDR 0343 (CC); 2011 (8) BCLR 761 (CC) (*Juma Musjid*) at paras 42-3 where this Court held that:

> "The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. . . . [B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities."

Province, respectively. The Minister of Basic Education is the fourth respondent, and Umalusi, the body responsible for the development of education frameworks and management of qualification standards, is the fifth respondent.

[5] But for the inexplicable conduct of the first respondent, Mr Moko would have completed his matric examinations a few weeks ago, and would have been able to have enjoyed the festive season in the knowledge that he had written these important examinations to the best of his ability. Instead, Mr Moko has spent the last few weeks in consultations with lawyers and filing papers in court, as he vehemently fights for his right to education.

[6] It is most unfortunate that the first respondent did not deem it necessary to take us into his confidence regarding what could have caused him to act as he did. Is there a policy or established practice that no learner is to be allowed to sit for an examination if they did not attend extra lessons? Or was the first respondent acting on a frolic of his own? We must do everything in our power to resist the seductive force of speculation, but this deafening silence when the circumstances cry out for an explanation regarding conduct that could ruin or have an inimical effect on the destiny of a young man is deeply concerning. But, let me start at the beginning.[2]

Background facts

[7] On Wednesday, 25 November 2020, Mr Moko arrived at Malusi Secondary School to write the Business Studies Paper 2 examination as part of the 2020 National Senior Certificate examinations (colloquially, the matric examinations). Upon his arrival, he and two other learners were met by the first respondent at the school gate and prevented from entering the school premises, on the basis that they had not attended certain extra lessons. They were instructed to return home to fetch their parents or guardians, supposedly for purposes of discussing the matter of not having attended those

[2] As none of the respondents opposed this matter or wished to advance an alternative set of facts to those described by the applicant in his papers, it is the set of facts given by the applicant that I outline in this judgment.

lessons. They were only to return to the school with their parents or guardians.[3] Mr Moko left the school as instructed, but was unable to locate either his grandmother, who was apparently at the hospital collecting medication, or his uncle. Although he managed to contact his sister, she was not nearby and was therefore unable to make it to the school. The applicant thus returned to the school alone. Upon arrival, the school gates were locked.[4]

[8] Mr Moko was seen outside the school by a certain Mr Moshuhla who, concerned to see the applicant outside the locked gates, convinced the security officer to let him in. At this stage, the Business Studies Paper 2 examination was already underway. As the examination had already begun, the first respondent refused to allow the applicant to enter the examination room. This deprived the applicant of the opportunity to write the Business Studies Paper 2 examination on 25 November 2020, as per the examination schedule.

[9] The day after the missed examination, Mr Moko, along with his uncle and Mr Moshuhla, met with the first respondent to discuss the incident, at which point Mr Moko was informed that he would only be able to write the supplementary examination in May 2021. The matter was thereafter, on Friday, 27 November 2020, escalated to the second respondent, who directed the District Director to urgently attend to the matter. The latter contacted Mr Moko that same day. He indicated that a decision had been taken against the first respondent, but confirmed that the applicant would only be able to write the examination in May 2021.

[10] Aggrieved by the decision that he would only be able to complete his matric examinations at that late stage, Mr Moko launched an urgent application in the High Court of South Africa, Limpopo Division, Polokwane, for an order that he be given the opportunity to write the missed examination imminently.

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[3] One of the learners was allowed into the school, after a discussion with the first respondent, and the other left and returned to the school with his parents, after which that learner was allowed to write the examination.

[4] The applicant informs us that the school gates are locked for security reasons during the school day.

[11] The High Court, however, struck the application from the roll for lack of urgency. That Court concluded that Mr Moko would be given the opportunity to write the paper in May 2021 and that there was therefore no need for the matter to be determined on an urgent basis.

[12] Mr Moko is of the view that the determination of the matter by the High Court in the ordinary course will not provide him with the urgent relief he seeks to write the missed examination as soon as possible. He thus approaches this Court directly on an urgent basis for an order directing that he be given an opportunity to write the examination before the release of the other results, so that his examination script can be marked and his results released together with the results of the other matric examinations. He further requests that the second to fourth respondents be ordered to arrange and pay for counselling sessions for him before the release of these results.

[13] Mr Moko submits that the conduct of the first respondent, in sending him home to call his parents, which resulted in him arriving late and being refused entry into the examination, violated his right to basic education in section 29(1)(a) of the Constitution as well as his right to further education in section 29(1)(b). This is because the delay in his completed matric results – if he is only able to write the missed examination in May 2021 – means that Mr Moko will be unable to begin any further education at an institution of higher learning at the start of 2021. It is particularly for this latter reason that the applicant submits that this matter be determined on an urgent basis.

Jurisdiction

[14] It is perspicuous that the matter engages this Court's constitutional jurisdiction. The applicant asks this Court to declare that his constitutional rights to basic and further education under section 29(1)(a) and (b) of the Constitution have been infringed. This

undoubtedly falls within the ambit of section 167(3)(b)(i) of the Constitution.[5] This Court's jurisdiction is engaged.

[15] But, is it in the interests of justice for this Court to determine this urgent application for direct access?

Direct access and urgency

[16] The applicant approaches this Court directly, on an urgent basis. This Court must therefore be convinced that it should determine the application as a court of first and last instance and as a matter of urgency.

[17] An application for direct access to this Court is an extraordinary procedure that ought to be followed only in exceptional circumstances.[6] Persuasive and compelling reasons are required before this Court will exercise its discretion to grant direct access.[7] Some pertinent considerations relating to an application for direct access were outlined by Chaskalson P in *Bruce* and have been referred to with approval in subsequent cases.[8] These include the prospects of success, but also consideration of Chaskalson P's warning that if this Court were to allow all constitutional matters to come directly to it—

> "[this Court] could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and

[5] Section 167(3)(b)(i) of the Constitution states that "[t]he Constitutional Court may decide constitutional matters". Section 167(7) goes on to state that "[a] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution".

[6] *Mazibuko N.O. v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (*Mazibuko*) at para 35; *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 4; *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4; *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice intervening)* [1996] ZACC 8; 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) at para 6; and *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11.

[7] *AParty v Minister of Home Affairs, Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 30 and *Bruce* id at para 9.

[8] *Bruce* id at paras 7-8 and 19. See, for example, *Mazibuko* above n 6 at para 35; *AParty* id at para 29; and *Christian Education South Africa* above n 6 at para 8.

> which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction."[9]

[18] Of particular importance, Chaskalson P went on to note that it is "not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given".[10] There is no doubt that more thorough, and therefore arguably better decisions are arrived at where many minds have considered a matter. Leapfrogging the High Court and the Supreme Court of Appeal is seldom desirable. This Court benefits greatly from the well-reasoned judgments of those courts on matters that come before us.

[19] However, that does not mean that there cannot be exceptional instances where this Court deems it appropriate to grant direct access to an applicant. In *Mazibuko*, Moseneke DCJ noted that "[f]or the existence of exceptional circumstances there must, in addition to other factors, be sufficient urgency or public importance, and proof of prejudice to . . . the ends of justice . . . to justify such a procedure".[11] A further relevant consideration to a grant of direct access is whether an applicant can show that they have exhausted all other remedies and procedures that are available to them.[12]

[20] Mr Moko approached the High Court as a matter of urgency for the vindication of his constitutional right to education – a right which, due to its transformative nature both for individuals and society as a whole, is of fundamental importance in this country. The High Court is a forum that is substantially better suited for determining urgent matters than this Court and it has jurisdiction to determine matters of a constitutional nature. It would therefore ordinarily be the appropriate forum for a matter of this ilk. And yet, for reasons beyond any feasible comprehension, the High Court

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[9] *Bruce* id at para 7.

[10] Id at para 8.

[11] *Mazibuko* above n 6 at para 35.

[12] *Besserglik* above n 6 at para 6.

struck this matter off the urgent roll. This placed the applicant in an invidious position. Desperate to not have to wait until the supplementary examination in May 2021 or for the matter to be enrolled on the ordinary roll in the High Court, which could result in a determination of the matter only many months down the line, the applicant chose to approach this Court directly for the urgent relief he seeks.

[21] On the face of it, this matter concerns a potentially serious violation of the applicant's right to education. Over and above that, a lack of urgent relief could have a significant adverse effect on the applicant's future endeavours and opportunities. His life could forever be out of step by a whole year. Also, delaying the pursuance of further education until 2022, to wait for the results of the supplementary examination, could easily result in the applicant abandoning that admirable goal entirely. Even if the applicant wished to pursue a different path, a five to six-month delay in obtaining his matric results could similarly frustrate any attempt to obtain employment that requires a matric certificate. In my view, the urgency of this matter is undeniable.

[22] Finally, there are no factual disputes requiring resolution that require the admission of evidence or the hearing of witnesses.[13] This, too, supports granting direct access, as this Court is not particularly well-suited to hearing factual evidence as a court of first instance. None of the respondents opposes the application and all have filed notices to abide the decision of this Court. The second to fourth respondents filed written submissions in an attempt to assist this Court, in which they indicated their willingness to offer the applicant an opportunity to write the examination in January 2021. All that is therefore required of this Court is to determine the purely legal constitutional question of whether the applicant's right to education has been violated.

[23] In light of the above, I am of the view that it would be a grave injustice if this Court refused to determine the matter. The circumstances here are exceptional and the

[13] In *Mazibuko* above n 6 at para 36, Moseneke DCJ noted in support of the granting of direct access that "the issues before us are crisp and well defined, and do not raise disputes of fact or require factual resolution".

applicant has raised compelling reasons for approaching this Court directly. Direct access to this Court on an urgent basis ought to be granted.

[24] Due to the lack of opposition from any of the respondents in this Court, together with the urgency of the matter, this Court has deemed it appropriate to determine this matter on the papers, without an oral hearing. What follows is this Court's brief judgment on the merits.

Did the first respondent infringe the applicant's rights under section 29(1)(a) and (b) of the Constitution?

[25] The core question for determination in this matter is whether the conduct of the first respondent, in refusing the applicant access to the Business Studies Paper 2 examination, violated his right to basic education under section 29(1)(a) and to further education in section 29(1)(b).

Section 29(1)(a) infringement

[26] I start with the first of the applicant's submissions: that the first respondent's conduct violated section 29(1)(a) of the Constitution. Did the conduct of the first respondent, resulting in the applicant missing his matric examination, violate the latter's right to basic education? In my view, the answer to this turns on the determination of two sub-questions:

(a) First, do matric examinations fall within the purview of "basic education", the right to which is protected under section 29(1)(a)?

(b) Secondly, if yes, does the first respondent have an obligation to give effect to or refrain from interfering with that right?

[27] Section 29(1) of the Constitution distinguishes between basic education and further education. The right to the former is immediately realisable, whereas the state is merely obliged to take reasonable measures to make further education progressively

available and accessible.[14] But where does basic education end and further education begin? In *Juma Musjid*, Nkabinde J accepted that basic education, at the very least, comprised education from Grades 1 to 9, which were the grades taught by the school in that matter.[15]

[28] In *Pridwin*, Nicholls AJ stated the following regarding basic education in her minority judgment:

> "While it is difficult to establish where the line should be drawn between basic education and further education, it cannot be disputed that basic education includes what is commonly known as primary education.
>
> . . .
>
> Accordingly, it is clear that every institution, elite or non-elite, that provides non-secondary or non-tertiary education is necessarily simultaneously engaged in providing those attending it a basic education."[16]

[29] That case concerned the rights of two children at an independent primary school. I do not interpret the above extracts as meaning that *only* primary education constitutes basic education. Rather, I understand my sister Nicholls AJ as emphasising that primary school education *most certainly* falls within the definition of basic education under section 29(1)(a), whether that education is provided by the state or an independent school.

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[14] *Juma Musjid* above n 1 at para 37.

[15] Id at para 38. This Court went on to state:

> "Section 3(1) of the [South African Schools Act 84 of 1996], following the constitutional distinction between 'basic' and 'further' education, makes school attendance compulsory for learners from the age of seven years until 15 years or until the learner reaches the ninth grade, whichever occurs first."

This statement could be said to create the impression that the constitutional distinction occurs at the point that education is no longer compulsory, but I do not see Nkabinde J as limiting basic education to those grades for which the Schools Act makes attendance compulsory. First, legislation cannot inform the interpretation of constitutional provisions. Second, the school in issue in that case concerned only Grades 1-9 and so it was not necessary for the Court to decide the nature of education outside those grades.

[16] *Pridwin* above n 1 at paras 78 and 80.

[30] The majority judgment in *Pridwin*, per Theron J, did not define basic education with reference to a person's age or school-grade. Instead, having considered the international law position in relation to the right to education,[17] it held that basic education ought to be described by reference to the content of the education provided.[18] It noted that basic education is—

> "a flexible concept which must be defined so as to meet the 'learning needs appropriate to the age and experience of the learner, whether child, youth or adult . . .' and should also provide access to nationally recognised qualifications."[19]

[31] In my view, school education culminating in the "nationally recognised qualification" of the National Senior Certificate is basic education under section 29(1)(a). This includes Grade 12 and the matric examinations. Besides, the Ministry of Basic Education bears the responsibility for the entire educational regime that cannot be properly classified as tertiary or higher education. Grade 12 is part of that regime.

[32] To limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right. For example, it would be highly problematic for our school system, and dare I say for our society as a whole, if section 29(1)(a) only required the state to provide desks for learners at primary and not secondary schools, or only up until Grade 9.[20] Or if the state could plead "insufficient resources" for providing sufficient Grade 10-12 teachers because those grades fell under further education in

[17] In particular, Article 26 of the Universal Declaration of Human Rights, 10 December 1948 and the United Nations Educational, Scientific and Cultural Organization World Declaration on Education for All, 1990.

[18] *Pridwin* above n 1 at paras 160-4.

[19] Id at fn 150 quoting Chürr "Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany" (2015) 18 *PER* 7 at 2411.

[20] In *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) at para 41, the Eastern Cape Local Division, Mthatha held that the failure by the state to provide adequate, grade- and age-appropriate furniture and desks for learners amounts to a breach of the right to basic education in section 29(1)(a).

section 29(1)(b), the right to which is not immediately realisable, but must be made "progressively available and accessible". Similarly, adopting a restrictive interpretation would have given rise to an absurd result in the *Welkom High School*[21] case: that school policies that provide for the automatic exclusion of any learner from school in the event of her falling pregnant, limit a pregnant learner's fundamental right to basic education in terms of section 29 of the Constitution, but only if the learner is in Grade 9 or below.

[33] I am therefore of the view that the applicant's matric examinations fell within the definition of basic education.

[34] The answer to the second sub-question is, quite simply, yes. The first respondent has a duty to not impair or diminish a learner's right to basic education.[22] He therefore had a duty not to prevent the applicant from writing his examinations. As an acting principal at a state school, the first respondent is an organ of state[23] and therefore has not only a negative obligation to not infringe a person's right to basic education, but also a positive obligation to ensure that the right is protected and fulfilled.[24] In his position as an acting principal, employed by the state, the first respondent is entrusted with carrying out, or giving effect to, the positive obligation held by the state to provide basic education to the learners who attend the school of which he is acting principal. The website for the Department of Basic Education describes school principals (and by extension, acting principals like the first respondent) as "key delivery agents in [the]

[21] In *Head of Department, Department of Education, Free State Province v Welkom High School* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) (*Welkom High School*), the different judgments of this Court noted that the impugned pregnancy policies affected the learners' right to basic education. See para 114, where it was stated that "[t]he policies limit pregnant learners' fundamental right to basic education in terms of section 29 of the Constitution by requiring them to repeat up to an entire year of schooling". See also paras 134 and 205-8.

[22] The core of section 29(1)(a) "negatively protects" the right to basic education from improper invasion, which imposes a basic duty to not impair or diminish a student's right to basic education. See *Juma Musjid* above n 1 at para 58.

[23] See section 239 of the Constitution for the definition of "organ of state".

[24] Section 7(2) read with section 8(1) of the Constitution requires organs of state to "respect, protect, promote and fulfil the rights in the Bill of Rights" and therefore imposes both positive and negative obligations on the first respondent in relation to section 29(1)(a). See *Juma Musjid* above n 1 at para 45.

education system" and "the most important partners in education".[25] The conduct of the first respondent does not reflect this key responsibility. His conduct, quite evidently, breached the duty imposed on him by section 29(1)(a).

[35] Access to a school is a "necessary condition for the achievement of the right to education".[26] Access to an examination, especially one that is integral to completing one's schooling, is another important component for the achievement of this right. The first respondent had both a positive and negative obligation under section 29(1)(a) to allow the applicant to write the examination, unless there was an acceptable basis for not doing so. Refusing the applicant entry into the school, without adequate justification, and preventing him from entering the Business Studies Paper 2 examination, especially when his lateness to the examination was caused by the first respondent, undeniably breaches the right to basic education in section 29(1)(a) of the Constitution. None of the respondents sought to provide any acceptable basis for the first respondent's conduct of refusing the applicant entry into the examination, or the earlier conduct of sending the applicant home from school on the morning of an examination which resulted in him missing the examination.

Section 29(1)(b) infringement

[36] Given the finding I have reached above that the applicant's right to basic education has been violated alongside the remedy that the respondents have offered outlined below, I do not deem it necessary to discuss the applicant's second submission regarding the potential infringement of section 29(1)(b) in much detail. All I will say is this: a year lost can never be recovered. In *Welkom High School*, it was noted:

> "Although in theory they are entitled to return to school and therefore to complete their education, many learners simply cannot afford to add an extra year to their studies. Moreover, statistics from Harmony indicate that two-thirds of the learners subject to

[25] See the Department of Basic Education website "Importance of Principals" available at https://www.education.gov.za/Informationfor/Principals.aspx.

[26] *Madzodzo* above n 20 at para 19 and *Juma Musjid* above n 1 at para 43.

> the pregnancy policies before 2010 never returned to complete their secondary-school education."[27]

[37] Section 29(1)(b) gives learners like Mr Moko a right to study beyond Grade 12, if so minded. Mr Moko has made it abundantly clear that he intends to exercise this right, circumstances permitting. Hence this litigation. It is evident that the right to further education is adversely affected when a learner is unjustifiably prevented from completing the Grade 12 examinations in time to apply to tertiary institutions for further studies. As a result of the first respondent's conduct, the applicant almost lost the opportunity to pursue further education at a tertiary institution starting in February 2021. It would not have broken his school career, as it did for those pregnant girls under the pregnancy policy in the *Welkom High School* case, but it would have broken his educational path by a year, which could easily have resulted in an irretrievable alteration of his future.

[38] I cannot conceive of how the High Court could not have found the matter to be urgent. Luckily, Mr Moko's determination to write the examination before the results are released, so that he can access further education in 2021, has resulted in the respondents' offer in their submissions in this Court that he be given an opportunity to write the examination in January 2021. The opportunity to write the examination in time to still receive his results along with his contemporaries, and in time to approach institutions of higher learning, will go a substantial way in vindicating Mr Moko's rights.

Remedy

[39] The applicant asks this Court to declare the conduct of the first respondent unconstitutional and to grant him substantive relief by, inter alia, ordering the second to fifth respondents to afford him the opportunity to write his examination as a matter of urgency. The second to fourth respondents have informed this Court that, following a

[27] *Welkom High School* above n 21 at para 114.

consultation with Umalusi, they can give Mr Moko an opportunity to write his missed assessment in the first week of January 2021. In addition, they have offered him counselling at the state's expense by a counsellor or clinical psychologist of his choice from the respondents' database of service providers.

[40] In the circumstances, the appropriate remedy, in my view, is to declare the conduct of the first respondent in violation of section 29(1) of the Constitution and to order the further respondents to comply with their offer to give the applicant the opportunity to write the missed examination at the start of January 2021. In order to ensure there is sufficient time for the relevant preparations to be made, the Court should order that the examination be written before the end of the second week of January 2021.

Costs

[41] I turn finally to the issue of costs. This Court has held that the proper approach to determining costs awards in constitutional litigation, whilst remaining flexible, is that "[i]n litigation between the government and a private party seeking to assert a constitutional right . . . if the government loses, it should pay the costs of the other side".[28] The applicant has been successful in this matter, which involves constitutional litigation against the state. In my view, there is no reason to depart from the general principle that the successful applicant is entitled to costs in this matter.

[42] Two points were raised by the second to fourth respondents in their submissions in this Court regarding costs: first, that the applicant was represented on a pro bono basis and secondly, that they assisted both the applicant and the Court and therefore ought not necessarily be mulcted with costs. I briefly touch on both of these below.

[28] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22.

[43] The applicant was represented on a pro bono basis. I do not necessarily see this as a reason for departing from the general principles relating to costs in constitutional litigation. In fact, the second to fourth respondents accept that the pro bono nature of the legal assistance of the applicant, in principle, is no reason not to award costs where the applicant has been successful. I agree. In my view, the following from *Jose v Minister of Home Affairs* is apt:

> "Legal practitioners who appear pro bono in matters in which litigants would otherwise not be able to pursue their fundamental rights, and in particular where the claims do not sound in money, ought not in ordinary circumstances to be prevented from claiming costs. On the contrary, the granting of a costs order in these circumstances is likely to increase access to justice."[29]

[44] The pro bono nature of the legal assistance does not affect the costs award in favour of the applicant.[30]

[45] On the second matter, that the second to fourth respondents have not opposed the application, I further do not think this absolves those respondents from paying costs. I pause here to state that I have been impressed by the second to fourth respondents' willingness to assist the applicant in this matter and to seek to provide an opportunity for the applicant to write his examination as a matter of urgency. However, a grave violation of the right to education has occurred. It took place in a state school, at the hands of an acting principal during the course of his duties as principal of that school. Over and above this, I am certain that, but for the litigation in this Court, the applicant would have only been able to write the supplementary examinations in May 2021. This was what he was told by members of the Department following the incident. The offer of the opportunity to write the missed examination in January 2021 only came to the fore after the litigation in this Court had been initiated.

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[29] *Jose v Minister of Home Affairs* 2019 (4) SA 597 (GP) at para 57.

[30] See further *ABSA Bank Limited v Hamid* 2019 JDR 0257 (GJ) at para 35 and *Kuhudzai v Minister of Home Affairs* 2018 JDR 1398 (WCC) at para 30. A similar approach is seen in the order of the Supreme Court of Appeal in *Minister of Justice and Constitutional Development v Southern African Litigation Centre* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) at para 113.

[46] In these circumstances, the first to fourth respondents ought to be jointly and severally liable to pay the applicant's costs in this matter, including the costs of two counsel, in both the High Court and this Court.

Conclusion

> "When someone takes away your pens you realise quite how important education is."[31]

[47] I hope that no other pens have to be taken away before the various role-players in our education system fully realise the critical importance of the right to education, especially in a nascent democracy like ours, which recognises the transformative nature of education and entrenches it as a socio-economic right in our Constitution. It is simply unacceptable that an educator can act in a manner that results in a learner missing a matric examination, for no justifiable reason whatsoever. We can only hope that conduct like this is rare and that most, if not all, of our matric learners feel supported by their schools, principals and teachers during the examination period, which is already a time of great angst for our learners.

[48] In the event, the following order is made:

1. Leave for direct access on an urgent basis is granted.
2. The conduct of the first respondent, which resulted in the applicant's inability to sit for the Business Studies Paper 2 examination on 25 November 2020, is declared to be a violation of the applicant's right to education in section 29(1) of the Constitution.
3. The second to fifth respondents are ordered to grant the applicant the opportunity to write the Business Studies Paper 2 examination by 15 January 2021.

[31] Yousafzai *I Am Malala: The Girl Who Stood Up for Education and Was Shot by the Taliban* (Weidenfeld & Nicolson, London 2014) at 134.

4. The result of the examination written in terms of paragraph 3 of this order is to be released simultaneously with the general release of the 2020 National Senior Certificate examination results in January or February 2021.

5. The first, second, third and fourth respondents are jointly and severally liable to pay the costs of the applicant, including the costs of two counsel, in both this Court and the High Court of South Africa, Limpopo Division, Polokwane.

For the Applicant:	S S Tebeile, L V Makofane, I R Kekana and L B Moshoeu instructed by Israel Maenetja Attorneys
For the Second to Fourth Respondents:	E N Gaisa instructed by the State Attorney, Polokwane