



2022 NATIONAL SCHOOLS MOOT COURT PROGRAM

HYPOTHETICAL FACTS

1. Denga High School is a public school in Limpopo Province. The school has a functional School Governing Body (SGB) and has generally been performing well academically for the past 5 years. However, one of the challenges being experienced is the increasing rate of teenage pregnancy which is resulting in a steady drop-out rate of female learners. In response, the school has adopted “the Denga School Pregnancy Policy” that is identical to the Department of Basic Education Policy on Management and Prevention of Learner Pregnancy in Schools (DBE Pregnancy Policy).
2. Rose Mudau is a 17-year-old grade 12 learner at Denga High School. She is engaged in a romantic relationship with Samuel Moloko who is currently aged 23. Samuel is employed as a bus driver for the appointed private service provider scholar transport that Rose uses daily to and from school. Rose discovered that she was pregnant in October 2021 and Samuel is excited on starting a family once he has saved enough money. He plans on marrying Rose after she completes matric.
3. Ms Mary Mashapa is the Life Orientation teacher and has a reputation for engaging in gossip with other teachers and learners. Since November 2021, she noticed that Rose’s attendance at school had become inconsistent and that during the teaching and learning sessions, Rose was fatigued, nauseous and was using the bathroom more frequently.
4. When Rose returns to school in January, her pregnancy is visible. On 20 January, Rose is called into the principal’s office and in the presence of Ms Mashapa, confirms that she is pregnant. The principal asks her to disclose the identity of the father of her unborn child. She is informed that this request is in terms of section 6.3.4 of the Denga School Pregnancy Policy which states, among others, that:

“Attention will also be paid to the identity and rights of the biological father involved, whether he is a learner, educator, or a person outside the basic education system-----.

If the biological father is a person outside the basic education system, he too should be subjected to judicial enquiry and action if there is a case to answer on the grounds of coercion, sexual violence and assault or statutory rape.”

5. Rose’s response is that the relationship is consensual and known by both families and refuses to provide the requested information. She feels that she is not obliged to provide such personal details on her private affairs. Rose also fears that giving such information might affect Samuel’s job and consequently the financial wellbeing of her future family. The principal then threatens to suspend her for failing to cooperate with section 6.3.4 of the school policy.
6. In accordance with Denga’s Teenage Pregnancy Policy, the principal nominated Ms Mashapa to provide counselling to Rose. During the counselling session, Rose asks to go to the bathroom and leaves her cell phone on top of her school bag. Ms Mashapa instantly took Rose’s personal cell phone and went through her social media platform. She discovered messages and pictures which clearly indicated that Samuel is the father. That confirmed a rumour she had heard amongst the learners, and she immediately informed the principal.
7. The principal in turn called Samuel and informed him that he is to be subjected to a judicial enquiry. He proceeded to inform Samuel’s employer of the situation and suggested that the employer institutes disciplinary proceedings against Samuel.
8. After consultation and with the approval of the School Governing Body (SGB), the principal suspended Rose from school for a period of 5 school days, for defiance of authority and failure to cooperate with Denga’s Teenage Pregnancy procedure. She received correspondence informing her that disciplinary proceedings will occur on the last day of her suspension.
9. Rose and Samuel considered the actions of Ms Mashapa as a severe invasion of privacy. Rose and Samuel then approached a local attorney for assistance in challenging the constitutionality of section 6.3.4 of the school policy, the lawfulness of the search and the suspension of Rose. The High Court ruled in favour of the school, citing that the policy was justifiable in terms of the Constitution. Furthermore, the search was in the public interest and therefore it is justifiable.

10. Unhappy with the ruling, Rose and Samuel applied for leave to appeal to the Supreme Court of Appeal (SCA), but leave is refused. Thereafter they applied for leave to appeal the decision of the High Court to the Constitutional Court. Leave was granted and the matter is set to be heard by the Constitutional Court in October 2022.

As lawyers for the Applicants (Rose and Samuel) you need to argue that:

1. Section 6.3.4 of the Denga School Pregnancy Policy is unconstitutional, and the search of the cell phone and processing of such information violates the learner's rights to privacy in terms of the Constitution; and
2. The school's decision is unconstitutional as it violates the learner's rights to freedom of association and education in terms of the Constitution.

As lawyers for the Respondents (the SGB and principal of Denga High School), you need to argue that:

1. Section 6.3.4 of the Denga School Pregnancy Policy is not unconstitutional, and the search of the cellphone and processing of such information does not violate the learner's rights to privacy in terms of the Constitution; and
2. The school's decision is not unconstitutional and does not violate the learner's rights to freedom of association and education in terms of the Constitution.

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RESOURCE PACK

This resource pack serves as a foundation upon which learners will build their arguments for both sides of their essays without additional research. While learners may utilise other sources that are not included in this pack should they so wish, deviation from the provided facts is strictly prohibited. Therefore, learners cannot add facts or evidence apart from what has been provided.

1) The Constitution of the Republic of South Africa, 1996

N.B The Constitution is the supreme law of the land. Therefore, any law that is inconsistent with it must be declared invalid. There may be other remedies sought that include (but are not limited to) amendment of the provision in question.

Section 9: Equality

Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 10: Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 14: Privacy

Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

Section 18: Freedom of association

Everyone has the right to freedom of association.

Section 28(2): Children

A child's best interest are of paramount importance in every matter concerning the child.

Section 29: Education

(l) Everyone has the right- (a) to a basic education.

Section 36(1): Limitation of Rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Section 39(1) (b): Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal, or forum— (b) must consider international law;

2. A) United Nations International Covenant on Civil and Political Rights (ICCPR)

NB: The ICCPR and CRC are recognised as forming part of international law, it was developed by the United Nations (UN). South Africa is one of many countries that ratified this treaty and has agreed to be bound by its provisions.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and found a family shall be recognised.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

B) United Nations Convention on the Rights of the Child (CRC)

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

3. State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

3. A) South African Schools Act No. 84 of 1996 (Schools Act)

NB: Schools in South Africa must conform to the provisions of the Schools Act.

Section 8: Code of Conduct

- (1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

- (2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

- (4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the schools attended by such learner.

Section 9: Suspension and expulsion from public school

- (1) Subject to this act and any applicable provincial law, the governing body of a public school may, after a fair hearing, suspend a learner from attending the school –
- (a) as a correctional measure for a period not longer than a week; or
 - (b) pending a decision as to whether the learner is to be expelled from the school by the Head of the Department.

B) Protection of Personal Information Act No. 4 of 2013 (POPI Act)

NB: The Act strives to ensure that all institutions within South Africa conduct themselves responsibly with personal information. It thus prescribes the minimum standards pertaining to the accessing and processing of any personal information belonging to another.

Lawfulness of Processing

- (9). Personal information must be processed –
- (a) Lawfully; and
 - (b) in a manner that does not infringe the privacy of the data subject

Consent, Justification and Objection

11. (1) Personal information may only be processed if –
- (a) the data subject or a competent person where the data subject is a child consents to the process

4. Case Law (Judgments handed down by the Courts)

NB: The following extracts are drawn from landmark judgments by South African courts. The underlying principles can be applied to the facts of the Moot. Case law is important as a court is bound by its previous decisions. In this case the Constitutional Court (CC) is bound by its previous decisions but may be persuaded by decisions of the lower courts to it such as the Supreme Court of Appeal (SCA) and the various divisions of the High Court.

A) *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2

[64] In the present context a claim to privacy can surely only be founded on the content of the information which the examinee is being forced to disclose, not on his desire not to disclose it. It is

simply not possible to pronounce on the issue of privacy unless the content of the document or information in respect whereof privacy is claimed is disclosed.

[67] No right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community.

[68] In South African common law the right to privacy is recognised as an independent personality right which the courts have included within the concept of dignity. Privacy is an individual condition of life characterised by seclusion from the public and publicity. Breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person.

[69] Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship. These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality.

B) Antonie v Governing Body, Settlers High School, and Others 2002 (4) SA 738 (C) (Antonie Case)

[17] The question should be asked, in this regard, whether the prohibition is aimed at promoting positive discipline and whether noncompliance therewith justifies punishment or some other form of sanction. This requires a spirit of mutual respect, reconciliation, and tolerance.

[19] The nature of misconduct must of necessity assist in determining what constitutes 'disgraceful, improper or unbecoming' behaviour. Quite clearly it must be of a particularly serious or aggravating nature before it can be classified as such. An offence against the code of conduct cannot just be classified as serious misconduct even if this behaviour had caused disruption or uncertainty.

C) Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (CCT 103/12) [2013] ZACC 25

[229] In terms of section 9(1) of the Schools Act the school governing body's power to suspend a learner from school is limited to those cases where "a learner is suspected of serious misconduct" and in respect of whom disciplinary proceedings are contemplated. The Schools Act does not give the school governing body any power to suspend a learner for any reasons other than the reason given in section 9(1) and the school governing body had no power to make a policy determination which was in conflict with section 9(1) of the Schools Act.

D) AB and Another v Pridwin Preparatory School and Others (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (17 June 2020)

[8] In cancelling a contract the school invoked the termination and notice provision...even though this clause entitles the school to 'terminate for any reason', it accepts that the termination is subject to constitutional scrutiny. It also acknowledges its constitutional obligation to apply the 'best interests of the child' principle when terminating a contract.

5. Other

- I. Office of the High Commissioner for Human Rights, Human Rights Committee General Comment No. 16.

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