IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT _____ /2013

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG	First Applicant
HEAD OF DEPARTMENT OF EDUCATION, GAUTENG	Second Applicant

and

FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS	Respondent

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FOUNDING AFFIDAVIT: APPLICATION FOR LEAVE TO APPEAL

I, the undersigned

LEN DAVIDS

do hereby make oath and state:

1 I am the Head of the Gauteng Department of Education and the second applicant in this matter. I am duly authorised to depose to this affidavit on behalf of the Member of the Executive Council for Education in Gauteng ("the MEC"), who is the first applicant in this matter.

2 The facts contained in this affidavit fall within my personal knowledge, except where indicated otherwise by the context, and are to the best of my belief both

true and correct.

INTRODUCTION

3 This is an application for leave to appeal from a judgment of the South Gauteng High Court, Johannesburg delivered by Janse van Nieuwenhuizen AJ on 28 August 2013. A copy of the judgment is attached **Annexure LD1.**

4 The judgment concerns the 2012 Gauteng Regulations for Admissions of Learners to Public Schools ("the Regulations"). Those Regulations were enacted by the MEC pursuant to her powers in terms of section 11(1) of the Gauteng Schools Education Act 6 of 1995. A copy of the Regulations is attached marked **Annexure LD2**. The Regulations have been implemented since mid-2012.

5 I deal with the nature and effect of the Regulations below. However, I emphasise two points.

5.1 The first is that in dealing with the admission of learners to public schools, one of the key purposes of the Regulations is to "*strike a balance between the interests of every individual school, its learners and its parents, on the one hand, and the broader public interest on the other.*"[1]

5.2 The second is that these Regulations were enacted in 2012. They were thus <u>not</u> in place when the events giving rise to the separate matter of

[1] Answering affidavit p 215-6 para 10

MEC for Education v Governing Body of Rivonia Primary School took place. On the contrary, it was hoped by the Department that the enactment of the would provide clarity and certainty on the position regarding the admission of learners to public schools in Gauteng and that, in doing so, it would strike the appropriate balance already referred to between the interests of schools, learners, parents and the public.

6 Despite this, the present respondent ("FEDSAS") chose to challenge the validity of a series of provisions of the Regulations.

7 The High Court judgment upheld many of these challenges and proceeded to conclude that no fewer than fourteen of the provisions of the Regulations were invalid. As I demonstrate below, the applicants contend that the High Court erred in doing so and that there was simply no basis for this outcome.

8 The applicants therefore now approach this Court for leave to appeal against the High Court judgment. They seek to do so directly, rather than proceeding first via the Supreme Court of Appeal.

9 In what follows, I deal with the following issues in turn:

9.1 The need for leave to appeal to be granted directly to this Court, on an expedited basis if possible;

9.2 The nature and purposes of the Regulations;

9.3 The various Regulations declared invalid by the High Court and the flaws in its approach.

10 In what follows, I refer to the South African Schools Act 84 of 1996 as "*SASA"* and the Gauteng School Education Act 6 of 1995 as "*the Gauteng Schools Act".*

DIRECT AND EXPEDITED APPEAL

11 The applicants are, together with this application, applying to the High Court for leave to appeal to the SCA. However, that application will only be proceeded with if the present application fails.

12 I submit that it is in the interests of justice for leave to appeal to be granted directly to this Court, rather than having the matter proceed to the SCA. This is so for the following reasons.

13 The present matter involves solely the question of whether the Regulations are lawful.

13.1 This is plainly a constitutional matter, as this Court made clear in *Affordable Medicines:* [2]

> *"In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary*

[2] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) para 50

exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality."

13.2 Moreover, at the heart of this matter – and the Regulations themselves – lies the duties of the state in relation to the right of access to a basic education under section 29 of the Constitution.

13.3 I point out that there are no circumstances which require the involvement of the SCA. This application does not involve any question of common law. Nor does the proposed appeal turn on factual issues. There are few – if any – true factual disputes on the papers. The challenge was brought as an abstract challenge to the Regulations concerned.

14 In the event that this matter were first to proceed via the SCA, this would substantially delay obtaining final resolution of this matter. This is particularly the case since both parties would ultimately seek final clarity from this Court as to whether the Regulations are valid and it is therefore most unlikely that the case would end at the SCA – whatever its decision.

15 Such delays would be damaging for all concerned. The question of admissions in Gauteng has already faced considerable uncertainty and flux since 2011 by virtue of the proceedings in the *Rivonia* matter. It is therefore important that clarity be obtained as soon as possible regarding whether or not the High Court was correct that some of the Regulations are unlawful.

15.1 If the High Court was correct, then the applicants require this to be made clear as soon as possible so that they can consider their position and can rectify the Regulations to the extent necessary.

15.2 If the High Court was incorrect, then again this must be made clear as soon as possible so that the continued implementation of the Regulations is not impeded.

16 Moreover, there is an acute need to have this matter determined, if at all possible, prior to the commencement of the 2014 school year.

16.1 Amongst the Regulations declared invalid by the High Court were regulations 4 and 8 in their entirety and regulation 5 in substantial part. These regulations play a critical role in the admissions process followed each year.

16.2 The Regulations came into force in mid-2012 and have been implemented ever since. Accordingly all of the activities of the Department, schools and learners in 2013 and in preparation for the 2014 year have occurred in accordance with the Regulations.

16.3 For example, the admission period for 2014 envisaged by Regulation 5 commenced on 17 April 2013. The application period for 2014 envisaged by Regulation 5 ran from 17 April 2013 to 21 May 2013. The various admission processes following the application period were thus already under way – in accordance with the Regulations – by the time of the High Court's judgment.

16.4 Moreover, and critically, the 2014 school year will undoubtedly again see the Department having to accommodate significant numbers of unplaced learners. If there is no finality by then as to the status of the Regulations – and in particular the powers of the Department and its officials in terms

of Regulations 5 and 8 – there is then a real risk that:

16.4.1 Unplaced learners will be prejudiced and will not be able to be properly accommodated; and

16.4.2 Further litigation will ensure in Gauteng about the respective rights, powers and responsibilities of the various role-players involved while the present appeal is pending.

16.5 This is plainly undesirable and damaging.

17 I am advised that this Court has a relatively full roll for November 2013. Nevertheless, in view of the importance of this matter and the need to obtain clarity one way or the other on the lawfulness of the Regulations, I respectfully request that the matter be set down during the November 2013 if at all possible.

18 If this is not possible, I respectfully request that the matter be dealt with in the first term of 2014.

19 In order to facilitate an expedited set-down I record the following the following:

19.1 The full record before the High Court was 301 pages. However, the bulk of the record consisted of policy documents, draft regulations and other annexures. The affidavits themselves totalled only approximately 100 pages.

19.2 Even in respect of the affidavits, there are very few (if any) disputes of fact.

19.3 The parties both prepared very full heads of argument in the High Court, meaning that heads of argument can be prepared relatively quickly in this Court.

THE NATURE AND PURPOSE OF THE REGULATIONS

20 The Regulations were enacted in terms of section 11 of the Gauteng Schools Act. It provides as follows:

> *"Admission to public schools*
>
> *(1) Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools.*
>
> *(2) Admission requirements for public schools shall not unfairly discriminate on grounds of race, ethnic or social origin, colour, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language."*

21 The answering affidavit in the High Court describes the purposes of the Regulations. It explains that one of their key purposes is to "*strike a balance between the interests of every individual school, its learners and its parents, on the one hand, and the broader public interest on the other*."[3]

22 SASA places the governance of public schools in the hands of their school governing bodies ("SGBs"). An SGB is in a relationship of trust with its school in terms of section 16(2) of SASA. It must, in terms of section 20(1)(a) of SASA, promote the best interests of the school.

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[3] Answering affidavit p 215-6 para 10

23 The state, however, cannot allow public schools to be governed purely in the interests of their current learners and their parents. This is so for four reasons.

24 First, public schools are public assets which must ultimately serve the broader public interest. The state cannot allow them to be monopolised in service of the interest of current learners and their parents, at the expense of the broader public interest.[4] This is made clear by this Court's decision in Hoërskool Ermelo.[5]

25 Second, there is still a deep inequality in the distribution of public school resources along racial lines. The better-endowed public schools tend to be located in white communities and serve white interests while the worst-endowed public schools tend to be located in black communities and serve black interests. One accordingly cannot allow public schools to continue serving only the best interests of their current learners and parents because it would entrench and solidify the racial inequality even where no race discrimination is intended. [6]

26 Third, there is a critical need to ensure that learners are not refused admission on the basis of their parent's inability to pay for their children's school fees.

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[4] Answering affidavit p 216 para 12.1

[5] Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) at para 80. See also: Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2012 (2) SA 637 (CC) at para 3; MEC for Education: KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC) at paras 123-124

[6] Answering affidavit p 216 para 12.1. See: Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) at para 2; Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at para 7

26.1 The applicants recognise that the legislative provisions which govern public schools make clear that a child cannot be refused admission on the basis that their parents are unable or may be unable to pay school fees.[7] However, they stress that they are aware that, as a matter of practice, various schools use subtle sifting mechanisms as part of their admission policies in an attempt to ensure that wealthier children are admitted while poorer children are excluded. These sifting mechanisms are often very hard to detect.[8]

26.2 This is a considerable problem as it means that poorer children are deprived access to many of the better-resourced schools on the basis of their financial status. It also means that other schools – who do not engage in these sifting mechanisms – are forced to take more than their fair share of poorer pupils, many of whom may be unable to pay fees. This undermines the ability of those schools to properly cater to all of their learners. [9] The SCA has recognised that the inability of a public school to recover school fees from some learners means that it must shoulder that loss or mulct other parents with additional charges and that this operates to "*to the detriment of other learners*".[10]

27 Fourth, section 29(1) of the Constitution entitles everyone to a basic education and obliges the state to take reasonable measures to make further education available and accessible to all.

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[7] For example, section 5(3)(a) of SASA provides that a learner may not be refused admission to a public school because the parent has not paid or is unable to pay the school fees.

[8] Answering affidavit p 217 para 12.3

[9] Answering affidavit p 217 para 12.3

[10] Fish Hoek Primary School v GW 2010 (2) SA 141 (SCA) at para 14

27.1 This is why SASA makes school attendance compulsory in terms of section 3(1) and imposes a duty on the MEC to place all children in schools in terms of sections 3(3) and 12(1). The right to a basic education is immediately realisable.[11]

27.2 The applicants cannot properly perform their statutory functions and comply with their constitutional and statutory duties if the SGBs of public schools are autonomous in their determination of their admissions policies and can shut the doors to the MEC if she seeks to place children who cannot be placed elsewhere. The regulations must accordingly regulate the admissions policy of public schools to ensure that they are fair and allow the MEC to override them where necessary to place children who cannot be placed elsewhere.[12]

28 These purposes out not to have been controversial. Yet, some extraordinarily, FEDSAS sought to take issue with the appropriateness of these purposes in its affidavits filed in the High Court. It contended that they are "*ulterior at best, and sinister at worst*"[13] and meant that the Regulations were enacted unlawfully and ultra vires.[14]

29 The High Court did not deal with whether it considered that these purposes were improper. Nevertheless, the High Court proceeded to declare invalid a number of the provisions which lie at the core of the Regulations. The effect is

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[11] Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (8) BCLR 761 (CC) at para 37;

[12] Answering affidavit p 217-8 para 12.4

[13] Replying affidavit p 277 para 5.1

[14] Replying affidavit p 280 para 5.9

that the applicants will be unable to achieve the purposes set out above.

30 In what follows I demonstrate that the High Court's reasoning was flawed in a series of respects. It is convenient to deal with the Regulations in a somewhat different manner to that of the High Court.

REGULATION 4: FEEDER ZONES[15]

31 Regulation 4 deals *inter alia* with the question of feeder zones.

31.1 Regulation 4(1) provides that, subject to various applicable laws, the MEC may determine the feeder zone for any school in the province after consultation with the relevant stakeholders.

31.2 Regulation 4(2) is a transitional provision which applies to all schools until the MEC has determined their feeder zones. It says in effect that a learner is deemed to fall within a school's feeder zone if it is the closest school, or within five kilometres from, the learner's residence or parent's place of work.

31.3 Such a transitional provision is necessary to ensure that all learners are within the feeder zone of a school. If it were left to the schools to determine their own feeder zones, some learners might not fall within the feeder zone of any school. It would also allow schools to unfairly

[15] High Court judgment, paras 38 - 41

exclude learners and communities from their feeder zones.[16]

32 The High Court declared Regulation 4 ultra vires in its entirety. Its reasoning appears from a single paragraph in the judgment:

> *"Neither section 5 of SASA nor section 11(1) of the [Gauteng] Act, enjoins the MEC with the statutory power to determine feeder zones. This power is specifically conferred by NEPA on the Head of Department."*[17]

33 This reasoning is unsustainable for two reasons.

34 First, the High Court appears to have confused the National Education Policy Act 27 of 2006 with the National Admissions Policy published in terms of that Act. It is the National Admissions Policy which indicates that an MEC may determine feeder zones. But this Court has already held expressly that a policy made in terms of this Act "*does not create obligations of law that bind provinces*".[18] The relevant provision of the Policy is thus entirely irrelevant to the question of whether Regulation 4 is ultra vires.

35 Second, while it is true that section 11(1) of the Gauteng Schools Act does not expressly mention feeder zones, this is beside the point. Section 11(1) confers on the MEC the power to make "*regulations as to the admission of learners to public schools*". The very purpose of feeder zones is to deal properly with admissions to public schools. Regulation 4 therefore plainly falls within the powers of the MEC under section 11(1) of the Gauteng Schools Act.

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[16] Answering affidavit p 239-240 paras 80-81

[17] High Court judgment, para 41

[18] Minister of Education v Harris 2001 (4) SA 1297 (CC) at para 11

36 In the circumstances, the present appeal bears good prospects of success in relation to Regulation 4.

REGULATIONS 5, 8 AND 11: DETERMINATION OF SCHOOL CAPACITY[19]

37 The majority of the provisions of the Regulations declared invalid by the High Court's order fell with Regulations 5, 8 and 11 and were justified on the same single basis. Before turning to the reasoning of the High Court, it is necessary to set out the effect of these Regulations.

The effect of Regulations 5, 8 and 11

38 The Department often faces the problem, at the commencement of the school year, that there are learners who have not been able to obtain admission at any school.[20] The Department must then ensure that they are placed at a school because they have a constitutional right to a basic education.

39 Regulations 5(8), (9) and (10) cater for this problem. They allow the Department, in narrow and defined circumstances, to place learners at schools.

39.1 Regulation 5(8) provides that, if a learner has not been placed at any school 30 school days after the end of the admission period, the District

[19] High Court judgment, paras 42 - 48

[20] Answering affidavit p 244 para 101

Director may place the learner at any school which has not been declared full in terms of regulation 8 and has no remaining unplaced learners on its waiting list.

39.2 Regulation 5(9) caters only for the learners who remain unplaced 45 days after the end of the admission period, that is, those whom the District Director has not been able to accommodate in terms of regulation 5(8). The HoD must then ensure that these learners are placed at a school.

39.3 Regulation 5(10) guides the placements made by the District Director in terms of regulation 5(8) and by the HoD in terms of regulation 5(9). Both the District Director and the HoD are required to have regard to,

39.3.1 the proximity of the school to the learner's place of residence or his or her parent's place of work, and

39.3.2 the capacity of the school to accommodate the learner relative to the capacity of other schools in the district.

40 These regulations must be read together with regulation 8. It allows the HoD to determine "*the objective entry level learner enrolment capacity of a school"* and to declare a school to be full when it has reached that capacity. This power is however subject to the following limitations:

40.1 The HoD determines the capacity of the school only "*for the purpose of placing learners whose applications for admission have not been accepted at any school in the public schooling system*". The

determination is accordingly only made for purposes of the placement of unplaced learners in terms of regulations 5(8), (9) and (10).

40.2 The HoD may moreover only make such a determination "*until such time as norms and standards contemplated in section 5A(2)(b) of the South African Schools Act are in force"*. The HoD's determination of the capacity of the school accordingly falls away if and when the Minister prescribes minimum uniform norms and standards for the capacity of schools.

41 Finally, Regulation 11 deals with the transfer of learners. In terms of regulation 11(4), the District Director may, in certain circumstances, require a school to accept a learner transferred from another school. This power is subject to the following restrictions:

41.1 The school to which the transfer is made, must not have been declared to be full. It must, in other words, have the capacity to admit the learner.

41.2 The District Director must be satisfied that there is good cause for the transfer.

41.3 The District Director must, in making the decision, have regard to a range of considerations spelt out in regulation 11(5).

<u>The High Court's approach</u>

42 The High Court proceeded to declare Regulations 5(7))(c)(iv), 5(8)(a), 5(10), 5(11), 5(12), 8, 11(3) and 11(5)(c) ultra vires. It also directed that various

words had to be severed from Regulations 5(9) and 11(4).

43 The High Court's reasoning for this far-reaching order is, with respect, extremely sparse. It rests on a single proposition, which is tersely stated.

44 For the convenience of this Court, I reproduce the reasoning in this regard in full:

> *"[44] The applicant's real objection is aimed at the capacity determination in terms of the regulations.*
>
> *[45] The capacity determination of schools does not fall within the ambit of admissions. This much appears clearly from section 5A of SASA which reads as follows:*
>
> > *"5A Norms and standards for basic infrastructure and capacity in public schools*
> >
> > *(1) The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for-*
> >
> > *(a) school infrastructure;*
> >
> > *(b) capacity of a school in respect of the number of learners a school can admit; and*
> >
> > *(c) the provision of learning and teaching support material."*
>
> *[46] Consequently the determination of school capacity by the Head of Department in terms of Regulation 8 and the authority granted to a district director to place learners in schools that are not "full", is ulra vires the empowering statute.*
>
> *[47] As a consequence, regulations 5(7)9c)(iv), 5(8)(a), 5(10), 5(11), 5(12) and regulation 8 are invalid."*

<u>The flaws in the High Court's approach</u>

45 I submit that this approach is plainly unsustainable for the following reasons.

46 First, it relies on a provision of SASA – a national Act – in order to determine the scope of the power of the MEC to make regulations in terms of the separate and independent Gauteng Schools Act. This is impermissible. Moreover, the impermissibility is exacerbated by the fact that the relevant provision of the Gauteng Schools Act was enacted and came into force in 1995 – before SASA had even been passed.

47 Second, the attempt by the High Court to sharply separate the "capacity" of schools from "admissions" is unsustainable as a matter of ordinary logic. There is an obvious relationship between the two concepts. Indeed, this is made clear even by the judgment of the SCA in *Rivonia Primary*, where it held that the "*admission policy of a school … must necessarily include the determination of its capacity, which is central to admission to the school and forward planning*".[21]

48 Third, Regulation 8 allows the HoD to determine "*the objective entry level learner enrolment capacity of a school"* and to declare a school to be full when it has reached that capacity. This power is however subject to the constraint that the HoD determines the capacity of the school only "*for the purpose of placing learners whose applications for admission have not been accepted at any school in the public schooling system"*. The determination is accordingly only made for purposes of the placement of unplaced learners in terms of

[21] Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others 2013 (1) SA 632 (SCA) at para 37

regulations 5(8), (9) and (10). This is plainly a matter that, to use the High Court's language "*falls within the ambit of admissions*". It could therefore not be ultra vires the empowering provision.

49 Fourth, while the High Court relied on section 5A(1) of SASA, there is nothing in that section that precludes the making of regulations on this score by a provincial MEC.

49.1 On the contrary, sections 5A(1)(b) and (2)(b) of SASA merely permit the Minister to prescribe minimum norms and standards for the determination of the capacity of a school. They do not vest the Minister with the power to make the determination.

49.2 Regulation 8(1) permits the HoD to make the determination. It is accordingly not in conflict with the Minister's power to prescribe minimum norms and standards.

49.3 Regulation 8(1) in any event makes it clear that the HoD may only determine the capacity of a school "*until such time as norms and standards contemplated in section 5A(2)(b) of (SASA) are in force"*. The HoD's power to determine the capacity of schools, accordingly lapses if and when the Minister's minimum norms and standards come into force. They will never exist side by side.

50 I submit therefore that that there is a good prospect that this Court will overturn the finding of the High Court on this score. Given that this finding is the sole premise on which the High Court based its decision to declare eight provisions

of the Regulations invalid, it demonstrates that the proposed appeal has good prospects of success.

51 It bears further emphasis that a number of the Regulations declared invalid by the High Court were not even mentioned by it during the course of its judgment. For example, Regulations 5(11) and 5(12) deal with admissions in respect of schools providing boarding accommodation. The High Court did not mention these provisions and yet saw fit to declare them ultra vires. A similar problem affects the High Court's decision to declare Regulations 11(3) and 11(5)(c) to be ultra vires.

REGULATION 2(2A): ADMISSION POLICY MINIMUM STANDARDS[22]

52 This regulation provides as follows:

> *"The department may determine the minimum standards for the formulation of the admission policy for specialist schools, technical schools and educational institutions."*

53 In the High Court papers, the applicants explained that the purpose of the regulation is to recognise that different categories of schools may require different admissions policies.

53.1 A specialist school is one which provides focussed learning in a specialised field. Because specialist schools need to cater to the province as a whole, they need specific admissions policies to deal with this and ensure that the most gifted learners are admitted.[23]

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[22] High Court judgment, paras 22 - 26

[23] Answering affidavit p 231 para 57.1

53.2 The same is true of technical schools, which focus on technical subjects and again need to source the most gifted technical learners from across the province.[24]

53.3 FEDSAS did not dispute any part of this explanation and did not, in particular, dispute the need for such schools to have greater flexibility in their admissions policies.[25]

54 Despite this, the High Court reviewed and set aside the enactment of Regulation 2(2A). It did so on the basis that this regulation did not form part of the original draft Regulations published for public comment and that the decision to enact it was therefore procedurally unfair.[26]

55 I submit that it erred in doing so.

56 The answering affidavit in the High Court explained[27] that this regulation was introduced pursuant to comments received from an interested party during the public comment process. The interested party was the Governor's Alliance, a public school governing body association.

57 The Governor's Alliance expressed concern about the effect of the draft regulations on specialist schools and proposed that greater flexibility be given to such schools. The MEC duly decided to do so and to extend the flexibility to

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[24] Answering affidavit p 231-2 para 57.1

[25] Replying affidavit p 292 para 38

[26] High Court judgment, paras 24 - 26

[27] Answering affidavit p 233-4 paras 61.1 – 61.5

technical schools, given that the same problems faced them.

58 It is trite that a regulation-making process must be procedurally fair.[28] However, what is procedurally fair will depend on the circumstances of the case.[29]

58.1 In this regard, the SCA has stressed that not every change to draft subordinate legislation flowing from public comments has to be advertised again, "*otherwise the legislative process would become difficult to implement*". It is only where the new subordinate legislation is "*markedly different*" that re-publication might be required. [30]

58.2 In the present case, the FEDSAS's only procedural complaint is confined to one sub-regulation out of more than 16 regulations that were introduced.

58.3 It moreover made very little, if any, difference and, contrary to the finding of the High Court, did not "*impact on the autonomy of governing bodies to determine admission policies without executive interference*".[31]

58.4 This is especially the case because the applicants accepted in the High Court papers that when the Department seeks to set the standards permitted by Regulation 2(2A), it will have to follow a separate notice

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[28] Sections 3(1) and 4(1) of PAJA

[29] Section 3(2)(a) of PAJA. See also: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at para 45; Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at para 39; Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC) at paras 100 - 101.

[30] Kouga Municipality v Bellingan and Others 2012 (2) SA 95 (SCA) at para 9

[31]

and comment procedure under PAJA.[32]

59 In the circumstances, the enactment of Regulation 2(2A) was not procedurally unfair. The applicants' proposed appeal bears good prospects of success on this score.

REGULATION 3(7) – CONFIDENTIAL REPORT[33]

60 Regulation 3(7) provides:

> *"When a learner has applied for admission to a school, neither the governing body of that school nor any person employed at that school may request the learner's current school or any person employed at that school to furnish it with a confidential report in relation to that learner."*

61 Regulation 1 defines a *"confidential report"* as-

> *"a report containing information about the financial status of a parent, whether the parent can afford school fees and employment details of a parent or any other information that may be used to unfairly discriminate against a learner."*

62 The applicant's only complaint related to the part of the definition of a "*confidential report"* which includes *"any other information that may be used to unfairly discriminate against a learner".* Yet the High Court decided to review and set aside Regulation 3(7) in its entirety.

63 Moreover, I point out that the debate between the parties was a narrow one. It did not turn on <u>whether</u> the new school will get access to the confidential report. It turned only on <u>when</u> the new school will get access to the confidential report.

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[32] Answering affidavit, p 233, para 60

[33] High Court judgment, paras 30 - 41

64 The answering affidavit in the High Court explains that the purpose of the regulation is to ensure that schools do not, during the admissions phase, unfairly discriminate against learners.

64.1 In the Department's experience, if a school is told in advance of the admission of a learner, that he or she has remedial difficulties, the school may be inclined to deny him or her admission because it would rather have higher achieving learners and better results. This is plainly undesirable, both for the learner and for the functioning of the school system as a whole. Government has a legitimate role in ensuring that this does not occur.[34]

64.2 Schools may purport to reject learners for other reasons than their remedial problems. It is very difficult for the learner concerned, the learner's parents and even the Department itself, to know whether and to what extent this has occurred in a given case. The Department took the view that it was preferable to prevent this difficulty by preventing the provision of such information before admission.[35]

65 The High Court rejected this approach. It held that:

> *"In weighing up the different considerations, at play, I find the MEC's justification for the inclusion of Regulation 3(7) unconvincing. The regulation is an unreasonable and justifiable interference with the functions of a governing body."* [36]

66 This approach is not permitted by decisions of this Court and of the SCA

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[34] Answering affidavit p 236-7 para 71

[35] Answering affidavit p 237 para 72-3

[36] High Court judgment, para 40

regarding reasonableness review. As this Court explained in Bato Star, "*a decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts*."[37]

67 This is especially, the case given that the high-water mark of FEDSAS's complaint was that the MEC should have struck the balance differently between the existing learners of the school and the new learner joining the school. Given that both sets of learners – the new and the old – have a constitutional right to education that must be given effect to, the manner in which the MEC struck the balance cannot be regarded as unreasonable or unjustifiable.

68 In the circumstances, the proposed appeal bears good prospects of success in relation to Regulation 3(7).

REGULATION 16: APPEAL TO MEC[38]

69 Section 5(9) of SASA provides that a learner who has been refused admission to a public school may appeal to the MEC.

70 Regulation 16 provides that a learner who has been refused admission to a school may have recourse against the refusal as follows:

70.1 The learner may first lodge an objection with the HoD in terms of

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[37] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at para 48

[38] High Court judgment, paras 54 - 57

regulation 16(2).

70.2 If the learner is dissatisfied with the HoD's decision, he or she may appeal to the MEC.

71 FEDSAS contended that regulation 16 is inconsistent with section 5(9) because it introduces *"a new layer of appeal"* between the school principal and the MEC. The High Court upheld this attack on the basis of the finding that the "*MEC is not empowered by virtue of the provisions of section 105 to delegate her power to decide an appeal to the Head of Department.*"[39]

72 But this attack is untenable. There is no conflict between section 5(9) and regulation 16 and there is no need for "*delegation*".

72.1 Section 5(9) does not say the learner can appeal directly from the principal to the MEC. It merely says that a learner *"who has been refused admission by a public school"* may appeal to the MEC.

72.2 The effect of regulation 16 is merely that the school principal's refusal is not final in that it is subject to an objection lodged with the HoD. Only if the HoD confirms the refusal, can it be said, for purposes of section 5(9), that the learner *"has been refused admission to a public school"*. The learner then has a right of appeal to the MEC in terms of both section 5(9) and regulation 16.

73 In the circumstances, the present appeal bears good prospects of success in

[39] High Court judgment, para 56

relation to Regulation 16

AN APPROPRIATE REMEDY

74 Before the High Court, the applicants advanced various arguments regarding the question of an appropriate remedy if any of the individual challenges were upheld. These included that:

74.1 Many of the complaints – if upheld – could be cured by severing a phrase or word from the relevant regulations.

74.2 There was no basis for an order of retrospective invalidity. Such an order would imperil the many thousands of admission decisions made by the Department and schools at the beginning of the 2013 school year and would cause considerable confusion.

74.3 Any order of invalidity should be suspended for a year to allow the MEC, the provincial legislature and possibly even the national Minister to resolve the problem.

75 While the High Court made use of severance in some instances, in others it struck down entire regulations where severance could have resolved the problem. Regulation 3(7) is one example.

76 Moreover, the High Court made no reference at all to the arguments relating to non-retrospectivity and suspension. Yet the order it gave is not suspended and appears to have full retrospective effect.

77 On this basis too, the proposed appeal bears good prospects of success.

CONCLUSION

78 I therefore submit that:

78.1 The present application raises constitutional issues of considerable public importance;

78.2 The proposed appeal bears good prospects of success on a wide range of grounds; and

78.3 For the reasons set out in paragraphs 12 to 16 above, it is in the interests of justice for this Court to hear the appeal directly, rather than requiring that it first be heard by the Supreme Court of Appeal.

79 Given the considerations set out at paragraphs 16.1 to 16.5 above, I respectfully request that the matter be set down during the November 2013 term if at all possible. If this is not possible, I respectfully request that the matter be dealt with in the first term of 2014.

WHEREFORE I pray for an order in terms of the Notice of Motion.

_____

LEN DAVIDS

SIGNED and SWORN to before me at _____ on this_____ day of _____, by the Deponent who has acknowledged that he knows and understands the contents of this affidavit and has declared that he has no objection to taking the oath and regards the oath as binding on his conscience and has uttered the following words : “I swear that the contents of this affidavit are true, so help me God. ”

_____

COMMISSIONER OF OATHS
FULL NAME:
ADDRESS:
CAPACITY:
AREA: