



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 021/2016

In the matter between

**THE MEC: DEPARTMENT OF EDUCATION
NORTH WEST PROVINCE**

FIRST APPELLANT

**THE HOD: DEPARTMENT OF EDUCATION
NORTH WEST PROVINCE**

SECOND APPELLANT

and

FEDSAS

RESPONDENT

Neutral citation: *MEC: Department of Education Northwest Province v FEDSAS* (021/2016) [2016] ZASCA192 (01 December 2016)

Coram: Maya AP, Wallis and Swain JJA and Fourie and Dlodlo AJJA

Heard: 09 November 2016

Delivered: 01 December 2016

Summary: Education – Powers of the MEC to make regulations relating to the administration of public schools hostels – s 27(1) of the North West Schools Education Act 3 of 1998 – ss 9, 12 and 20(1)(g) of the South African Schools Act 84 of 1996 – interpreted in the light of s 29(1) and 28(2) of the Constitution – hostel regulations within the powers of the MEC.

ORDER

On appeal from: North West Division, Mahikeng (Kgoele J sitting as court of first instance):

- 1 Leave to appeal is granted.
- 2 The appeal is upheld with no order as to costs.
- 3 The order of the court a quo is set aside and replaced with the following order:
'The application is dismissed.'

JUDGMENT

Dlodlo AJA (Maya AP, Wallis and Swain JJA and Fourie AJA concurring):

[1] The respondent, the Federation of Governing Bodies for South African Schools (FEDSAS) launched an application in the North West Division of the High Court seeking orders reviewing and setting aside the 'Regulations relating to the Administration of Public school hostels' promulgated in the *North West Provincial Gazette Extraordinary* 7031, GN 430 of 2012, of 31 August 2012 (the hostel regulations). The application was opposed by the Head of Department, Education and Training, North West Province (the HoD). The High Court upheld the application and declared that the hostel regulations were 'unlawfully promulgated, *ipso facto* void and of no force or effect'. Leave to appeal against that order was refused by the High Court on the basis that the appeal had been perempted. However, this court (per Leach JA and Plasket AJA) referred the application for leave to appeal for oral argument.

BACKGROUND FACTS

[2] The Department of Education in the North West Province had received numerous complaints of learners being unfairly excluded and others being expelled from hostels without recourse to the provisions of the law. This resulted in those learners being unable to go to school at all. There were also reports of abuse of authority including 'the charging of high and exorbitant boarding fees and school fees.'

[3] The impugned hostel regulations are reportedly the result of an intense study by the Department on how to achieve the realization of the rights guaranteed by the Constitution. The Department identified the 'lack of access to schools by learners, more especially in rural areas', as 'one of the challenges that impacted on the provision of quality education and learner achievement'.

[4] On the relationship between the provision of hostels and access to education, the position is articulated in para 3.1 of the answering affidavit:

'Boarding facilities provide access to education for learners from remote rural areas and farming communities. Such facilities also provide learners with exposure to the environment beyond the confines of their own community. They provide an answer for learners living in places where the State cannot provide schools, thus reducing the difficulties of transport across distances including costs, the dangers involved in it and the time being consumed. Boarding facilities also provide access to a choice of education and access to further education for learners whose local schools are limited to lower level grades.'

This was admitted by FEDSAS stating that boarding facilities do provide relief for a variety of circumstances, for example, where parents are transferred their children are able to remain at school which has hostel facilities. In FEDSAS's view, the Department must either expend capital on new schools closer to those deprived of educational access, or build more hostels at existing schools to accommodate

those learners. It was accepted that boarding facilities enable learners to pursue specialised curricular directions such as technical, agricultural, science and mathematics fields which may not be available to them at their local school.

[5] There are a number of reasons why boarding facilities provided by hostels play a vital role in the provision of access to education. Boarding facilities provide a disciplined environment particularly in cases of families of single working parents, families in which the parents are compelled to travel extensively, or families which are unable to provide after-school supervision for learners. They provide many disadvantaged learners with an opportunity to enjoy better living conditions and sometimes better care than they would experience in their own home environment. Basic facilities such as electricity and shelter, television, computers and media centres are made accessible in some boarding facilities. Boarding facilities also facilitate participation in extra-curricular activities including sports and cultural activities.

[6] Boarding facilities provide a relatively safe environment for children, many of whom are at risk in that they live in informal settlements and townships and are without supervision for much of the day. They provide a stable environment for children from broken families or homes with special needs and problems. They facilitate positive social development and the ability to accept others from different social or cultural backgrounds. They promote independence, self-discipline and the ability to work as part of a team of learners.

[7] The provision of boarding facilities can be a cost efficient measure in small, sparsely populated rural and farming communities. The hostel facilities offer disadvantaged learners from rural areas, who would otherwise have to travel long distances to school, better living conditions that are conducive to learning. Learners travelling long distances to school and back home are exposed to all kinds of challenges such as arriving late for school or being tired due to the long

hours they have to spend on the road. The accommodation of learners in boarding facilities will evidently eradicate these challenges and reduce the dropout rate in schools.

THE LAW

[8] The impugned hostel regulations were promulgated in terms of s 27 of the North West Schools Education Act 3 of 1998 (the North West Schools Act) read with s 9(3) of the South African Schools Act 84 of 1996 (SASA). These must be read in the light of the Constitution. Section 29(1) of the Constitution provides:

'Education

(1) Everyone has the right –

(a) to a basic education including adult basic education.'

And s 28(2) of the Constitution provides:

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

[9] The most recent pronouncement by the Constitutional Court on the importance of basic education is found in *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng & another* [2016] ZACC 14; 2016 (4) SA 546 (CC) (*Fedsas v MEC for Education, Gauteng*) para 3 as follows:

' . . . access to teaching and learning has not been freely and widely accessible to all people at all times. All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning. At the end of a long and glorious struggle against all forms of oppression and the beginning of a democratic and inclusive society, we, filled with rightful optimism, guaranteed universal access to basic education. We collectively said: "[e]veryone has the right to a basic education, including adult basic education.'" (Footnote omitted.)

Similarly, the Constitutional Court observed in *Governing Body of the Juma Masjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae)* [2011] ZACC 13; [2011] 8 BCLR 761 (CC) paras 42 and 43 as follows:

‘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. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

Indeed, basic 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 fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.’ (Footnotes omitted.)

[10] The right to basic education guarantees access thereto, which must include, where appropriate, access to hostels because of their importance in making basic education accessible. In terms of Schedule 4 of the Constitution, ‘education at all levels, excluding tertiary education’ is a concurrent provincial and national legislative competence. This concurrent competence operates as described by the Constitutional Court in *Fedsas v MEC for Education, Gauteng* para 26:

‘Education is a functional area of concurrent national and provincial legislative competence. Parliament may legislate on education and a province too. In turn, the Premier and MECs in a province exercise authority by implementing provincial legislation. The legislative competence of a province cannot be snuffed out by national legislation without more. The Constitution anticipates the possibility of overlapping and conflicting

national and provincial legislation on concurrent and national legislative competences.’
(Footnotes omitted.)

[11] The Constitutional Court in *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC) paras 55-56 described the role of SASA as follows:

‘The avowed purpose of the Schools Act is to give effect to the constitutional right to education. Its preamble records that the achievement of democracy has consigned to history the past system of education which was based on racial inequality and segregation, and that the country requires a new national system for schools which will redress past injustices in the provision of education and will provide education of a progressively high quality for all learners. The new education system must lay a foundation for the development of all people’s talents and capabilities and advance the democratic transformation of society, and combat racism, sexism, unfair discrimination, and contribute to the eradication of poverty. The preamble also expresses the intent to advance diverse cultures and languages and to uphold the rights of learners, parents and educators. It also makes plain that the statute aims at making parents and educators accept the responsibility for the organisation, governance and funding of schools in partnership with the State.

An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school’. (Footnote omitted.)

See also *MEC for Education, Gauteng Province & others v Governing Body, Rivonia Primary School & others* [2013] ZACC 34; 2013 (6) SA 582 (CC) para 36.

[12] Section 12 of SASA provides:

‘Provision of public schools

- (1) The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.
- (2) The provision of public schools referred to subsection (1) may include the provision of hostels for the residential accommodation of learners.’

Section 20(1)(g) identifies the function of governing bodies, subject to the Act, as the power to:

‘administer and control the *school’s* property and buildings and grounds occupied by the *school*, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the *Executive Council or Head of Department* in terms of any law or policy.’

[13] The preamble to the North West Schools Act provides that its purpose is:

‘To provide for a uniform system for the organisation and funding of schools; to amend and repeal certain laws relating to schools; to cater mainly for the best educational interests of the child by providing an education of progressively high quality and upholding the rights of all *learners, parents and educators*, and to promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State; and to provide for matters connected therewith.’

[14] Section 27(1) of the North West Schools Act provides in relevant part:

‘Regulations

27 (1) The Member of the Executive Council in consultation with the Head of Department may make regulations which are not inconsistent with any law, as to –

- (a) any matter which shall or may be prescribed by regulation under this Act;
- (b) any matter which the Member of the Executive Council may deem necessary or expedient to prescribe in order to achieve the objectives of this Act’.

The purpose of the hostel regulations as stated in regulation 2(1) is ‘to regulate the administration and control of hostels, the admission of learners to hostels, disciplinary procedures and matters related thereto.’

DISCUSSION

[15] FEDSAS submitted in reliance upon *Ngcobo & others v Van Rensburg* 1999 (2) SA 1057 (SCA) para 11, that the North West Schools Act cannot be read disjunctively, or in a manner where only the preamble determines the objectives of the Act. It emphasised that, when analysing s 27(1)(b) of the North West Schools Act, this must be done contextually and not by reference to the preamble alone. To determine whether a functionary has acted *intra vires* his or her legislative powers, the ambit of such power must be discernible by reference to the objects of the entire North West Schools Act. Absent an apparent object, the functionary does not have that power and acts *ultra vires*. In making these submissions FEDSAS relied on *Minister of Health NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 144 where the following appears:

‘Where the making of regulations is challenged on this ground, lawfulness depends on the terms of the empowering statute. If the regulations are not sanctioned by the empowering statute they will be unlawful and invalid.’

[16] FEDSAS argued that in the absence of any express statutory authority, the general empowering provision finds application only in matters of an administrative nature and cannot be used to make regulations of a substantive nature. Relying on *Hoërskool Ermelo*, it was submitted that the intention of the Legislature in the two statutes is that the power to run school hostels is placed in the hands of the parents and guardians of learners through School Governing Bodies (SGBs).

[17] The issue in this appeal engages the right to basic education enshrined in s 29 of the Constitution. Unlike other socio-economic rights, the right to basic education has no internal limitation requiring it to be progressively realised. It is a right which is 'immediately realizable'. See *Juma Masjid Primary School* para 37; and *Minister of Basic Education & others v Basic Education For All & others* [2015] ZASCA 198; 2016 (4) SA 63 (SCA) para 36-37.

[18] All legislation must be read in a manner which promotes the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution). This is an obligation placed on courts regardless of the approach adopted by the litigants. See *Phumelela Gaming and Leisure Ltd v Gründlingh & others* [2006] ZACC 6; 2007 (6) SA 350 (CC) paras 26-27. Additionally, all statutory instruments must be interpreted purposively, contextually and consistently with the Constitution. See *Stratford & others v Investec Bank Ltd & others* [2014] ZACC 38; 2015 (3) SA 1 (CC) para 19; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[19] The assertion that the MEC had simply no power to promulgate the hostel regulations, militates against the established principle of interpretation that powers expressly granted must be interpreted to include those powers reasonably necessary or incidental to those powers. See *City of Cape Town v Claremont Union College* 1934 AD 414 at 420 recently followed in *Engen Petroleum Limited v The Business Zone 1010 CC trading as Emmarentia Convenience Centre* [2015] ZASCA 176 para 21.

[20] The regulation-making power in s 27(1) of the North West Schools Act, extends to what the MEC deems 'necessary or expedient to prescribe in order to achieve the objectives of this Act'. This phrase as submitted by the appellant, confers power 'of the widest possible character' and leaves it to the decision-maker to decide 'what method to follow in order to achieve the purpose stated in

the subsection.’ See *Catholic Bishops Publishing Co v State President & another* 1990 (1) SA 849 (A) at 861F. As mentioned above, the objects of the Act include ‘the best educational interests of the child by providing an education of progressively high quality.’

[21] The constitutional right to education in s 29(1) and the best interests of the child learner provided for in s 28(2) of the Constitution must be promoted and protected. These provisions envisage that the right to education goes substantially further than the provision of classrooms. In a country as large as ours, with scattered population in rural areas, access to education must necessarily include the provision of hostels to enable learners living far from schools to obtain an education. Legislation which gives effect to the right to education requires a generous interpretation. The provision of hostels is thus an essential component for facilitating the right of access to education.

[22] The MEC is vested with regulation-making powers. This is clear from ss 12(1) and 12(2) of SASA. The MEC is empowered in terms of s 27(1)(b) of the North West Schools Act to make regulations deemed necessary or expedient in order to achieve the objects of the North West Schools Act. The right to education must include the provision of necessary facilities which includes hostels. SGBs do not have exclusive authority over the governance of schools and by extension, school hostels and accordingly do not have unfettered powers to administer school hostels. Section 20(1)(g) of SASA provides that the exercise and administration of powers over school hostels must not in any manner interfere with or otherwise hamper the implementation of a decision made by the MEC or HoD in terms of any law or policy. The MEC and the HoD accordingly have a say in the administration of school hostels, contrary to the contention by FEDSAS that the administration of school hostels is its exclusive preserve. The relationship between the Minister, the MEC, HoDs and SGBs in the overall administration of school matters in terms of SASA was recognised by the Constitutional Court in *Head of Department,*

Department of Education, Free State Province v Welkom High School & others [2013] ZACC 25; 2014 (2) SA 228 (CC) paras 36-37 where it was held, inter alia, that:

‘The State’s obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is the Schools Act. That Act contains various provisions governing the relationships between the Minister, members of provincial executive councils responsible for education (MECs), HoDs, principals and the governing bodies of public schools. It makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HoD and MEC, and the Minister. Its provisions are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system.’ (Footnote omitted.)

[23] FEDSAS’ claim to the exclusive governance of hostels disregards the constitutional obligation of the MEC to ensure access to education. This would be hampered if the MEC were precluded from promulgating regulations relating to access to hostels for learners as these regulations do. The authority to promulgate the regulations is a necessary and ancillary power to the constitutional and legislative duty to provide basic education. This must be understood within the broader constitutional scheme of cooperative governance (ss 40 and 41 of the Constitution) that enjoins all spheres of government to adhere to the principles of unity, indivisibility and coherence in inter-spherical government relations as well as the fostering of friendly relations assistance and support. This must also be seen in the context of concurrent legislative competence where the MEC is enjoined to make basic education accessible to everyone. Thus the MEC’s power to make regulations is also derived from his statutory power to arrange for the provision of education, and in many instances, this cannot be done without providing a hostel. Once the hostel is provided, the MEC must make regulations pertaining to that hostel. The MEC has the power under SASA to prescribe codes of conduct. It would thus be absurd to say that he can do that for the school premises, but not the hostel. If that was the case, it would mean that conduct that is unacceptable in

the school buildings (such as vandalism) is not a disciplinary offence if it occurs in the school hostel.

[24] Relying upon ss 146-150 of the Constitution, FEDSAS submitted that the inconsistency between the sets of legislation was sufficient to invalidate the hostel regulations. This argument was, however rejected by this court and the Constitutional Court in *Fedsas v MEC, Gauteng*. The Constitutional Court laid down the approach to possible conflicts as follows (paras 27-28):

‘The conflict resolution scheme of sections 146, 149 and 150 of the Constitution departs from the conventional hierarchy that provincial legislation may not be in conflict with national legislation. Automatic repugnancy between the two classes of legislation does not arise. The scheme readily acknowledges and manages the potential conflict related to concurrent national and provincial law-making competences. Under the scheme, provincial legislation prevails over national legislation except if the national legislation applies uniformly countrywide or the matter cannot be regulated effectively by respective provinces or the matter is one listed in the Constitution as requiring uniformity across the nation. None of these considerations apply here.

Even if there was conflict, it does not render the national or provincial legislation on Schedule 4 matters invalid. A court must first attempt to avoid the conflict by preferring any reasonable interpretation of the two pieces of legislation which avoids conflict. If the conflict persists, the provincial legislation prevails. It must be added that national legislation may enjoy supremacy over provincial law only in accordance with the test laid down in sections 146(2) and (3) of the Constitution and in terms of section 148 if section 146 does not apply. However, the trumped provincial or national legislation is not to be struck down. It simply ‘becomes inoperative for as long as the conflict remains.’

[25] The argument of FEDSAS demands that unless SASA set out in detail the powers of the MEC in relation to hostels, any regulation-making powers conferred by the North West Schools Act could not be competently exercised in relation to hostels. This is not correct. The impugned regulations do not unlawfully limit the powers of SGBs. In *Hoërskool Ermelo*, the Constitutional Court acknowledged the

important role of SGBs, but stressed that the powers of SGBs are not absolute and are subject to a range of limitations. Section 16(2) of SASA provides that an SGB 'stands in a position of trust towards the school,' and s 20(1)(a) provides that the SGB 'must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at that school'.

[26] FEDSAS submits that the definition of both 'learners' and 'school' has been expanded by the regulation and are 'contrary to SASA and cannot prevail, and none of the individual regulations can pass constitutional muster'. This is not so, because as correctly pointed out by the appellant, the need to have appropriate definitions was a practical mechanism of confirming the ambit of the regulations in relation to hostels. The suggestion that some of the impugned regulations are irrational is contrary to the requirements of rationality review. The executive has a wide discretion 'in selecting the means to achieve its constitutionally permissible objectives' and courts may not interfere with the means selected 'simply because they do not like them or because there are other more appropriate means that could have been selected'. See *Albutt v Centre for the Study of Violence and Reconciliation & others* [2010] ZACC 4; 2010 (3) SA 293 (CC) para 51. The question is simply whether the means selected are rationally related to the objectives sought to be achieved. The court must merely determine whether there is a 'sufficient connection' between the regulations and the objective they seek to achieve and not whether it was 'the best decision [it] could have made or whether [it] could have made a different decision'. See *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 70.

[27] FEDSAS disregards the objectives sought to be achieved in the ambit of the right to education and the best interests of the learner. The MEC can lawfully make regulations pertaining to a school, and he can equally do so in relation to hostels because they are an integral part of schools. The appeal must accordingly

succeed. In accordance with the principle in *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) Counsel for the appellant did not ask for an order for costs.

ORDER

[28] In the result, the following order is made:

- 1 Leave to appeal is granted.
- 2 The appeal is upheld with no order as to costs.
- 3 The order of the court a quo is set aside and replaced with the following order:
'The application is dismissed.'

D V Dlodlo
Acting Judge of Appeal

APPEARANCES

For appellant	G J Marcus SC (with him O K Chwaro and M Makoti)
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For first respondent	J I Du Toit SC (with him M J Merabe)
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