

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

Case Number: 43163/2012

In the matter between:

FEDERATION OF GOVERNING BODIES
FOR SOUTH AFRICAN SCHOOLS

AND

THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF BASIC EDUCATION
GAUTENG PROVINCE

THE HEAD OF DEPARTMENT,
DEPARTMENT OF BASIC EDUCATION,
GAUTENG PROVINCE

DELETE WHICHEVER IS NOT APPLICABLE.
(1) REPORTABLE: YES/NO. NO.
OF INTEREST TO OTHER JUDGES: YES/NO. NO.
(2) REVISED. YES NO. Applicant
22.8.2013
DATE SIGNATURE
Janse van Nieuwenhuizen
First Respondent

Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

- [1] On 9 May 2012, the first respondent ("the MEC"), promulgated amendments to the Regulations for Admission of Learners to Public Schools. [See: *Provincial Gazette Extraordinary*, No. 127, General Notice 1160 of 2012].

[2] The members of the applicant, a national representative organisation for school governing bodies, are disgruntled with the amendments, which dissatisfaction culminated in the launching of the present application.

[3] The MEC made the amendments to the regulations, in terms of the authority bestowed upon her by the provisions of section 11(1) of the Gauteng School Education Act, No. 6 of 1995 ("the Act").

[4] Section 11(1) reads as follows:

"Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools."

[5] The applicant, attacks the regulations on three grounds, to wit:

- i) the regulations are in conflict with the South African Schools Act, No 84 of 2006 ("SASA"); and/or
- ii) the regulations are *ultra vires* the powers conferred on the MEC by the provisions of section 11(1) of the Act; and/or
- iii) the regulations are not justifiable and reasonable as envisaged by section 4 of the Act.

- [6] Naturally, the MEC does not agree with the aforesaid contentions and opposes the application.
- [7] In order to properly consider the applicant's objections to the amendments, it is first of all instructive to have regard to the legislative framework pertaining to education in South Africa.

LEGISLATIVE FRAMEWORK:

- [8] National government has considered and regulated education in South Africa by virtue of:
- i) two white papers, of which the second white paper, the Organisation, Governance and Funding of Schools [General Notice 130 of 1996] ("the White Paper") is of particular importance; and
 - ii) SASA.
- [9] Both the "White Paper" and SASA defines the different role players in the education system. Moseneke DCJ succinctly summarised the functional area of each role player in *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 at par[56], to wit:
- "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."

- [13] In terms of the aforesaid division of functional areas, the governance of public schools falls within the functional are of governing bodies. This much is confirmed by Moseneke DCJ in the *Ermelo* matter at par [79]:

"School governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body. [Section 23(2) read with section 20 of the Schools Act]" [Also See: Head of Department, Department of Education, Free State Province v Welkom High School and Another, Head of Department, Department of Education, Free State Province and Harmony High School and Another [2013] ZACC 25, par [63] and [123]].

[14] In order to give effect to the democratic governance of public schools by governing bodies, it is of utmost importance that a public school's autonomy be safeguarded. Should the State, through national or provincial legislation, be allowed to interfere with the specific functions allocated to a governing body, a real risk for the perpetuation of the authoritarian nature of the pre-constitution education system arises.

[15] Khampepe J carefully considered the scheme of SASA in the *Welkom* matter and held as follows at the end of par [124]:

"It is therefore essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in the Schools Act."

[16] Parents and community members of a public schools is ideally suited to formulate policies that take the specific needs, circumstances and dynamics of "their" school into account. Schools are situated in vastly different areas and it is for this reason, that a *"one policy fits all"* scenario is not possible.

AMENDED REGULATIONS:

[17] The present dispute pertains to the powers of the MEC to promulgate regulations in respect of the admission of learners to public schools in Gauteng. Section 2(3) of SASA determines that a provincial legislature may enact legislation for school education in a province in accordance with the Constitution and SASA.

[18] The provisions of section 2(3) of SASA is echoed in section 2(2) and 3 of the Act, to wit:

"2(2) The Member of the Executive Council and the Head of Department must exercise any power conferred upon them by or under this Act, after taking full account of the South African Schools Act, 1996 (Act No. 84 of 1996), the Gauteng Educational Policy Act, 1998 (Act No.12 of 1998) and the National Education Policy Act, 1996 (Act No. 27 of 1996)."

and

"3. The Member of the Executive Council must exercise control over school education in the province subject to this Act; the Constitution, the National Education Policy Act, 1996 (Act No. 27 of 1996); the South African Schools Act, 1996 (Act 84 of 1996) and the Gauteng Education Policy Act, 1998 (Act 12 of 1998)."

- [19] The provincial legislature in enacting these sections, no doubt, took due cognisance of the carefully crafted democratic structure created in SASA.
- [20] Section 11(1) of the Act deals exclusively with admissions of learners and in order to determine the ambit of admissions in the general scheme of the schooling system, it is instructive to have regard to the equivalent section in SASA.
- [21] Section 5 of SASA, deals with the admission of learners and reads as follows:
- 5. Admission to public schools -**
- (1) *A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.*
- (2) *The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test.*
- (3) *No learner may be refused admission to a public school on the grounds that his or her parent-*
- (a) *is unable to pay or has not paid the school fees determined by the governing body under section 39;*

- (b) *does not subscribe to the mission statement of the school; or*
 - (c) *has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner.*
- (4)(a) *The admission age of a learner to a public school-*
- (i) *grade R is age four turning five by 30 June in the year of admission;*
 - (ii) *grade 1 is age five turning six by 30 June in the year of admission.*
- (b) *Subject to the availability of suitable school places and other educational resources, the Head of Department may admit a learner who-*
- (i) *is under the age contemplated in paragraph (a) if good cause is shown; and*
 - (ii) *complies with the criteria contemplated in paragraph (c).*
- (c) *The Minister may, by regulation, prescribe-*
- (i) *criteria for the admission to a public school, at any age lower than the admission age, of an underage learner who complies with the criteria;*
 - (ii) *age requirements for different grades at a public school.*
- (d) *For the purpose of paragraph (b)(i), good cause shown means that-*
- (i) *it can be shown that exceptional circumstances exist which necessitate the admission of an underage learner because admission would be in his or her best interest; and*

(ii) *the refusal to admit that learner would be severely detrimental to his or her development.*

(5) *Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.*

(6) *In determining the placement of a learner with special education needs, the Head of Department and principal must take into account the rights and wishes of the parents of such learner.*

(7) *An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department.*

(8) *If an application in terms of subsection (7) is refused, the Head of Department must inform the parent in writing of such refusal and the reason therefor.*

(9) *Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council."*

[19] It is within this framework that I will consider the offending regulations.

Regulation 2:

[20] The regulation provides that the admission policy of a school determined in terms of section 5(5) of SASA may not be inconsistent with the regulations promulgated by the MEC.

[21] The applicant objects to the practical effect of the regulation. The applicant contends that admission policies made in accordance with the unamended regulations will be 'inconsistent' with the amended regulations and due to the fact that the regulations do not contain a transition period, public schools will be faced with admission policies that are invalid.

[22] In the premises, the applicant submit that the regulation is unreasonable and unjustified within the meaning of section 4 of the Act.

[23] Section 4 reads as follows:

"No power conferred by this Act shall be exercised in a manner which is unreasonable or unjustifiable."

[24] The MEC contends that it is desirable and unobjectionable for existing admission policies to be brought into conformity of the present regulations.

[25] Insofar as the existing admission policy of a public school is inconsistent with the amended regulations, such policy should simply be amended to accord with the amended regulations.

[26] In the premises, I do not deem the regulation to be unreasonable or unjustifiable.

Regulation 2(2A):

[22] The regulation reads as follows:

"The Department may determine the minimum standards for the formulation of the admissions policy for specialist schools, technical schools and educational institutions"

[23] The applicant attacks the regulation on the following grounds:

- i) it is an unjust encroachment on the admission policy powers granted by section 5(5) of SASA to governing bodies;
- ii) the MEC might not delegate her legislative powers to the Department; and
- iii) the regulation did not form part of the original regulations published for comment and this procedural defect invalidates the MEC's legislative administration action.

[24] Section 5(5) of SASA subjects the admission policy powers of governing bodies to *"any applicable provincial law"*.

[25] The regulations are part and parcel of "*provincial law*" and the applicant's first objection to this regulation must, therefore, fail.

[26] Section 105 of the Act deals with the delegation of powers and reads as follows:

"105(1) The Member of the Executive Council may, subject to such conditions as he or she may determine-

(a) delegate any power conferred upon him or her under this Act, except powers to make regulations and the power to decide an appeal lodged with him or her in terms of this Act;.....

(b)

to the Head of Department or a person employed by the department."

[27] Section 106 of the Act provides that the MEC may make regulations as to any matter which may be prescribed by regulation under the Act.

[28] The determination of minimum standards for the formation of the admission policy for the schools specified in this regulation, falls within the ambit of section 11(1) read with the provisions of section 105 and 106 of

the Act. For this reason, the second objection also fails.

[24] In respect of the third objection, Mr Trengove SC, counsel for the respondents, submitted that each and every amendment to regulations, consequent upon submissions received by interested parties, need not be advertised again. The need for re-publication will depend on the ambit and nature of the amendment. In support for this submission, Mr Trengove SC relied on the decision by the Supreme Court of Appeal in *Kouga Municipality v Bellingan and Others* 2012 (2) SA 59 SCA at par [9].

[25] This regulation is, however, far-reaching. It impacts on the autonomy of governing bodies to determine admission policies without executive interference. In the circumstances, the applicant's objection is well founded and the applicant should have been afforded an opportunity to submit its views on the subject.

[26] This procedural defect invalidates regulation 2(2A) and the regulation falls to be set aside.

Regulation 2(4) and 2(5)

[26] The regulations provide for the certification, by the Head of Department, of a school's admission policy to be consistent with the Act, SASA and the

regulations. Until an admission policy is so certified, the policy is not in force and has no effect.

[27] The applicant's complaint is largely based on the same grounds as its objection to regulation 2(2).

[28] In terms of section 58C of SASA, the MEC must ensure that the policy determined by a governing body in terms of section 5(5) of SASA, complies with the norms and standards determined by the Minister.

[29] These regulations enable the MEC to comply with her obligations in terms of section 58C of the Act and I do not deem these regulations to be *ultra vires* the MEC's statutory powers.

Regulation 3(7)

[30] The regulation reads as follows:

"3(7) 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."

- [31] The applicant submits that the regulation impinges on a governing body's obligation to ensure a safe school environment. According to the applicant a governing body must be able to take account of a learner's disciplinary history in order to protect, *inter alia*, the safety of learners and educators.
- [32] The MEC holds the view that the provision of confidential information will be detrimental to a learner who perform poorly at school, is not able to afford school fees and/or has a problematic disciplinary record. In the end result, so the MEC contends, a learner might be discriminated against on the basis of the information contained in a confidential report.
- [33] The applicant contends that the reasons advanced by the MEC, are not reasonable and justifiable as contemplated in section 4 of the Act.
- [34] Regulation 3(1)(c)(i) directs that a learner may not be discriminated against on the ground that his or her parent is unable to pay or has not paid school fees, a registration fee or a deposit determined by the governing body. Any fear for discrimination on this basis, is therefore removed by virtue of the provisions of this regulation.

- [35] In the event, of an application for admission being refused, the Head of Department must, in terms of section 5(8) of SASA, inform the parent in writing of such refusal and the reason therefore. If a learner is refused admission on the ground of a poor performance record or due to disciplinary problems, these reasons will be made available to the parent of the learner.
- [36] In terms of section 5(9), the parent may appeal against the decision to the MEC.
- [37] Learners are therefore protected from discrimination in any form whatsoever.
- [38] On the other hand, the duties of a governing body in respect of a school and its learners need to be considered. These duties are prescribed in section 20(1)(a) of SASA, as follows:

"promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school."

[39] In order to comply properly with this obligation, it is incumbent on a governing body to obtain as much information as possible in respect of a learner applying to be admitted to the school.

[40] 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 unjustifiable and unreasonable interference with the functions of a governing body.

[41] In the premises, regulation 3(7) falls foul of the provisions of section 4 of the Act and falls to be set aside.

Regulation 4:

[38] Regulation 4 provides for the determination, by the MEC, of feeder zones for schools in the Province. The discretion of the MEC is made subject to the provisions of the *National Education Policy Act No. 27 of 1996*.

[39] Section 33 of NEPA reads as follows:

"33. A Head of Department, after consultation with representatives of Governing Bodies, may determine feeder zones for ordinary Public

Schools, in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other."

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

[41] As a consequence regulation 4 *is ultra vires* section 11(1) of the Act.

Regulation 5 read with regulation 8

[42] Regulation 5 prescribes:

- i) the manner in which admission applications must be made to the Head of Department;
- ii) the manner in which the Head of Department must deal with the applications; and
- iii) enjoins the District Director to place learners on a waiting list at schools that have not been declared full by the Head of Department in terms of regulation 8.

[43] The manner in which admission applications must be dealt with, falls no doubt, within the MEC's statutory power in terms of section 11(1) of the Act.

[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 of 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 *ultra vires* the empowering statute.

director to place learners in schools that are not "full", is *ultra vires* the empowering statute.

[47] As a consequence, regulations 5(7)(c)(iv), 5(8)(a), 5(10), 5(11), 5(12) and regulation 8 are *ultra vires*.

[48] In order to save regulation 5(5), the words "*in accordance with Regulation 5(9)*" is set aside / deleted.

Regulation 11

[50] Regulation 11 deals with the transfer of learners between schools. In order to be transferred, a learner would naturally have to apply for admission at the school.

[51] The regulation therefore falls within the ambit of the MEC's statutory powers in terms of section 11(1) of the Act.

[52] The regulation, however, also enjoins the district director with the power to transfer a learner to a school that has not been declared "full".

[53] For the same reasons advanced in respect of regulation 5 read with regulation 8, the capacity determination in the regulation is *ultra vires* the MEC's statutory powers.

[55] in order to save regulation 11 (4) the words "*that has not be declared full*" is deleted.

Regulation 16

[54] Regulation 16 deals with appeals and provides for an objection process to the Head of Department, prior to an appeal to the MEC.

[55] If the parent of a learner is satisfied with the response from the Head of Department, an appeal to the MEC falls away.

[56] 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.

[57] The objection process envisaged in regulation 16, impinges on the right of the parent of a learner to appeal directly to the MEC. Regulation 16 is consequently *ultra vires* the MEC's statutory power.

ORDER:

I make the following order:

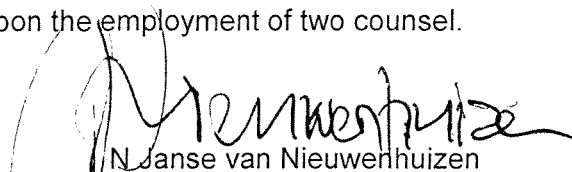
1. Regulations 4, 5(7)(c)(iv), 5(8)(a), 5(10), 5(11), 5(12), 8, 11(3), 11(5)(c) and 16 of the Regulations for Admission of Learners to Public Schools published in Provincial Gazette Extraordinary, No. 127, General Notice 1160 of 2012 on 9 May 2012 are declared *ultra vires*.

2. The following words are deleted from:
 - 2.1 Regulation 5(5): "*in accordance with Regulation 5(9)*";

 - 2.2 Regulation 11(4): "*that has not be declared full*".

3. Regulation 2(2A) and 3(7) is reviewed and set aside.

4. The respondents are ordered to pay the costs of the application, which costs include the costs consequent upon the employment of two counsel.



N. Janse van Nieuwenhuizen

Acting Judge of the North Gauteng High Court

Attorneys for applicants:

Michael Randall attorneys

c/o: Shepstone & Wylie attorneys

Counsel: Adv. W Trengove SC

Adv. M Chaskalson

