Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO: **887/2016**
DATE HEARD: **14/06/2016**
DATE DELIVERED: **08/07/2016**

In the matter between:

FEDERATION OF GOVERNING BODIES OF SOUTH AFRICAN SCHOOLS Appellant

and

THE HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION, NORTHERN CAPE PROVINCE 1st Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, NORTHERN CAPE PROVINCE 2nd Respondent

Coram: Williams J *et* Olivier J

JUDGMENT

Olivier J

[1.] The applicant is the Federation of Governing Bodies of South African Schools. It represents 108 school governing bodies ("*SGB's*) as contemplated in section 16(1) of the **South African Schools Act**[1] ("*SASA*").

[2.] The first respondent is the Head of the Northern Cape education department and the second respondent the Member of the Executive Council responsible for education in the Northern Cape Province, both as envisaged in section 1 of SASA.

[3.] On 16 March 2016 the first respondent issued circular number 26/2017[2], dated 14 March 2016 and titled "*MANAGEMENT OF LEARNER ADMISSIONS TO PUBLIC SCHOOLS IN THE NORTHERN CAPE FOR 2017*". It was addressed to, *inter alia*, school principals and SGB's.

[4.] Three of the four paragraphs under the heading "*INTRODUCTION*" deals with enrolment and admission of learners, the first referring to the importance of early enrolment, the second to problems experienced in the past with the admission of learners to schools and the third stating that the Department had the duty to "*admit all learners who apply for admissions in schools without discriminating on any ground*". The fourth paragraph under the heading deals with the role of school principals in the prevention of illegal practices at schools.

[5.] In paragraph 2 of the circular its purpose is set out as being aimed at, *inter alia*, the "*procedure for enrolment of learners for the 2017 school year*", support in the development of admission policies and the facilitation of the manner and administration of the admission of learners to schools.

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[1] 84 of 1996

[2] It is not clear why the number refers to 2017, and not 2016. It may be because it pertains to the 2017 school year.

[6.] Paragraph 5 of the circular is titled *"ADMISSION TO PUBLIC SCHOOLS"*. The applicant's challenge is aimed at statements under this heading (and also in paragraph 1.3 of the circular) that the first respondent has the responsibility and duty to admit learners[3], that SASA places *"admission decisions squarely in the hands of the Head of Department of Education in the Province and not the School Governing Body"*[4] and that *"the implementation of the admission policy at the school level is the responsibility of the principal (and not the governing body), acting under the authority of the head of department"*[5].

[7.] In paragraph 8 of the circular, under the heading *"AGE REQUIREMENTS FOR ADMISSION TO A PUBLIC SCHOOL"*, the first respondent makes reference to minimum age requirements and then proceeds to lay down compulsory age requirements for the admission of certain learners.

[8.] In paragraph 9.6 the first respondent prescribes the type of admissions register to be kept by schools.

[9.] Paragraph 11 of the circular deals with the issue of the re-registration of learners and prescribes the form of application to be used for re-registration, thereby implying the necessity of such applications for learners to remain enrolled in schools attended by them.

[10.] Paragraph 6 is titled *"UNLAWFUL PRACTICES"*. It states that school principals are to be responsible for the prevention of certain illegal practices listed in sub-paragraphs 6.1 to 6.7, *"or any other illegal practices"*, and that principals who make use of any of the listed practices *"will be charged with misconduct"*. Paragraph 1.4 of the circular also states that principals are responsible for *"ensuring that illegal practices do not take place at a school"*.

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[3] Paragraph 5.2.1
[4] Paragraph 5.2.4
[5] Paragraph 5.2.5

[11.] It is not in dispute that the applicant represents those SGB's in the Northern Cape that are members of it and that on this basis it has standing in respect of issues concerning the interests of those SGB's.

[12.] The respondents have taken issue with the applicant's standing in respect of issues concerning the interests of school principals. In my view there is no merit in this objection. Principals are members of SGB's[6]. One of the responsibilities of SGB's is in fact to support principals *"in the performance of their professional functions"*[7].

[13.] On 12 April 2016 the applicant addressed a letter to the first respondent. Attached to it was a legal opinion obtained by the applicant to the effect that the abovementioned contents of the circular were reviewable on the grounds that the principle of *audi alteram partem* was not observed in issuing the circular and that the circular included provisions that purport to take away powers of schools and SGB's and to vest those powers in the first respondent; which provisions the first respondent had according to the applicant not been entitled to prescribe and/or were inconsistent with existing legislation. The first respondent was invited to withdraw the circular and was requested to respond to the letter within 7 days. It is common cause that the first respondent never responded to the letter.

[14.] The applicant then launched this application on a semi-urgent basis, in that the notice of motion contains shorter time limits than normally provided for the filing of a notice of opposition and answering affidavits.

[15.] The relief sought, apart from condonation for the non-compliance with the provisions pertaining to service and time periods, includes rescission of the circular on the basis that the principle of *audi alteram partem* was not

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[6] See section 23(1)(b) of SASA

[7] See section 20(1)(e) of SASA, and also **Stutterheim High School v The Member of The Executive Council, Department of Education, Eastern Cape Province** 2007 JDR 0586 (E) para [4]

observed, alternatively an order declaring the particular paragraphs of the circular invalid or setting them aside, further alternatively an interdict preventing the implementation of the particular paragraphs pending the review thereof.

[16.] The application was set down for hearing on 13 May 2016, but was on that day postponed to 26 May 2016 for hearing, costs to be costs in the application. On 26 May the application was, however, again postponed to 14 June 2016, costs standing over for later determination. The reason for the latter postponement was that arrangements had not been made for the application to be heard by two Judges, as is the practice in this Division in applications for review. No reason has been advanced why the applicant should not bear the wasted costs occasioned by that postponement. It had been the applicant's duty to ensure that the application could be heard on that day.

[17.] On 14 June the application was heard and judgment was reserved. The applicant was represented by Adv J Du Toit SC, and with him Adv M J Merabe, who eventually presented the argument for the applicant, while the respondent was represented by Adv Tshavhungwa.

[18.] Mr Tshavhungwa argued that the Uniform Rules provide only for the notion of urgency, and not for the semi-urgency relied upon and employed by the applicant. There is absolutely no merit in this submission. Applications brought with shortened periods for the filing of notices of opposition and answering affidavits are common. It is trite that different degrees of urgency would require different approaches[8].

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[8] Compare **Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)** 1977 (4) SA 135 (W); **Victoria Park Rate Payers' Association v Greyvenouw CC and Others** 2004 JDR 0498 (SE), para [28]; **IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another** 1981 (4) SA 108 (C)

[19.] If the applicant's interpretation of the particular provisions of the circular were to be correct, the application would indeed have been sufficiently urgent to have justified the periods provided for in the notice of motion. The date from which the provisions were supposed to be implemented was imminent.

[20.] The applicant's explanation for the time that expired between the issue of the circular and the filing of the application is in my view sufficient to show that the applicant has not caused its own urgency. There was no undue delay in first obtaining advice internally and then from counsel. The applicant can also certainly not be blamed for then first seeking the cooperation of the first respondent before approaching the court[9]. The application was lodged within a week of the expiry of the period within which the first respondent had been requested to respond and had failed to do so.

[21.] It is in any event important to keep in mind that ultimately the issues concerned in this matter would impact on children, whose best interests should be decisive[10].

[22.] We were not informed of any prejudice that the respondents have suffered because of the way in which the application was brought. The answering affidavit was filed within the shortened period provided in the notice of motion and it was not argued that the respondents had been prejudiced by that in any way.

[23.] An undertaking to afford an opportunity to be heard would give rise to a legitimate expectation of such an opportunity[11], and in such circumstances the *audi alteram partem* principle would be applicable to administrative actions[12].

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[9] Compare **Head of Department, Department of Education, Free State Province v Welkom High School and Others** 2014 (2) SA 228 (CC) paras [132], [135] and [141]
[10] See section 28 (2) of the **Constitution of the Republic of South Africa**, 108 of 1996
[11] Compare **Claude Neon Ltd v Germiston City Council and Another** 1995 (3) SA 710 (W) at 719; **Park-Ross v Director-Office for Serious Economic Offences** 1998 (1) SA 108 (C) paras [29] and [30]
[12] Compare **Administrator, Transvaal and Others v Traub and Others** 1989 (4) SA 731(A); **President of The Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) para [159]

[24.] The contents of the circular have the potential of affecting the legal rights of SGB's and, at least as far as the contents pertain to the manner in which applications for admission are to be made for the 2017 school year, the issue of the circular constituted the performance by the first respondent of his duty to prescribe such procedure. The issue of the circular therefore constituted administrative action that is reviewable in terms of the **Promotion of Administrative Justice Act**, 3 of 2000[13].

[25.] It is, however, clear that the contents of the circular cover far more than the manner in which applications for admissions are to be made and in respect of which the first respondent would indeed be supposed to determine the procedure[14], the argument for the first respondent being that he was entitled and competent to do so. Much of it is couched in peremptory language, purporting to create obligations and restrictions, and in the case of principals who do not comply, even a sanction[15]. In paragraphs 8.2.3 and 8.3.3 of the circular, for example, it is provided that schools "*must only*" admit learners of prescribed age groups to respectively Grades R and 1. This has nothing to do with the manner in which parents are to apply for the admission of learners and would limit the right of schools to admit learners of the minimum age groups prescribed in section 5(4)(a) of SASA.

[26.] Paragraph 9.6.1 of the circular states that principals "*must ensure*" that admissions are recorded on SA-SAMS, apparently an electronic system different from the one used by schools at the moment.

[27.] The procedure prescribed for re-registration of learners (who are already attending a school to which they had previously been admitted; as opposed to

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[13] Compare **Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others** 2005 (6) SA 313 (SCA), paras [23] and [24]
[14] See section 5(7) of SASA.
[15] Compare **Minister of Education v Harris** 2001 (4) 1297 (CC) paras [12] and [13]

the initial admission of learners to a school) would also create new obligations for schools.

[28.] It is the applicant's case that at a meeting of the Provincial Consultative Forum ("*the PCF*") on 1 March 2016 an undertaking had indeed been given to afford it the opportunity to comment on the proposed circular.

[29.] According to the founding document of the PCF it consists of the second respondent (represented by one or more persons) and any "*provincial organisation representing governing bodies of public schools*" (represented by one or more persons).

[30.] According to the founding document the PCF was established "*in pursuance of the notion of partnership to education between the State and stakeholders in public schools, as represented by governing bodies*" and to "*enhance communication*" between the second respondent and organisations like the applicant, and parties to agreements reached in the forum would be "*enjoined... to take all steps necessary to implement any such agreement expeditiously...*".

[31.] In her supporting affidavit Mrs Strydom, who had attended the meeting as a representative of the applicant, confirms that the "*issue concerning admissions to schools*" had been raised at the meeting and that the chairperson, Ms Modise, had given "*the assurance that a draft circular concerning the manner in which admissions would be administered in 2017 would be submitted to* (the applicant) *for its input prior to it being officially published*".

[32.] I must say that it is difficult to discern from the unnecessarily aggressive and insulting contents of the answering affidavit by Mr O G Mogatle what exactly the respondents' case is as regards what happened at the meeting.

[33.] Although Mr Mogatle at first accused the applicant of relying on "*some undertaking made by the* (second respondent) *and/or her representative at some unidentified meeting*", apparently because Mr Mogatle was unaware of the copy of the minutes of the meeting attached to the affidavit of Mrs Strydom, it soon enough appeared that he knew full well what meeting the applicant was referring to.

[34.] Mr Mogatle then went on to accuse Mrs Strydom of having "*misrepresented what was agreed on at the said meeting*", but he failed to point out in what way. It is in any event difficult to understand the allegation, because Mrs Strydom from the outset disclosed a copy of the minutes of the meeting. She specifically made reference to Item B.9 thereof. What she could in the circumstances have attempted to misrepresent is not clear.

[35.] Mr Mogatle did not claim that any part of the contents of the minutes were wrong. He also did not claim to have himself attended the meeting, and could therefore not have had personal knowledge of what had been said and agreed upon there.

[36.] The respondents chose not to obtain the comments of Ms Modise on this and there can therefore not really be any meaningful challenge by the respondents to what Mrs Strydom has said about the meeting and about the contents of the minutes.

[37.] Mr Mogatle furthermore made the point that the applicant, according to the minutes, had undertaken to "*give inputs*" on, *inter alia*, "*the Admission Circular in relation to responsibilities determining Admission Policies…*". He stated that the applicant had failed to do so or to inform the court of what input it would have given had the circular not been issued, and he also submitted that the circular in any event does not deal with any of the issues in respect of which the applicant had according to him been supposed to give its input.

[38.] These submissions were clearly based on the remarks in the columns titled *"DISCUSSION TOPIC"* and *"RESPONSIBILITY/TIME FRAME"* of Item B.9 of the minutes, but in my view those remarks should be read with the rest of the remarks in respect of Item B.9, and more specifically also those in the column *"ACTION POINTS"*.

[39.] Item B.9 appears as follows in the minutes:

ITEM NO.	DISCUSSION TOPIC	ACTION POINTS	RESPONSIBILITY / TIMEFRAME
B.7	...	...	...
B.8	...	...	...
B.9	**Admission of learners:** FEDSAS to give inputs on the Admission circular in relation to responsibilities determining Admission Policies. The aspect of closure and merging of schools to also be included in the Admission circular.	The departmental admission policy to be reviewed and consultation to take place before it is circulated.	FEDSAS

[40.] It is very clear that the word *"policy"* in the column *"ACTION POINTS"* was a mistake and that the intention had been to refer to the *"departmental admission circular"*, and more specifically the intended circular for the 2017 school year.

[41.] The only **admission** *"policy"* provided for by SASA is the admission policy to be formulated by SGB's[16]. Mr Tshavhungwa never attempted to argue otherwise, and the respondents have not made any attempt to explain or to justify the use of the phrase *"departmental admission policy"* in any other way than as in fact referring to a draft of this circular.

[16] Section 5(5) of SASA.

[42.] It is only a circular like the one concerned here which would be "*circulated*" as envisaged in the column "*ACTION POINTS*" of Item B.9.

[43.] It is only when the word "*policy*" in the column titled "*ACTION POINTS*" is substituted with the word "*circular*" that the remarks in the column titled "*DISCUSSION TOPIC*" would make sense. The reference to a "*departmental admission circular*" would then clearly have been a reference to the "*Admission Circular*" referred to in the column "*DISCUSSION TOPIC*", and in respect of which the applicant would have given its input.

[44.] In my view it is clear that the agreement had been that a draft circular on admissions would be circulated to all concerned, in respect of which the applicant would then have given its input before the circular was finally issued and circulated (after review of and consultation about its contents).

[45.] This is clearly how Mrs Strydom understood the agreement and the contents of the minutes. Ms Modise has not deposed to an affidavit to the contrary and, as already said, Mr Tshavhungwa made no attempt to attach any other meaning to the remarks in Item B.9, read as a whole.

[46.] There is therefore no merit in the suggestion that the circular was issued when the applicant failed to give its input. It is in any event important to keep in mind that the circular was issued only approximately 2 weeks after the meeting, and it was not suggested by what date the applicant had been supposed to give its input[17].

[47.] It is common cause that the circular concerned in this matter had never been preceded by a draft version, or by any consultation at all.

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[17] Even if it is, in other words, for the moment assumed that there had never been an agreement that the draft circular would be made available by the Department.

[48.] Mr Mogatle stated that there is "*no single provision in the entire scheme of* (SASA) *that stipulates that the* (first respondent) *should first consult any person*" before issuing a circular like this.

[49.] I am not convinced that this is necessarily correct, given the fact that the scheme of SASA envisages a partnership between the Minister for Education, the Head of a Provincial Department of Education and Governing Bodies[18], and it is difficult to conceive of a partnership functioning properly without any consultation and communication amongst its partners[19].

[50.] It is, however, not necessary to decide this. It is clear that, even if the first respondent would not otherwise have been required to grant the applicant an opportunity to be heard on the contents of the proposed circular before its issue, the undertaking to do so had led to such a legitimate expectation on the part of the applicant, and a corresponding duty on the first respondent[20].

[51.] It is not clear what point the respondents and Mr Tshavhungwa attempted to make by emphasising that Ms Modise had represented the second respondent at the meeting, but it was fortunately never pursued to the point of suggesting that the first respondent would not have been bound by such an undertaking, or that he would not in the circumstances have had to satisfy the expectation raised by such an undertaking.

[52.] The first respondent, as Head of a Department for which the second respondent is ultimately responsible, is clearly a subordinate of the second respondent and it would have been ludicrous to suggest that the first respondent would not be bound to execute an undertaking which the second respondent had, through her representative/s, given at a meeting of a forum

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[18] Compare **Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another** 2010 (2) SA 415 (CC) para [56]
[19] Compare **Stanmaker Mining (Pvt) Ltd v Metallon Corporation Ltd** 2007 (JOL) 19107 (ZH) at p.30; **Goldberg v Trimble and Bennett** 1905 TS 255 at 275
[20] **Administrator, Transvaal and Others v Traub and Others, supra**, at 756 I

intended to enhance cooperation between *"the State"*[21] and governing bodies of schools.

[53.] In Item A.4 of the minutes of the meeting it was in fact recorded that the PCF would be a *"structure where communication* (would) *take place between schools in the form of SGB associations* ***and the Department***"[22] (of which the first respondent is the Head).

[54.] There is therefore also no merit at all in Mr Tshavhungwa's argument that there is no indication in the founding document of the PCF of the first respondent or his department being a member of that forum. It is inconceivable, to the point of absurdity, that the second respondent could consult and negotiate on matters like *"education issues affecting the interests of public schools"* and the *"governance of public schools"* without any involvement of the first respondent in such process.

[55.] An undertaking by or on behalf of the first respondent to grant the applicant the opportunity to comment on a draft circular would not have amounted to an abdication by the first respondent of any right or discretion of his[23].

[56.] I am therefore of the view that the applicant, and any other like organisations that may have been represented at the meeting, should in the circumstances have been granted the opportunity to be heard on the contents of the proposed circular. Some of the challenged contents of the circular are so entwined and interwoven with the rest of its contents that the only practical approach would be to set aside the circular as a whole.

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[21] Of which the first respondent would obviously in any event in his official capacity be part, regardless of his subordinate position *vis-à-vis* the second respondent.
[22] My emphasis
[23] Compare **Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd** 2005 (6) SA 182 (SCA) para [20]

[57.] As regards the costs of the application there is no reason why it should not follow the result. The respondents were afforded the opportunity of avoiding litigation, but instead chose to ignore the applicant's letter and to answer to the applicant's founding affidavit in an abrasive tone.

[58.] In the premises the following orders are made:

1. **THE APPLICANT IS ORDERED TO PAY THE WASTED COSTS OCCASIONED BY THE POSTPONEMENT OF 26 MAY 2016.**
2. **CIRCULAR NUMBER 26/2017, DATED 14 MARCH 2016 AND SIGNED BY THE FIRST RESPONDENT ON 16 MARCH 2016, IS SET ASIDE.**
3. **THE RESPONDENTS ARE ORDERED TO PAY THE COSTS OF THE APPLICATION JOINTLY AND SEVERALLY, THE ONE TO PAY THE OTHER TO BE ABSOLVED PRO TANTO.**

CJ OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree.

CC WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	**Adv J Du Toit SC, with him Adv M J Merabe**
Instructed by:	**Elliott Maris Wilmans & Hay, Kimberley**
For the Respondent:	**Adv T C Tshavhungwa**
Instructed by:	**Mjila & Partners, Kimberley**